A BETTER WAY WHOLESALE AUTOS, INC. *v.* JAMES SAINT PAUL ET AL. (AC 40014)

DiPentima, C. J., and Lavine, Sheldon, Keller, Elgo, Bright, Moll and Lavery, Js.*

Syllabus

The plaintiff motor vehicle dealer sought to vacate an arbitration award that was issued in favor of the defendants in connection with their purchase of a vehicle from the plaintiff. The parties had entered into a financing agreement that contained an arbitration provision stating that any arbitration would be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration. The defendants thereafter filed a demand for arbitration, claiming that the plaintiff had violated, inter alia, the Truth in Lending Act (15 U.S.C. § 1601 et seq.) when it required them to purchase certain contracts as a condition of the financing agreement. After the arbitrator awarded the defendants damages, attorney's fees and costs, the plaintiff filed in the trial court an application to vacate the award within the three month limitation period set forth in 9 U.S.C. § 12 to file an application to vacate, but beyond the thirty day limitation period permitted under state law (§ 52-420 [b]). The defendants thereafter filed an application to confirm the award, which the plaintiff did not oppose, and for an award of supplemental attorney's fees. The defendants also sought to dismiss the plaintiff's application to vacate on the ground that the trial court lacked subject matter jurisdiction because the application to vacate was not timely filed pursuant to § 52-420 (b). The trial court dismissed the plaintiff's application to vacate as untimely, granted the defendants' applica-

* This appeal originally was argued on May 21, 2018, before a panel of this court consisting of Chief Judge DiPentima, and Judges Moll and Lavery. Subsequently, the court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the case be considered en banc. Accordingly, Judges Lavine, Sheldon, Keller, Elgo and Bright were added to the panel, and additional oral argument was heard en banc on October 10, 2018. See footnote 3 of this opinion.

tion to confirm the award and awarded the defendants supplemental attorney's fees. On the plaintiff's appeal to this court, *held*:

1. The plaintiff's appeal was not moot despite the plaintiff's failure to file an opposition to the defendants' application to confirm the award or to address the application to confirm in its brief to this court; this court could afford the plaintiff practical relief by reversing the trial court's dismissal of the application to vacate pursuant to statute (§ 52-417), as the question of mootness was inextricably intertwined with the plaintiff's claim that its application to vacate was improperly dismissed on timeliness grounds.
2. The trial court properly dismissed the plaintiff's application to vacate the arbitration award as untimely: the parties could not, as a matter of law, agree to have the three month limitation period in 9 U.S.C. § 12 apply to a vacatur proceeding in Connecticut state court so as to supplant or override the thirty day limitation period in § 52-420 (b), which is subject matter jurisdictional in nature and applicable to any application to vacate an arbitration award brought in Connecticut state court; accordingly, this court's decision in *Doctor's Associates, Inc.* v. *Searl* (179 Conn. App. 577) was overruled insofar as it stands for the proposition that parties can, as a matter of law, agree, by way of a choice of law provision, to apply the three month limitation period in 9 U.S.C. § 12 to a vacatur proceeding brought in Connecticut state court.
3. Although the trial court erred when it reviewed the substance of the application to vacate the arbitration award after it ruled that the application should be dismissed, as the court lacked subject matter jurisdiction over the application to vacate, any error in its consideration of the plaintiff's application's in connection with its consideration of the defendants' application to confirm was harmless, as the court properly dismissed the plaintiff's application as untimely and confirmed the award.
4. The trial court did not abuse its discretion in awarding the defendants supplemental attorney's fees; that court was not required to adopt the findings of another trial court regarding the reasonableness of the hourly rates that were requested by the defendants' counsel, and the plaintiff's claim that no reasonable client would consider paying the hourly fee charged by the defendants' counsel was unavailing, as that argument lacked any citation to the record or to legal authority and was little more than the ipse dixit of the plaintiff's counsel.

(*Two judges dissenting in one opinion*)

Argued May 21 and October 10, 2018—officially released September 3, 2019

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Waterbury,

The listing of the judges reflects their seniority status on this court as of the date of oral argument on October 10, 2018.

where the defendants filed motions to confirm the award and for attorney's fees, and to dismiss the application to vacate the award; thereafter, the matter was tried to the court, *M. Taylor*, *J.*; judgment dismissing the application to vacate, and granting the motions to confirm and for attorney's fees, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Richard F. Wareing, with whom was *Daniel S. Blinn*, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, A Better Way Wholesale Autos, Inc., appeals from the judgment of the trial court dismissing its application to vacate an arbitration award issued in favor of the defendants, James Saint Paul and Julie J. Saint Paul, and granting the defendants' application to confirm the arbitration award. On appeal, the plaintiff contends that the court improperly (1) dismissed its application to vacate as untimely, (2) engaged thereafter in a review of the substance of the plaintiff's application to vacate and concluded that the arbitration award did not manifest an egregious or patently irrational application of the law, and (3) awarded the defendants $2185 in supplemental attorney's fees. We conclude that the court properly dismissed the plaintiff's application to vacate as untimely and did not abuse its discretion in awarding supplemental attorney's fees. In light of our conclusion that the court properly dismissed the plaintiff's application to vacate as untimely, we also conclude that the court erred by reviewing the substance of the application but that such error was harmless. Accordingly, we affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. In early 2015, the defendants purchased a motor vehicle from the plaintiff, a

motor vehicle dealer located in Naugatuck. To finance their purchase, the defendants entered into a financing agreement with the plaintiff. The agreement contains an arbitration provision that provides, in part, that any dispute arising out of or relating to the purchase of the defendants' vehicle shall be resolved by binding arbitration. The agreement also contains a general choice of law clause, which provides that "[f]ederal law and the law of the state of our address shown on the front of this contract apply to this contract." The front of the financing agreement shows an address in Naugatuck. The arbitration section of the financing agreement contains a specific choice of law provision, which provides in relevant part: "[1] Any arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act [(FAA)] (9 U.S.C. § 1 et seq. [2012]) and not by any state law concerning arbitration. [2] Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the [FAA]." The arbitration section further provides in part that "[a]ny court having jurisdiction may enter judgment on the arbitrator's award."

On December 15, 2015, the defendants filed an arbitration demand with the American Arbitration Association, claiming that the plaintiff required the defendants to purchase an oil change contract and a service contract as a condition of financing in violation of the federal Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq. (2012), and the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. On July 21, 2016, following an evidentiary hearing,[1] the arbitrator issued a so-called "unreasoned award" in favor of the defendants in the amount of $8797.81, which included $2297.81 in actual damages, $2000 in statutory damages under TILA, and $4500 in attorney's fees and costs. The arbitrator concluded that the plaintiff violated TILA by

[1] We note that the parties chose not to have the hearing transcribed.

failing to include the oil change contract and the service contract in the finance charge disclosure provision of the agreement.

On August 26, 2016, the plaintiff filed in the Superior Court an application to vacate the arbitration award pursuant to the FAA, claiming therein that the arbitrator exceeded his powers. On September 28, 2016, pursuant to General Statutes § 52-417,[2] the defendants filed an omnibus "motion to confirm arbitration award, opposition to plaintiff's application to vacate arbitration award, and motion for supplemental attorney's fees" (application to confirm). On November 9, 2016, the defendants filed a supplemental memorandum of law in opposition to the plaintiff's application to vacate, arguing therein that the plaintiff's application to vacate should be dismissed for lack of subject matter jurisdiction because it was not timely filed pursuant to General Statutes § 52-420 (b) ("[n]o motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion"). On December 7, 2016, the plaintiff filed a memorandum of law in support of its application to vacate, which did not address the timeliness issue raised by the defendants.

On December 30, 2016, following a hearing, the trial court dismissed the plaintiff's application to vacate as untimely filed pursuant to § 52-420 (b) and granted the

[2] General Statutes § 52-417 provides: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

defendants' application to confirm, including the defendants' request therein for $2185 in supplemental attorney's fees under TILA. This appeal followed.[3] Additional facts will be set forth as necessary.

I

As a threshold matter, we address the defendants' claim that the plaintiff's appeal should be dismissed as moot. The defendants argue that, because the plaintiff failed to file in the Superior Court an opposition to their application to confirm and did not address in this court the application to confirm, this court can no longer grant the plaintiff any practical relief. We disagree.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . A case is considered moot if [the] court cannot grant . . . any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, 333, 179 A.3d 201 (2018). "Because mootness implicates our subject matter jurisdiction . . . it is a proper basis upon which to seek the dismissal of an appeal."

[3] A three judge panel of this court heard oral argument on May 21, 2018. Following argument, this court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the appeal would be considered en banc and ordered the parties to file supplemental briefs addressing the following questions:

"1. As a matter of law, with respect to an application to vacate an arbitration award filed in the Superior Court, can parties agree to an application of the three month limitation period set forth in the Federal Arbitration Act, 9 U.S.C. § 12?

"2. Does our Supreme Court's holding that the thirty day limitation period set forth in General Statutes § 52-420 (b) is subject matter jurisdictional; e.g., *Wu* v. *Chang*, 264 Conn. 307, 312 [823 A.2d 1197] (2003); *Middlesex Ins. Co.* v. *Castellano*, 225 Conn. 339, 344 [623 A.2d 55] (1993); affect the analysis under question [one]?

"3. What effect, if any, does this court's decision in *Doctor's Associates, Inc.* v. *Searl*, 179 Conn. App. 577 [180 A.3d 996] (2018), have on your answers to questions one and two?"

The court heard oral argument en banc on October 10, 2018.

(Citation omitted.) *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 96–97, 172 A.3d 1263 (2017).

In the present case, the question of mootness is inextricably intertwined with the principal substantive issue that the plaintiff raises on appeal, namely, whether the trial court improperly dismissed the plaintiff's application to vacate on timeliness grounds. See *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 575–76, 953 A.2d 868 (2008). Notwithstanding the plaintiff's failure to file an opposition to the application to confirm in the Superior Court and its failure to address such application in its appellate brief, this court could afford the plaintiff practical relief by reversing the court's dismissal of the plaintiff's application to vacate on timeliness grounds. See General Statutes § 52-417 ("[t]he court or judge shall grant such an order confirming the award *unless the award is vacated*, modified or corrected as prescribed in sections 52-418 and 52-419" [emphasis added]). Therefore, we conclude that the plaintiff's appeal is not moot.[4]

II

We turn now to the merits of the plaintiff's claims on appeal. The plaintiff first claims that the court erred in dismissing its application to vacate as untimely under our state law on the ground that it was filed beyond the thirty day limitation period set forth in § 52-420 (b).[5] According to the plaintiff, the arbitration provision contained in the parties' financing agreement requires the application of the FAA in all respects, including its three month limitation period to file an application to

[4] We note that this court previously has rejected the identical argument in a similar appeal. See *A Better Way Wholesale Autos, Inc.* v. *Gause*, 184 Conn. App. 643, 646–47, 195 A.3d 747, cert. denied, 330 Conn. 940, 195 A.3d 693 (2018).

[5] General Statutes § 52-420 (b) provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

vacate. See 9 U.S.C. § 12 (2012).[6] The defendants maintain that our state law governs the timeliness question presented, and, therefore, the trial court properly dismissed the plaintiff's application to vacate as untimely under § 52-420 (b). We agree with the defendants.

In the present case, it is uncontested that the plaintiff filed its application to vacate after the expiration of the thirty day limitation period set forth in § 52-420 (b) but within the three month limitation period set forth in 9 U.S.C. § 12. Whether the court properly dismissed the plaintiff's application to vacate as untimely depends on whether state or federal law controls the limitation period in which the plaintiff was required to file such application. Therefore, the question before us is a legal one. "[W]e review a [trial] court's decision to confirm or vacate an arbitration award de novo on questions of law . . . ." (Internal quotation marks omitted.) *Henry* v. *Imbruce*, 178 Conn. App. 820, 828, 177 A.3d 1168 (2017).

A

We first turn our attention to the fundamental question of whether parties can, *as a matter of law*, agree to have the FAA's three month limitation period set forth in 9 U.S.C. § 12 apply to a vacatur proceeding filed in Connecticut state court so as to supplant or override the thirty day limitation period in § 52-420 (b). For the reasons that follow, we conclude that they cannot.

We begin with a brief review of the purposes and limitations of the FAA. In 1925, Congress enacted the FAA "[t]o overcome judicial resistance to arbitration"; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); and

[6] Section 12 of title 9 of the 2012 edition of the United States Code provides in relevant part: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. . . ."

to declare " 'a national policy favoring arbitration' of claims that parties contract to settle in that manner." *Preston* v. *Ferrer*, 552 U.S. 346, 353, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008), quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). In that connection, § 2 of the FAA provides that arbitration agreements in contracts "involving commerce" are "valid, irrevocable, and enforceable." 9 U.S.C. § 2 (2012). The FAA was designed to place agreements to arbitrate "upon the same footing as other contracts . . . ." (Citation omitted; internal quotation marks omitted.) *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (*Volt*). The FAA " 'creates a body of federal substantive law,' " and "the substantive law the [FAA] created [is] applicable in state and federal courts." *Southland Corp.* v. *Keating*, supra, 12, quoting *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). The United States Supreme Court has stated that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. . . . But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Citation omitted; internal quotation marks omitted.) *Volt*, supra, 477.

The FAA does not create independent federal jurisdiction. The United States Supreme Court has described the nonjurisdictional nature of the FAA as follows: "As for jurisdiction over controversies touching arbitration, the [FAA] does nothing, being 'something of an anomaly in the field of federal-court jurisdiction' in bestowing no

federal jurisdiction but rather requiring an independent jurisdictional basis." *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 581–82, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), citing *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, supra, 460 U.S. 25 n.32. "While the [FAA] creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Southland Corp.* v. *Keating*, supra, 465 U.S. 15 n.9.

"Given the substantive supremacy of the FAA, but [its] nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden* v. *Discover Bank*, 556 U.S. 49, 59, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009), superseded by statute in part on other grounds as stated in *Vermont* v. *MPHJ Technology Investments, LLC*, 803 F.3d 635, 643–44 (Fed. Cir. 2015), cert. denied, U.S. , 136 S. Ct. 1658, 194 L. Ed. 2d 766 (2016), and cert. denied, *MPHJ Technology Investments, LLC* v. *Vermont*, U.S. , 136 S. Ct. 1660, 194 L. Ed. 2d 766 (2016). Accordingly, despite its expansive reach, the FAA does not extend so far as to preempt the procedural rules governing state court proceedings in the absence of an actual conflict with the purposes of Congress. That is because, as the United States Supreme Court has made clear, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, supra, 489 U.S. 476.

We now turn to our state law procedures governing an application to vacate an arbitration award brought in Connecticut state court. "A proceeding to vacate an arbitration award is not a civil action, but is rather a special statutory proceeding. . . . Section 52-420(b) requires that a motion to vacate an arbitration award

be filed within thirty days of the notice of the award to the moving party." (Citations omitted.) *Middlesex Ins. Co.* v. *Castellano*, 225 Conn. 339, 344, 623 A.2d 55 (1993).

Our Supreme Court repeatedly has held that the thirty day limitation period set forth in § 52-420 (b) is subject matter jurisdictional. See id. ("[i]f the motion is not filed within the thirty day time limit, the trial court does not have subject matter jurisdiction over the motion"); see also *Wu* v. *Chang*, 264 Conn. 307, 312, 823 A.2d 1197 (2003); *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 471, 139 A.3d 774, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016); *Petrucelli* v. *Travelers Property Casualty Ins. Co.*, 146 Conn. App. 631, 640–41, 79 A.3d 895 (2013), cert. denied, 311 Conn. 909, 83 A.3d 1164 (2014). Indeed, in *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 267–68, 193 A.3d 520 (2018), our Supreme Court recently reaffirmed the principle of legislative acquiescence, which, as applied to the present case, serves to buttress the court's long-standing interpretation of the limitation period set forth in § 52-420 (b) as subject matter jurisdictional. See id., 268 ("the legislature has never seen fit to overrule our conclusion that compliance with the repose period [in General Statutes § 52-555, this state's wrongful death statute] is a jurisdictional prerequisite to suit").[7] "[A]s an intermediate appellate court, we are

[7] In *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 266–69, our Supreme Court discussed its decision in *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 150 A.3d 1109 (2016). In *Blakely*, our Supreme Court asked the parties to submit supplemental briefs on the following question: "Should this court continue to characterize limitation periods contained within statutorily created rights of action as jurisdictional in nature . . . or should this court apply a presumption in favor of subject matter jurisdiction to statutory time limitations for all other actions and determine whether strong evidence of legislative intent exists to overcome that presumption?" (Citation omitted; internal quotation marks omitted.) Id., 749 n.5. In *Angersola*, our Supreme Court stated that its request for supplemental briefing in *Blakely* reflected "the tension we previously have perceived between our characterization of limitation periods contained

bound by Supreme Court precedent and are unable to

within statutorily created rights of actions as subject matter jurisdictional and the distinction we have repeatedly drawn between a trial court's jurisdiction and its authority to act under a particular statute." (Internal quotation marks omitted.) *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 267. The court, in both cases, concluded that because § 52-555 created a cause of action that did not exist at common law, and because the legislature had acquiesced to the court's description of the statute of limitations contained therein as a limit on the court's subject matter jurisdiction, it would continue to treat it as such.

The same analysis applies here. "Arbitration proceedings, including court proceedings to compel arbitration, are creatures of statute in Connecticut and are not common law actions." (Internal quotation marks omitted.) *Bennett* v. *Meader*, 208 Conn. 352, 357, 545 A.2d 553 (1988). Furthermore, "[t]he right to review an arbitration award is wholly encompassed within the parameters of [General Statutes] § 52-418. [Section] 52-418 goes beyond the common law and provides additional grounds upon which to vacate an award." (Footnote omitted; internal quotation marks omitted.) Id., 356–57. In addition, it has been more than twenty-five years since the Supreme Court stated in *Middlesex Ins. Co.* v. *Castellano*, supra, 225 Conn. 344, that the failure to file a motion to vacate in state court within the thirty day time limit of § 52-420 (b) deprived the court of subject matter jurisdiction. Yet, the legislature has not chosen to amend the statute to say that it is not subject matter jurisdictional.

Although the foregoing analysis compels the conclusion that we must continue to view the time limit in § 52-420 (b) as jurisdictional, we can perceive of reasons why the legislature might consider amending the statute to permit parties to agree to waive the time limit. In particular, the right or obligation to arbitrate is a creature of the parties' agreement. If they so agree, they can construct the arbitration process in virtually any manner they wish. They can set the number and qualification of arbitrators. They can decide where and when the arbitration proceedings will take place, whether any rules of evidence will apply, whether there will be a transcript of the proceedings, whether the arbitrator will issue a reasoned or unreasoned award, and who will bear the costs of the arbitration proceedings. Given the freedom the parties have to construct their extrajudicial dispute resolution process as they see fit, it is fair to ask why the parties should not also be able to agree on the time to file a challenge to an award of the arbitrator. In fact, there may be good reasons for them to choose a period of time different from that set forth in § 52-420 (b). For example, the parties, particularly if they are in a long-term relationship, may wish to give themselves time to negotiate a resolution of their dispute after the arbitrator issues his or her award, or they may need time to negotiate how best to implement the award. Requiring them to file a motion to vacate within thirty days may impede their ability to reach an amicable resolution on such issues. An amendment to § 52-420 (b) that allows parties, by explicit written agreement,

modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 605 n.5, 197 A.3d 959 (2018).

It is, of course, a bedrock principle that parties cannot agree to confer subject matter jurisdiction on a court, nor can they waive the lack of subject matter jurisdiction. *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 265–66 (statutory time limitation that is jurisdictional may not be waived); *Rayhall* v. *Akim Co.*, 263 Conn. 328, 337, 819 A.2d 803 (2003) ("[a]lthough both parties agree that this court has jurisdiction, a subject matter jurisdictional defect may not be waived . . . [or] conferred by the parties, explicitly or implicitly" [internal quotation marks omitted]); *Manning* v. *Feltman*, 149 Conn. App. 224, 236, 91 A.3d 466 (2014) ("subject matter jurisdiction cannot be conferred by waiver or consent").

The foregoing well settled principles require us to conclude that, as a matter of law, parties cannot contract around, by way of a choice of law provision, the subject matter jurisdictional nature of § 52-420 (b), applicable to any application to vacate an arbitration award brought in Connecticut state court. Therefore, the limitation period set forth in § 52-420 (b) applies to the plaintiff's application to vacate. It is not disputed that, if § 52-420 (b) is deemed to be the applicable limitation period, the plaintiff's application was untimely. Accordingly, we affirm the trial court's dismissal of the

to extend the date for filing motions to vacate would preserve the presumptive statutory deadline while providing a mechanism for avoiding judicial intervention that would be consistent with the general contractual nature of arbitration.

plaintiff's application to vacate as untimely under § 52-420 (b).[8]

B

In light of the foregoing conclusion, we deem it necessary to discuss a recent decision of this court, *Doctor's Associates, Inc.* v. *Searl*, 179 Conn. App. 577, 180 A.3d 996 (2018).[9] By way of background, in *Doctor's Associates, Inc.*, the trial court had granted the plaintiff's application to confirm an arbitration award entered in its favor and concluded that the defendants' objection to that application, which the parties treated as a motion to vacate the award, was untimely filed under § 52-420 (b). Id., 579–82. On appeal to this court, the defendants claimed that, pursuant to the terms of the parties' arbitration agreement, either federal law or New York law governed the limitation period in which they had to file their motion to vacate the arbitration award. Id., 582–83. Specifically, the parties' agreement provided in relevant part: "Any disputes concerning the enforceability . . . of the arbitration clause shall be resolved pursuant to the [FAA] . . . *and the parties agree that the* [*FAA*] *preempts any state law restrictions . . . on the enforcement of the arbitration clause in this Agreement.*" (Emphasis altered.) Id., 585. Thereupon, this

[8] We recognize that if the plaintiff had filed its application to vacate in federal court, the thirty day limitation in § 52-420 (b) likely would not have applied, and the application would have been timely filed under the FAA, 9 U.S.C. § 12. Although at first glance, this may seem anomalous, it is simply an example of how the statutory procedures between two independent court systems can differ. Furthermore, this particular difference exists in virtually every case, regardless of the language of the arbitration agreement, where, as here, both the federal and state courts have jurisdiction over a motion to vacate the arbitration award.

[9] Following the trial court's December, 2016 decision in the present case, this court rendered its decision in *Doctor's Associates, Inc.* v. *Searl*, supra, 179 Conn. App. 577. Prior to the initial oral argument in the present case on May 21, 2018, the parties were "ordered to be prepared to address, at oral argument, the applicability of *Doctor's Associates, Inc.* v. *Searl*, [supra, 179 Conn. App. 577] to this appeal."

court reasoned: "By agreeing that the [FAA] preempts any state law restrictions on the enforcement of the arbitration clause, the parties have made clear that federal law governs the procedures by which the arbitration clause contained in the franchise agreement is to be enforced. It necessarily follows that the procedure for moving to vacate an arbitration award is governed by federal law. Application of Connecticut's statute of limitations for filing a motion to vacate, pursuant to § 52-420 (b), would contradict the parties' contractual intent to use federal law, as expressly agreed to in the franchise agreement." (Footnote omitted.) Id., 585–86. Relatedly, this court also held that "the parties expressly agreed in [their] agreement that federal law preempted the state law procedures used to enforce the arbitration clause. Therefore, federal law should have been used to determine whether the defendants timely filed their motion to vacate." Id., 585–86 n.7. This court went on to note that the agreement contained a general choice of law provision, which provided that Connecticut law governed the agreement: "The Agreement will be governed by and construed in accordance with the substantive laws of the State of Connecticut, without reference to its conflicts of law, *except as may otherwise be provided in this Agreement.*" (Emphasis altered.) Id., 586. However, this court reasoned that "[w]hen the general choice of law clause of the franchise agreement is read in light of the arbitration clause, it becomes clear that although, generally, Connecticut law governs the terms of the agreement, federal law governs the procedures used to enforce the arbitration clause." Id., 587. The court noted: "[W]e do not deviate from the established precedent that holds that the [FAA] does not preempt state law where the parties agreed to abide by state arbitration rules. In this case, the parties expressly intended and contracted that federal

law would apply to any disputes regarding the enforcement of the arbitration clause." Id., 586 n.8. Accordingly, this court reversed the judgment of the trial court, concluding that the defendants were entitled to a hearing to determine whether they timely moved to vacate the arbitration award pursuant to the FAA, and that, if so, the trial court was required to reach the merits of their motion. Id., 588.

We have provided the foregoing summary because in *Doctor's Associates*, *Inc.*, the parties did not raise, and this court did not address, the legal issues we have considered in part II A of this opinion, namely, the subject matter jurisdictional nature of the thirty day limitation period set forth in § 52-420 (b), or the related question of whether a choice of law clause in an arbitration agreement that purports to "preempt" the vacatur procedure under Connecticut law, specifically, § 52-420 (b), violates the principle that parties cannot agree to confer subject matter jurisdiction on the court. That is, *Doctor's Associates*, *Inc.*, assumed that parties could, as a matter of law, agree, by way of a choice of law provision, to an application of the FAA's three month limitation period set forth in 9 U.S.C. § 12 to a vacatur proceeding brought in Connecticut state court. The conclusion reached in part II A of this opinion, however, requires us to overrule this court's decision in *Doctor's Associates*, *Inc.* v. *Searl*, supra, 179 Conn. App. 577, insofar as it stands for the proposition that, as a matter of contract interpretation, parties can agree to have "the procedure for moving to vacate an arbitration award [in Connecticut state court] governed by federal law."[10] Id., 585–86.

[10] "[T]his court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." *Consiglio* v. *Transamerica Ins. Group*, 55 Conn. App. 134, 138 n.2, 737 A.2d 969 (1999).

III

The plaintiff next claims that the court erred by reviewing the substance of the plaintiff's application to vacate after ruling that the application should be dismissed. We agree but conclude that any error was harmless.

"[A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . Once it becomes clear that the trial court lacked subject matter jurisdiction to hear the plaintiff['s] complaint, any further discussion of the merits is pure dicta. . . . Lacking jurisdiction, the court should not deliver an advisory opinion on matters entirely beyond [its] power to adjudicate." (Citations omitted; internal quotation marks omitted.) *Shockley* v. *Okeke*, 92 Conn. App. 76, 85, 882 A.2d 1244 (2005), appeal dismissed, 280 Conn. 777, 912 A.2d 991 (2007).

In its memorandum of decision, the court dismissed the plaintiff's application to vacate and subsequently reviewed the substantive grounds of the plaintiff's application in connection with its consideration of the defendants' application to confirm.[11] Thereafter, the court granted the defendants' application to confirm, concluding that "[a]lthough the award was not vacated . . . had the application to vacate survived the motion to dismiss, there was no substantive basis set forth in [the plaintiff's] application to vacate the award . . . ."

Although the court lacked subject matter jurisdiction over the plaintiff's application to vacate, in light of our conclusion that the court properly dismissed the application as untimely and confirmed the arbitration award, any error inherent in the court's consideration of the

[11] The court stated that "[a]lthough [the plaintiff's] application to vacate has been dismissed, the court will briefly review the substance of its claim, as set forth in its brief dated December 7, 2016."

arguments made in the plaintiff's application to vacate was harmless.

IV

The plaintiff's final claim on appeal is that the court's award of $2185 in supplemental attorney's fees, pursuant to TILA, on the basis of a $400 hourly rate for Attorney Daniel S. Blinn, counsel for the defendants, is excessive. The defendants contend, to the contrary, that the court's award of supplemental attorney's fees was within the court's broad discretion. We agree with the defendants.

"It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Sabrina C.* v. *Fortin*, 176 Conn. App. 730, 752, 170 A.3d 100 (2017).

In its memorandum of decision, the court applied the following presumptively reasonable fee standard, which the plaintiff does not challenge on appeal, stating: " 'To determine reasonable attorneys' fees, the [United States Court of Appeals for the] Second Circuit has historically implemented the lodestar method of examining the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. . . . However, in 2008, the Second Circuit determined that [t]he meaning of the term "lodestar" has shifted over time, and its value as a metaphor has deteriorated to the

point of unhelpfulness.' *Arbor Hill Concerned Citizens Neighborhood Assn.* v. *County of Albany*, 522 F.3d 182, 190 (2d Cir. 2008). In place of the lodestar method, the court used the "presumptively reasonable fee" standard. . . .

" 'The presumptively reasonable fee standard is predicated on the same basic analysis as the lodestar method: the multiplication of the hours reasonably expended by a reasonable hourly rate. . . . Using the presumptively reasonable fee standard, the . . . court must engage in a four-step process: (1) determine the reasonable hourly rate; (2) determine the numbers of hours reasonably expended; (3) multiply the two to calculate the presumptively reasonable fee; and (4) make any appropriate adjustments to arrive at the final fee award. . . . As part of the reasonableness analysis, the . . . court should consider the factors enumerated in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)[12] . . . and may adjust the presumptively reasonable fee based on the degree of success of the prevailing party.' . . . *Negron* v. *Mallon Chevrolet, Inc.*, Civil No. 3:08-CV-182 (TPS), 2012 WL 435864 (D. Conn. September 24, 2012)." (Footnote in original.)

Applying the foregoing presumptively reasonable fee standard, the court concluded that the defendants are

[12] "'The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.' *Negron* v. *Mallon Chevrolet, Inc.*, Civil No. 3:08-CV-182 (TPS), 2012 WL 435864, *1 n.1 (D. Conn. September 24, 2012)."

entitled to a supplemental attorney's fee of $2185. The court reasoned: "Attorney Blinn is a highly experienced consumer affairs lawyer. He has provided the court with a detailed account of the hours billed in this case, his customary fee in this and similar matters, as well as hourly rates approved by courts in other cases. Although his hourly rate of $400 is relatively high, the court finds his briefs and other filings, totaling 175 pages, to have been produced in a highly professional and efficient manner. The court reaches this conclusion in light of the 6.4 hours of time billed by Attorney Blinn and his paralegal, at [her] lower hourly rate of $150, to produce one brief of sixteen pages in length, as well as a second brief, three pages in length. Attorney Blinn also appeared at two court proceedings in this matter. His efficiency appears to be the result of his experience in this area of the law and, thus, his hourly rate is appropriate in this case. Moreover, he has received a good disposition for his client in this case."

With regard to this claim on appeal, the plaintiff first contends that no reasonable paying client would consider paying an attorney $400 per hour to prosecute the claims brought in this relatively simple matter and that the client would inevitably spend more in attorney's fees than any anticipated gains from litigation would justify. Made without any citation to the record or any legal authority, the plaintiff's argument in this regard is little more than the ipse dixit of counsel and, thus, is unavailing. The plaintiff next contends that the trial court "ignored precedent" by awarding an hourly rate different from that awarded in *Freeman* v. *A Better Way Wholesale Autos, Inc.*, Docket No. CV-13-6045900-S, 2016 WL 1397704, *3 (Conn. Super. March 18, 2016), dismissed in part and aff'd in part, 174 Conn. App. 649, 166 A.3d 857, cert. denied, 327 Conn. 927, 171 A.3d 60 (2017), in which the court, *Huddleston, J.*, described

the $400 hourly rate requested therein by Attorney Blinn (as counsel for the defendants in that case) as "somewhat high" and instead found $375 to be a reasonable hourly rate. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 174 Conn. App. 649, 651–52 n.1, 166 A.3d 857 (dismissing that portion of appeal contesting award of attorney's fees for failure to amend appeal to include such order), cert. denied, 327 Conn. 927, 171 A.3d 60 (2017). We reject this argument because it is well settled that "[t]rial court cases do not establish binding precedent"; *McDonald* v. *Rowe*, 43 Conn. App. 39, 43, 682 A.2d 542 (1996); and the court in this case simply was not required to adopt the findings of the court in *Freeman* regarding the reasonableness of the hourly rates requested.[13]

In sum, we conclude that the court did not abuse its discretion in awarding the defendants $2185 in supplemental attorney's fees.

The judgment is affirmed.

In this opinion DiPENTIMA, C. J., and LAVINE, KELLER, ELGO and BRIGHT, Js., concurred.

LAVERY, J., with whom SHELDON, J., joins, dissenting. I respectfully dissent from the majority's conclusion that the thirty day limitation period set forth in General Statutes § 52-420,[1] rather than the parties' contractual agreement to follow the three month period contained in the Federal Arbitration Act (FAA), 9 U.S.C.

[13] We further note that the plaintiff argued to the court that, for purposes of awarding any supplemental attorney's fees, Attorney Blinn's hourly rate should be capped at $300 per hour. Thus, the plaintiff's challenge to the award of supplemental attorney's fees, had it been meritorious, would have reduced the award by $490.

[1] General Statutes § 52-420 (b) provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

§ 12 (2012),[2] controls the time frame within which the plaintiff, A Better Way Wholesale Autos, Inc., may file its application to vacate the arbitration award issued in favor of the defendants, James Saint Paul and Julie J. Saint Paul. Such a conclusion is contrary to the terms set forth in the parties' privately agreed upon arbitration clause in the parties' automobile financing agreement. Because I would hold that the terms of the parties' arbitration agreement govern, I respectfully dissent. See *Doctor's Associates, Inc.* v. *Searl*, 179 Conn. App. 577, 585–86, 180 A.3d 996 (2018) (in accordance with parties' contractually agreed upon terms, FAA governed time period for filing motion to vacate arbitration award).

The facts are undisputed and aptly stated by the majority. I emphasize, however, that the parties' financing agreement contains a choice of law provision specifying that "[a]ny arbitration . . . shall be governed by the [FAA] (9 U.S.C. § 1 et seq. [2012]) and not . . . any state law concerning arbitration." Despite the clear language of the parties' contract, the trial court applied, and the majority affirms, the thirty day limit to file a motion to vacate, pursuant to state law.[3]

[2] Section 12 of title 9 of the 2012 edition of the United States Code provides in relevant part: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. . . ."

[3] In its memorandum of decision, the court incorrectly stated that § 12 of the FAA did not apply because the plaintiff, pursuant to § 9 of the FAA, "was free to bring this application in the Connecticut federal district court where the longer, three month limitation applies." Section 9 of the FAA provides in relevant part that "[i]f no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . . ." Section 9 of the FAA, however, does not confer subject matter jurisdiction in federal courts but, instead, "provide[s] an additional procedure and remedy . . . where jurisdiction already exists." (Internal quotation marks omitted.) *Metal Products Workers Union, Local 1645, UAW-AFL-CIO* v. *Torrington Co.*, 242 F. Supp. 813, 819 (D. Conn. 1965), aff'd, 358 F.2d 103 (2d Cir. 1966).

On this point, the United States Supreme Court has characterized the FAA as an "anomaly" in the area of federal jurisdiction, as "[the FAA] creates a body of federal substantive law establishing and regulating the duty to

Moreover, the parties agreed to be bound by the FAA in its entirety. Namely, the parties' agreement includes § 2 of the FAA, which binds state courts to render agreements to arbitrate "valid, irrevocable, and enforceable."[4] 9 U.S.C. § 2 (2012); see also *Vaden* v. *Discover Bank*, 556 U.S. 49, 71, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009) (in accordance with § 2 of FAA, both state and federal courts are obligated to honor and enforce agreements to arbitrate), superseded by statute in part on other grounds as stated in *Vermont* v. *MPHJ Technology Investments, LLC*, 803 F.3d 635, 643–44 (Fed. Cir. 2015), cert. denied, U.S. , 136 S. Ct. 1658, 194 L. Ed. 2d 766 (2016), and cert. denied, *MPHJ Technology Investments, LLC* v. *Vermont*, U.S. , 136 S. Ct. 1660, 194 L. Ed. 2d 766 (2016). The majority's decision undercuts the arbitration terms as agreed upon by the parties.

The United States Supreme Court has recognized that it is incumbent upon states to honor the terms that the

honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction . . . ." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). Accordingly, the court mistakenly referred to § 9 of the FAA as the source of federal jurisdiction in the present case.

Instead, the parties had federal question jurisdiction by virtue of their claim under the Federal Truth in Lending Act, 15 U.S.C. § 1601 et seq. (2012). The parties otherwise did not have federal question or diversity jurisdiction. Accordingly, if the parties did not have their Federal Truth in Lending Act claim, then the court's decision not to enforce their agreement to follow § 12 of the FAA would have left them without the option to bring a motion to vacate after thirty days, despite their clearly agreed upon three month time frame.

[4] Section 2 of title 9 of the 2012 edition of the United States Code provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

parties set forth in their arbitration agreement. See, e.g., *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 22 n.27, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). In *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), the United States Supreme court concluded that the FAA preempts application of state laws that render arbitration agreements unenforceable. The court determined that arbitration is strictly a matter of contract and, therefore, parties should be "at liberty to choose the terms under which they will arbitrate." (Internal quotation marks omitted.) Id., 472. "Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted." (Citation omitted.) Id., 479. The court, in essence, emphasized that the overarching national policy goal behind the FAA was not just to enforce the parties' contractual right to arbitrate, but, moreover, was to uphold the enforcement of stipulated obligations in the parties' arbitration agreement itself.

Following *Volt Information Sciences, Inc.*, the United States Supreme Court continually has recognized contractual freedom as the FAA's bedrock principle. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (parties' arbitration agreement contractual provisions govern which entity, court or arbitrator, shall decide whether condition precedent to arbitration has been fulfilled); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (question of whether court or arbitrator has primary ability to

decide arbitrability is determined by contractual agreement); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (contract between securities brokerage firm and customers permitted arbitration panel to award punitive damages to customers when arbitration clause was governed by rules of National Association of Securities Dealers, which permitted such award, despite agreement that New York law, prohibiting award of punitive damages, otherwise governed contract). Parties, therefore, generally are free to tailor their arbitration contract as they see fit. This court's decision in *Doctor's Associates, Inc.* v. *Searl*, supra, 179 Conn. App. 577, was consistent with that principle.[5]

Accordingly, I would not hold that state law governs the arbitration agreement unless the parties express "a clear intent to incorporate state law rules for arbitration." (Internal quotation marks omitted.) *Fidelity Federal Bank, FSB* v. *Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004); see also *Martis* v. *Dish Network Service, L.L.C.*, 597 Fed. Appx. 301, 304 (6th Cir. 2015) (whether FAA or Michigan law applied resolved in favor of federal standard even though Michigan law governed arbitrator's substantive decision); *Johnson* v. *Gruma Corp.*, 614 F.3d 1062, 1067 (9th Cir. 2010) ("where the FAA's rules control arbitration proceedings, a reviewing court must also apply the FAA standard for vacatur"); see *Kim-C1, LLC* v. *Valent Biosciences Corp.*, 756 F. Supp. 2d 1258, 1261–62 (E.D. Cal. 2010); *New England Utilities* v. *Hydro-Quebec*, 10 F. Supp. 2d 53, 60–61 (D. Mass. 1998).

I do not mean to say that the FAA preempts the General Statutes regarding arbitration. That would be contrary to clear United States Supreme Court precedent. See *Volt Information Sciences, Inc.* v. *Board of*

[5] In *Doctor's Associates, Inc.*, the parties, in their contract, agreed that the FAA governed disputes concerning the enforceability of the arbitration clause therein. *Doctor's Associates, Inc.* v. *Searl*, supra, 179 Conn. App. 585. This court upheld the parties' agreement to apply the FAA. Id., 585–86.

Trustees of Leland Stanford Junior University, supra, 489 U.S. 477. The parties, however, chose the FAA as the governing law. Because an "arbitration provision in an agreement is effectively an agreement that is separate and distinct from the broader contract"; *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 386, 926 A.2d 1035 (2007); and we must give effect to the parties' intent; *Levine* v. *Advest, Inc.*, 244 Conn. 732, 745–46, 714 A.2d 649 (1998); I cannot see how we would not enforce the parties' agreement that § 12 of the FAA governs the time limit to file a motion to vacate.

The majority, however, declines to enforce § 12 of the FAA, reasoning that our state courts must follow state procedural rules. Although acknowledging that the substantive law of the FAA applies in both state and federal court; see *Vaden* v. *Discover Bank*, supra, 556 U.S. 59; the majority maintains that the FAA does not preempt state procedural rules. Reasoning that our courts have considered § 52-420 (b) to be procedural and subject matter jurisdictional, the majority concludes that the thirty day limitation period set forth therein is not preempted by the FAA.

In support of its conclusion that § 52-420 (b) is procedural, the majority cites to a string of cases in which our courts have understood § 52-420 in the context of subject matter jurisdictional claims, but none of which involved a choice of law claim or a dispute as to which law governed the given arbitration agreement. See *Wu* v. *Chang*, 264 Conn. 307, 308, 823 A.2d 1197 (2003) ("sole issue raised by this appeal is whether a claim of fraud tolls the thirty day period within which a motion to vacate an arbitration award must be filed pursuant to General Statutes § 52-420 [b]"); *Vail* v. *American Way Homes, Inc.*, 181 Conn. 449, 450, 435 A.2d 993 (1980) (sole issue was enforceability of arbitration award ordering specific performance of construction contract for private dwelling); *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 470, 139 A.3d 774 (rejecting claims that court incorrectly concluded that

application to vacate was untimely under § 52-420 [b] on basis of due process deprivation; allegation that arbitration panel failed to consider defendant's testimony and evidence; erroneous factual findings; and award was contrary to public policy), cert. denied, 322 Conn. 904, 138 A.3d 933 (2016); *Petrucelli* v. *Travelers Property Casualty Ins. Co.*, 146 Conn. App. 631, 633, 79 A.3d 895 (2013) (rejecting claim that court erred in concluding that it lacked subject matter jurisdiction under § 52-410), cert. denied, 311 Conn. 909, 83 A.3d 1164 (2014). Operating under the assumption that § 52-420 is procedural, the majority then reasons that parties cannot waive or otherwise contract around this statute. I do not agree with the majority's distinction between procedure and substance.

The mere fact that § 52-420 sets a time limitation does not compel the conclusion that it is procedural and, therefore, subject matter jurisdictional. The United States Supreme Court has characterized such provisions differently. Namely, in *Scarborough* v. *Principi*, 541 U.S. 401, 413–14, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004), the United States Supreme Court concluded that the time bar for filing a fee application set forth under the Equal Access to Justice Act, 28 U.S.C. § 2412 (d) (1) (B) (2012), did not concern the federal courts' subject matter jurisdiction. The court reasoned that the time limitation pertained to postjudgment proceedings auxiliary to a matter already within the court's adjudicatory authority. *Scarborough* v. *Principi*, supra, 414.

Following this rationale, at least one court has set forth a compelling argument that the time limitation set forth in § 12 of the FAA is substantive, not procedural or jurisdictional. In *Equitas Disability Advocates, LLC* v. *Daley, Debofsky & Bryant, P.C.*, 177 F. Supp. 3d 197, 218 (D.D.C.), aff'd, 672 Fed. Appx. 13 (D.C. Cir. 2016), the court considered, in relevant part, whether an application to vacate was timely served under § 12 of the FAA. In light of United States Supreme Court precedent

indicating that "time prescriptions, however emphatic, are not properly typed jurisdictional in the sense of restricting courts' subject-matter jurisdiction," the court concluded that a question as to the timeliness for filing the motion to vacate the arbitral award did not concern the court's jurisdiction. (Internal quotation marks omitted.) Id., quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); see also *Craig* v. *Southwest Securities, Inc.*, Docket No. 05-16-01378-CV (BLG), 2017 WL 6503213, *2 (Tex. App. December 18, 2017) ("[s]ection 12 [of the FAA] provides a substantive three-month limitations period").

Additionally, *Equitas Disability Advocates, LLC*, noted that Congress has not specifically qualified the FAA as jurisdictional and, therefore, courts should treat any restrictions as to timeliness set forth therein as nonjurisdictional. *Equitas Disability Advocates, LLC* v. *Daley, Debofsky & Bryant, P.C.*, supra, 177 F. Supp. 3d 218; see also *Arbaugh* v. *Y & H Corp.*, supra, 546 U.S. 516 (threshold number of employees set forth in statute not jurisdictional in nature).

Applying these principles to § 52-420, I am not convinced that this statute necessarily is procedural and, therefore, subject matter jurisdictional. The majority acknowledges that "[a]rbitration proceedings, including court proceedings to compel arbitration are creatures of statute in Connecticut and are not common law actions"; (internal quotation marks omitted) *Bennett* v. *Meader*, 208 Conn. 352, 357, 545 A.2d 553 (1988); and that "[t]he right to review an arbitration award is wholly encompassed within the parameters of [General Statutes] § 52-418 . . . [which] goes beyond the common law and provides additional grounds upon which to vacate an award." Id., 356–57. If we accept those premises, then the thirty day limitation could be considered

an element necessary to establish a right, and, therefore, substantive in nature. See *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 340–41, 644 A.2d 1297 (1994); id., 340 ("[a] limitation period is considered 'one of the congeries of elements necessary to establish the right,' and therefore characterized as substantive, only when it applies to a new right created by statute"); but see *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 529, 294 A.2d 633 (1972) ("the general rule [is] that a time limitation on the enforcement of a right, created by statute and not existing at common law, is a part of the right and must be met in order to provide a court with jurisdiction to hear the cause of action"); see also *Ecker* v. *West Hartford*, 205 Conn. 219, 233, 530 A.2d 1056 (1987) (deeming wrongful death action jurisdictional under this general rule). Further, in *Ekstrom* v. *Value Health, Inc.*, 68 F.3d 1391, 1395 (D.C. Cir. 1995), the court, citing to our state precedent, held that § 52-420 is substantive because "[u]nder Connecticut law . . . jurisdictional time limits are not subject to waiver . . . ." It remains uncertain, therefore, that § 52-420 (b) is procedural.

The majority, nonetheless, posits that the principle of legislative acquiescence compels the conclusion that § 52-420 properly may be considered procedural. As support, the majority cites *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 193 A.3d 520 (2018). In *Angersola*, our Supreme Court directed the parties to file supplemental briefs to address the question, inter alia, of whether strong evidence existed as to legislative intent to overcome the presumption that the statutorily created rights under General Statutes § 52-555 were jurisdictional in nature. Id., 266. The court, in reaching its decision on this question, acknowledged that tension exists "between a trial court's jurisdiction and its authority to act under a particular statute." (Internal quotation marks omitted.) Id., 267.

In accordance with the principle of legislative acquiescence, the court reasoned that "[o]nce an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision . . . ." (Citation omitted; internal quotation marks omitted.) Id., 267–68. Noting that the legislature had never, in thirty years, seen fit to overrule the court's conclusion that compliance with the repose period is a jurisdictional requirement, the court concluded that the legislature had acquiesced to such characterization, and, therefore, the court concluded that it was appropriate to consider § 52-555 as a jurisdictional requirement. Id., 268.

The majority's analysis, and that provided in *Angersola*, presume that the legislature's inactivity is sufficient to establish legislative acquiescence. That analysis, however, is incomplete. "[T]he legislative acquiescence doctrine requires actual acquiescence on the part of the legislature. [Thus] [i]n most of our prior cases, we have employed the doctrine not simply because of legislative inaction, but because the legislature affirmatively amended the statute subsequent to a judicial or administrative interpretation, but chose not to amend the specific provision of the statute at issue. . . . In other words, [l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute." (Citation omitted; quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 525, 949 A.2d 1092 (2008); see also *Berkley* v. *Gavin*, 253 Conn. 761, 777 n.11, 756 A.2d 248 (2000) (legislative acquiescence requires actual acquiescence by legislature), superseded by statute in part on other grounds as stated in *Estate of Brooks* v. *Commissioner of Revenue Services*, 325 Conn. 705, 716, 159 A.3d 1149 (2017).

Here, there is no evidence in the record that the legislature affirmatively has amended § 52-420 without choosing to address whether it is jurisdictional or substantive in nature. Moreover, it is not clear that any characterization of this statute as procedural and subject matter jurisdictional is accurate. I, therefore, would not conclude that the legislature has acquiesced to any language from the precedent the majority cites for the proposition that the time limitation in § 52-420 is procedural and subject matter jurisdictional.

In honoring the contractual freedom afforded to parties under the FAA, I would enforce the terms set forth in the parties' arbitration agreement. I, therefore, would hold that § 12 of the FAA, rather than § 52-420 of the General Statutes, governs the parties' motion to vacate and that our precedent in *Doctor's Associates, Inc.* v. *Searl*, supra, 179 Conn. App. 577, be upheld.

Accordingly, I respectfully dissent.

ONE ELMCROFT STAMFORD, LLC *v.* ZONING BOARD OF APPEALS OF THE CITY OF STAMFORD ET AL.
(AC 41208)

Sheldon, Elgo and Lavery, Js.*

Syllabus

The plaintiff appealed to the trial court from the decision by the defendant zoning board of appeals granting the application of the defendant P, filed on behalf of the defendant P Co., for approval of the location of a used car dealer on certain real property. The plaintiff claimed, inter alia, that the board failed to conduct the requisite suitability analysis, as required by the applicable statute (§ 14-55). The court agreed with the plaintiff's argument that § 14-55 applied and acknowledged that the board's certificate of approval looked and read like a variance, but concluded that the board gave due consideration to the suitability of

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

the proposed use and that the board's decision was, thus, akin to an approval under § 14-55. The trial court subsequently rendered judgment denying the plaintiff's appeal from the board's decision, from which the plaintiff appealed to this court. On appeal, the plaintiff claimed, inter alia, that although published editions of the General Statutes have stated that § 14-55 has been repealed, in actuality, it has not been repealed, and that had the board properly followed § 14-55, it would have considered the suitability factors set forth therein. Although Public Acts 2003, No. 03-184, § 10 (P.A. 03-184), repealed § 14-55, effective October 1, 2003, Public Acts 2003, No. 03-265, § 9 (P.A. 03-265), which also became effective October 1, 2003, repealed and replaced § 14-55. *Held*:

1. The plaintiff could not prevail on its claim that the trial court improperly concluded that the named applicant, P, had standing to apply to the board for location approval and, accordingly, was a proper party, which was based on its claim that P Co., in its business capacity, sought a used car dealer's license from the Department of Motor Vehicles, but the certificate of approval of the location application and subsequent hearing notification listed P as the applicant and, thus, the board's approval of P's application was improper because its decision was rendered in favor of a person rather than in the name of the proposed licensee; the record revealed that although P Co. was not the named applicant on the certificate of approval application, the totality of the circumstances sufficiently linked P to P Co., such that no one was misled or misunderstood the nature of the application, and, thus, the trial court did not err in concluding that P, as a representative of P Co., had standing to apply to the board for location approval.
2. Because § 14-55 has not been repealed, the board should have reviewed P's application under the standard set forth therein; given that there was no mention in P.A. 03-265, which repealed and replaced § 14-55, effective October 1, 2003, of P.A. 03-184, which ostensibly repealed § 14-55, effective October 1, 2003, and it was impossible to simultaneously give effect to both of those public acts, they were in irreconcilable conflict, and, thus, pursuant to statute (§ 2-30b), the later public act, P.A. 03-265, was deemed to have repealed and replaced the older public act, P.A. 03-184.
3. The board mistakenly treated P's application as if it were an application for a variance and, thus, failed to comply with the requirements set forth in § 14-55 in granting that application; even though P's application was a matter to which § 14-55 applied and even though the board heard evidence and issued several conditions of approval that, to some extent, could pertain to suitability, the record revealed that on several occasions P's application was referred to and treated as an application for a variance, the reasons that the board provided in its certificate of approval and the conditions provided therein were made with reference to an application for a variance, the board issued only one factual finding, in which it expressly applied variance standards provided in the local

zoning regulations, and the board issued no findings as to the suitability factors enumerated under § 14-55.

4. The trial court erred in searching beyond the board's stated reason for approval to find a basis for the board's decision and improperly upheld the board's decision on alternative grounds; because the board had stated its reason for approval, the trial court was not permitted to search the record for evidence that could support alternative grounds on which the board could have granted P's application, and, thus, when the court reviewed the record to determine whether the evidence could support a conclusion that the suitability requirement of § 14-55 was satisfied, even though the board did not make any findings on that point, the court was incorrect in substituting its own judgment for that of the board.

Argued February 13—officially released September 3, 2019

Procedural History

Appeal from the decision by the named defendant granting the application of the defendant Pasquale Pisano for approval of the location of a used car dealer on certain real property, brought to the Superior Court in the judicial district of New Britain and transferred to the judicial district of Stamford-Norwalk, where the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment denying the plaintiff's appeal, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Jeffrey P. Nichols, with whom was *John W. Knuff*, for the appellant (plaintiff).

James V. Minor, special corporation counsel, with whom was *Kathryn Emmett*, director of legal affairs, for the appellee (named defendant).

Gerald M. Fox III, for the appellees (defendant Pasquale Pisano et al.).

Opinion

LAVERY, J. The plaintiff, One Elmcroft Stamford, LLC, appeals from the judgment of the Superior Court denying its appeal from the decision of the defendant Zoning Board of Appeals of the City of Stamford

(board), approving the application of the defendant Pasquale Pisano (defendant) to locate the defendant used car business, Pisano Brothers Automotive, Inc. (Pisano Brothers), at 86 Elmcroft Road in Stamford. On appeal, the plaintiff claims that the court improperly (1) determined that the defendant had standing to apply to the board for approval of the application, (2) upheld the board's decision, despite the board's failure to review the application in accordance with General Statutes § 14-55,[1] and (3) searched beyond the board's stated reason for approval of the application.[2] We disagree with the plaintiff's first claim but agree with the plaintiff's second and third claims. Accordingly, we reverse the judgment of the Superior Court.

The following facts and procedural history are relevant. Pisano Brothers is the lessee of the 6500 square foot parcel located at 86 Elmcroft Road in Stamford (property), in a General Industrial (M-G) zone. The plaintiff owns abutting property at 126 Elmcroft Road.

In June, 2016, the defendant, on behalf of Pisano Brothers, applied for a used car dealer license from the Department of Motor Vehicles, listing himself as vice president and his brother as president. Pursuant to General Statutes § 14-54, a license for "dealing in or repairing motor vehicles" requires a "certificate of approval of the location" (certificate of approval) from the appropriate local board. Accordingly, the defendant additionally applied to the board for its approval of a "used car dealer" on the M-G zoned property (Pisano application).

[1] Although § 14-55 is reported as "repealed," effective October 1, 2003, in our official state statute books, the parties dispute whether § 14-55 has been repealed. This matter will be discussed in part II A of this opinion.

[2] The plaintiff advances a number of additional claims that are collateral or inconsequential to our decision. Accordingly, we do not address them. See footnote 10 of this opinion.

The board referred the Pisano application to various city agencies and boards. The record contains advisements from the Planning Board of the City of Stamford (planning board) and the Engineering Bureau of the City of Stamford (engineering bureau). In a letter to the board dated September 8, 2016, the planning board "unanimously recommended denial of [the Pisano application]," opining "that the proposed application does not keep with the character of the neighborhood and . . . [is] not consistent with the 2015 Master Plan Category #9 (Urban Mixed-Use)." The engineering bureau advised that it found the proposal "will not result in any adverse drainage impacts" and, further, that approval of the Pisano application should be conditioned on the installation of a "[n]ew concrete curb and sidewalk . . . along the frontage of the property."

On September 14, 2016, the board held a public hearing on the Pisano application. The board posed several questions to the defendant and his attorney, Gerald M. Fox III. Two individuals spoke against the Pisano application. They were concerned about the inability to conceal the building and parking lot on the property with fencing, the lack of sidewalks, and the potential for a crowded parking lot. The plaintiff did not offer comment. The board, during its deliberations, noted that the defendant seemed amenable to complying with various conditions of approval that would make the property compatible with the local neighborhood. The board unanimously voted to approve the Pisano application. Subsequently, on September 29, 2016, the board issued a letter to the defendant, stating its approval and setting forth several conditions.

Pursuant to General Statutes § 14-57 and the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183 et seq., the plaintiff appealed to the Superior Court. The plaintiff advanced three claims: (1) the defendant was not a proper party and lacked standing

to apply to the board for location approval, (2) the board did not comply with hearing notice requirements, and (3) the board failed to conduct the requisite suitability analysis, as prescribed in § 14-55. As to the first two claims, the court disagreed. As to the third claim, the court agreed with the plaintiff's argument that § 14-55 applied and further acknowledged that "the board's certificate of approval looks and reads like a variance." Upon its review of the transcript from the September 14, 2016 public hearing, however, the court concluded that the board, nonetheless, gave due consideration to the suitability of the proposed use. It, therefore, reasoned that the board's decision was akin to an approval under § 14-55.[3] Accordingly, the court, in its memorandum of decision dated December 13, 2017, denied the plaintiff's appeal. Subsequently, pursuant to General Statutes § 4-184, the plaintiff appealed to this court.[4] Additional facts and procedural history will be set forth as necessary.

[3] The court, in its memorandum of decision, indicated: "[T]he court finds that the [board] properly considered the suitability of locating the Pisano business at 86 Elmcroft Road. The court has reviewed the full transcript of the [board] hearing and subsequent deliberations of the board on September 14, 2016 . . . and finds more than substantial evidence of the board's careful scrutiny of, and resulting conditions on, the Pisano application." (Citation omitted.) The court then referenced instances in which "board members questioned [the defendant] about the scope of his towing operation, the hours of operation and the location and the type of his repair work," the board noted that Pisano Brothers was "not a general towing operation," and that "repairs would take place inside the building." Additionally, the court noted that, during deliberations, the board considered that other businesses within the parameters of M-G zoning "could move in tomorrow" without board approval, considered several conditions of approval that would make the use more "acceptable to neighbors," and that the board even issued several conditions of approval. (Internal quotation marks omitted.) The court concluded that the board's conditions of approval constituted "stark evidence of the careful attention paid by the [board] to the issue of suitability."

[4] General Statutes § 4-184 provides: "An aggrieved party may obtain a review of any final judgment of the Superior Court under this chapter. The appeal shall be taken in accordance with section 51-197b."

I

We first address the plaintiff's claim that the court improperly concluded that the named applicant, the defendant, had standing to apply to the board for location approval and, accordingly, was a proper party. The plaintiff notes that Pisano Brothers, in its business capacity, sought a used car dealer's license from the Department of Motor Vehicles, but the certificate of approval application and the subsequent hearing notification listed the defendant as the applicant. Accordingly, the plaintiff contends that the board's approval of the Pisano application was improper because its decision was rendered in favor of a person rather than in the name of the proposed licensee. The plaintiff cited no authority in support of this proposition. We are not persuaded.

"[T]he standard for determining whether a party has standing to apply in a zoning matter is less stringent [than the standard that applies to a determination of whether a party is aggrieved]. A party need have only a sufficient interest in the property to have standing to apply in zoning matters. . . . [I]t is not possible to extract a precise comprehensive principle which adequately defines the necessary interest . . . ." (Internal quotation marks omitted.) *RYA Corp.* v. *Planning & Zoning Commission*, 87 Conn. App. 658, 663, 867 A.2d 97 (2005). Here, the issue is not whether Pisano Brothers has standing but, instead, whether standing, in effect, was voided by virtue of a technical glitch in listing the defendant as the applicant.

RYA Corp. v. *Planning & Zoning Commission*, supra, 87 Conn. App. 658, presented similar circumstances as in the present case. In that case, the applicable zoning regulations required that an applicant be a "record owner or developer . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 669. Although the plaintiff subdivision applicant, The RYA Corporation (RYA), did not qualify as such, the plaintiff record

owner, Myers Nursery, Inc. (Myers, Inc.), consented in writing to RYA filing the application. Id., 667–68. The defendant planning and zoning commission claimed that the trial court improperly concluded that Myers, Inc., had standing to appeal the planning and zoning commission's decision, arguing that RYA had not "established definitively by the terms of the consent form" that it was acting under the authority of Myers, Inc. Id., 668.

This court concluded that the property owner requirement set forth in the applicable zoning regulations was satisfied, stating: "As a matter of law, we are not persuaded that the trial court was required to read these documents as narrowly as do[es] the [planning and zoning commission]. Taking into account the totality of the relationship between Myers, Inc., and RYA, the court had the authority to conclude that the physical linkage between the application and the consent form gave Myers, Inc., a sufficient interest to have standing to contest the denial of the proposed subdivision. This conclusion is supported not only by the nature of the documentation itself but because, as noted previously, the court reasonably might have found that RYA was acting as Myers, Inc.'s agent in filing the subdivision application." Id.; see also *Loew* v. *Falsey*, 144 Conn. 67, 73–74, 127 A.2d 67 (1956) (fact that owner of corporation, E. M. Loew, applied for permit in his own name, rather than in name of his corporation, E. M. Loew, Inc., did not mislead anyone and there was no reason why permit could not have been granted under name provided, and, accordingly, no jurisdictional defect resulted simply by incorrectly using name of owner in permit application).

Similarly, the record in the present case reveals that although Pisano Brothers was not the named applicant on the certificate of approval application, the totality of the circumstances sufficiently link the defendant to Pisano Brothers, such that no one was misled or misunderstood the nature of the application. The application

for a used car dealer license from the Department of Motor Vehicles lists "Pisano Brothers Automotive Inc." as the name under which the business was to be conducted, with the defendant and his brother identified as officers of the company. The proposed improvement location survey identified "Pisano Brothers Automotive, Inc.," as the prospective user. Additionally, at the outset of the public hearing, the defendant was introduced as one of the owners of Pisano Brothers, along with his brother. Accordingly, we conclude that the court did not err in concluding that the defendant, as a representative of Pisano Brothers, had standing to apply to the board for location approval.

II

The plaintiff claims that the court erred in upholding the board's decision, despite the board's failure to apply the standard set forth in § 14-55. Although the plaintiff did not offer comment or argument before the board during the public hearing, the plaintiff argued before the trial court that despite the fact that the then current edition of the General Statutes provided that § 14-55 had been repealed, in actuality, it had not been repealed. The plaintiff contended that had the board properly followed § 14-55, it would have considered the suitability factors set forth therein, namely, "due consideration to [the proposed use's] location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel." The plaintiff, therefore, contended that the board not only failed to issue any findings as to these suitability factors, but, further, it improperly treated the Pisano application as one for a variance. The court concluded that the record reflected that the board gave due consideration to the requisite suitability factors. The court, therefore, denied the plaintiff's appeal.

Before this court, the plaintiff maintains that, despite the fact that published editions of the General Statutes

have stated that § 14-55 has been repealed, in actuality, it has not been repealed. The board agrees that the statute has not been repealed but argues, nonetheless, that it substantially complied with the statute's requirements in granting the Pisano application. The defendant and Pisano Brothers argue that § 14-55 was repealed but that, even if it was not repealed, the board substantially complied with the statute. We conclude that (1) § 14-55 had not been repealed at the time of the board's action on the Pisano application, and (2) the board mistakenly treated the Pisano application as if it were an application for a variance and, thus, failed to comply with the requirements set forth in § 14-55 in granting that application. We will address both matters in turn.

A

As a threshold matter, we address whether § 14-55 had been repealed at the time of the board's action. This precise issue was addressed by our Superior Court in 2011 in an opinion authored by the court, *D. Tobin*, *J.*, which concluded that § 14-55 was not repealed. See *East Coast Towing, Ltd.* v. *Zoning Board of Appeals*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6003028-S (March 2, 2011) (51 Conn. L. Rptr. 572). The plaintiff submits that the court's decision in *East Coast Towing, Ltd.*, was sound and, accordingly, that the court correctly concluded that § 14-55 remained in effect, despite its apparent repeal. We agree with Judge Tobin's well reasoned decision in *East Coast Towing, Ltd.*, and, accordingly, conclude that § 14-55 has not been repealed.

"The meaning of a statute shall, in the first instance, be ascertained from 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." General Statutes § 1-2z. Following the apparent repeal of § 14-55, we are left with no text to consider. Accordingly, to determine whether this statute remains in effect, we will look to extratextual evidence, such as the legislative history. See *State* v. *Russo*, 259 Conn. 436, 447–48, 790 A.2d 1132 (process of statutory interpretation involves, inter alia, searching legislative history to discern legislative intent), cert. denied, 537 U.S. 879, 123 S. Ct. 79, 154 L. Ed. 2d 134 (2002). Although compilations of the General Statutes list § 14-55 as having been "repealed," this fact is not dispositive of the issue at hand.[5]

Judge Tobin's decision in *East Coast Towing, Ltd.*, provides a well reasoned and principled basis upon which we also conclude that § 14-55 has not been repealed. Judge Tobin's reasoning was as follows. In 2003, the legislature made a series of changes to § 14-55. First, in Public Acts 2003, No. 03-184, § 10 (P.A. 03-184), the legislature ostensibly repealed § 14-55 of our General Statutes, effective October 1, 2003. *East Coast Towing, Ltd.* v. *Zoning Board of Appeals*, supra, 51 Conn. L. Rptr. 575. The legislature then, in Public Acts 2003, No. 03-265, § 9 (P.A. 03-265), repealed and replaced § 14-55, also effective October 1, 2003.[6] Id.,

[5] This court has held that compilations of public acts prepared by the Legislative Commissioners' Office do not constitute the actual law of this state: "[T]he compilations of the public acts are not published on the day a law effective on passage is approved by both houses and signed by the governor, allowed to become law without signature of the governor or repassed by a two-thirds majority of the legislature following a gubernatorial veto. . . . [I]t is not the publication of these acts in the [p]ublic [a]cts compilations that makes them effective against members of the public, but their lawful passage by the General Assembly." *Figueroa* v. *Commissioner of Correction*, 123 Conn. App. 862, 870, 3 A.3d 202 (2010), cert. denied, 299 Conn. 926, 12 A.3d 570 (2011).

[6] P.A. 03-265, § 9, provides: "Section 14-55 of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2003):

"In any town, city or borough the local authorities referred to in section 14-54 shall, upon receipt of an application for a certificate of approval

575–76. Finally, in Public Acts 2003, No. 03-278, § 40, which took effect from passage on July 9, 2003, the legislature repealed and replaced the then current version of § 14-55, making a minor, technical correction to it without any mention of either P.A. 03-184, § 10, or P.A. 03-265, § 9, both of which were to become effective on October 1, 2003.[7] See id., 576.

Pursuant to General Statutes § 2-30b (a), "[w]hen two or more acts passed at the same session of the General Assembly amend the same section of the general statutes, or the same section of a public or special act, and

referred to in said section, assign the same for hearing within sixty-five days of the receipt of such application. Notice of the time and place of such hearing shall be published in a newspaper having a general circulation in such town, city or borough at least twice, at intervals of not less than two days, the first not more than fifteen, nor less than ten days, and the last not less than two days before the date of such hearing and sent by certified mail to the applicant not less than fifteen days before the date of such hearing. All decisions on such certificate of approval shall be rendered within sixty-five days of such hearing. The applicant may consent to one or more extensions of any period specified in this section, provided the total extension of any such period shall not be for longer than the original period as specified in this section. The reasons for granting or denying such application shall be stated by the board or official. Notice of the decision shall be published in a newspaper having a general circulation in such town, city or borough and sent by certified mail to the applicant within fifteen days after such decision has been rendered. Such applicant shall pay a fee of ten dollars, together with the costs of publication and expenses of such hearing, to the treasurer of such town, city or borough. No such certificate shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel. *In any case in which such approval has been previously granted for any location, the local authority may waive the requirement of a hearing on a subsequent application. In addition, the local authority may waive the requirement of a hearing on an application wherein the previously approved location of a place of business is to be enlarged to include adjoining or adjacent property.*" (Emphasis added.) The italicized sentences indicate the portions that were added to the 2003 revision of § 14-55.

[7] Because this amendment to § 14-55 was effective on July 9, 2003, and P.A. 03-265, § 9, took effect on October 1, 2003, we conclude that P.A. 03-265, § 9, replaced the July amendment on October 1, 2003.

reference to the earlier adopted act is not made in the act passed later, each amendment shall be effective except in the case of irreconcilable conflict, in which case the act which was passed last in the second house of the General Assembly shall be deemed to have repealed the irreconcilable provision contained in the earlier act . . . .'' Our Supreme Court has held that the term ''amendment,'' as used in § 2-30b, applies ''to all acts which expressly change existing legislation,'' including public acts. (Internal quotation marks omitted.) *State* v. *Kozlowski*, 199 Conn. 667, 676, 509 A.2d 20 (1986).

In the present case, there is no mention in P.A. 03-265 of P.A. 03-184, and it is impossible to give effect to both public acts, simultaneously. Accordingly, P.A. 03-184 and P.A. 03-265 are in ''irreconcilable conflict.'' Thus, pursuant to § 2-30b, the later public act must be deemed to have repealed and replaced the older public act. See also footnote 7 of this opinion.

Public Act 03-184 was passed by the House of Representatives on May 13, 2003, then by the Senate on June 2, 2003, and, subsequently was signed into law by the governor on June 26, 2003. Public Act 03-265 was passed by both houses of the legislature on June 4, 2003, and, subsequently was signed into law by the governor on July 9, 2003. With both public acts being in irreconcilable conflict, and with P.A. 03-265 being enacted last, P.A. 03-265 sets forth the version of the statute that went into effect.

We are aware of no laws that have been passed to repeal or otherwise amend § 14-55 since Judge Tobin's decision in *East Coast Towing, Ltd.* Additionally, no appeal was taken from Judge Tobin's decision and, otherwise, there have been no appellate decisions addressing whether the version of § 14-55 set forth in P.A. 03-265 has been repealed. We are persuaded that

Judge Tobin's analysis is correct, and, therefore, we adopt his reasoning.

Accordingly, we conclude, in accordance with the language of P.A. 03-265, § 9, that the current revision of § 14-55 of the General Statutes, which remains in effect to this date, provides: "In any town, city or borough the local authorities referred to in section 14-54 shall, upon receipt of an application for a certificate of approval referred to in said section, assign the same for hearing within sixty-five days of the receipt of such application. Notice of the time and place of such hearing shall be published in a newspaper having a general circulation in such town, city or borough at least twice, at intervals of not less than two days, the first not more than fifteen, nor less than ten days, and the last not less than two days before the date of such hearing and sent by certified mail to the applicant not less than fifteen days before the date of such hearing. All decisions on such certificate of approval shall be rendered within sixty-five days of such hearing. The applicant may consent to one or more extensions of any period specified in this section, provided the total extension of any such period shall not be for longer than the original period as specified in this section. The reasons for granting or denying such application shall be stated by the board or official. Notice of the decision shall be published in a newspaper having a general circulation in such town, city or borough and sent by certified mail to the applicant within fifteen days after such decision has been rendered. Such applicant shall pay a fee of ten dollars, together with the costs of publication and expenses of such hearing, to the treasurer of such town, city or borough. No such certificate shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway

and effect on public travel. In any case in which such approval has been previously granted for any location, the local authority may waive the requirement of a hearing on a subsequent application. In addition, the local authority may waive the requirement of a hearing on an application wherein the previously approved location of a place of business is to be enlarged to include adjoining or adjacent property."

In light of the foregoing analysis, we conclude that § 14-55 was not repealed. Accordingly, the board should have reviewed the Pisano application under the standard set forth therein.

B

We now address whether the board, despite erroneously treating the Pisano application as one for a variance, complied with the requirements of § 14-55. The plaintiff claims that the board approved the Pisano application under the wrong standard. It contends that the board mistakenly treated the Pisano application as though it was an application for a variance and, in so doing, applied a set of criteria that did not comport with the analysis required under § 14-55. The board contends that the court correctly determined that the board gave due consideration to the necessary factors. The defendant and Pisano Brothers essentially contend that the use of variance language by the board was merely a clerical error. We agree with the plaintiff.

The record reveals that on several occasions the Pisano application was referred to and treated as an application for a variance. On his certificate of approval application, the defendant requested a variance for the following section of the Stamford zoning regulations: "APA TAB II #55 to allow a used car dealer to [b]e [l]ocated in . . . [M-G] zone." In reviewing the Pisano application, the engineering bureau referred to the application as a "variance to allow for a used car dealer

to be located in the M-G [z]one . . . .'' At the outset of the public hearings, a board member further stated, without correction, that ''[t]he engineering bureau has reviewed the plans for a variance to allow for a used car dealer to be located in the [M-G] zone . . . .'' Further, the board's certificate of decision regarding the Pisano application certified that it granted ''the application . . . for a variance of Motor Vehicle approval of Table II, Appendix A, #55 (Auto Sales Requirements) of the Zoning Regulations . . . .''

In approving the Pisano application, the board issued one finding, in which it directly quoted the following variance standard provided in the Stamford zoning regulations: ''[S]trict application of the provisions of these Regulations would deprive the applicant of the reasonable use of such land or building and the granting of the variance is necessary for the reasonable use of the land or building.''[8] Stamford Zoning Regs., art. v, § 19

[8] The board's certificate of decision stated: ''THE BOARD FINDS:

''1. That the aforesaid circumstances of conditions is/are such that the strict application of the provisions of these Regulations would deprive the [defendant] of the reasonable use of such land or building(s) and the granting of the application is necessary for the reasonable use of the land or building(s).

''The [b]oard GRANTS a Motor Vehicle approval of Table II, Appendix A, #55 (Auto Sales Requirements) of the Zoning Regulations in order to allow a Used Car Dealer to operate and be located in an [M-G] zone. This application is exempt from Coastal Area Management Approval, Exemption Number 10C, subject to the following restrictions:

''1. All concerns of the [e]ngineering [bureau] shall be adhered to.

''2. There shall be no more than [six] cars parked in the front.

''3. The [defendant] shall make an effort to contact the [e]ngineering [b]ureau and discuss having [it] add sidewalks to the area.

''4. The hours of operation shall be [8 a.m. to 6 p.m.], Monday through Saturday.

''5. There shall be no vehicular parking between the front property line and the curb on Elmcroft Road.

''6. There shall be one tow truck only on the premises.

''7. There shall be year round evergreen screening around the property.

''8. There shall be no auto body shop or painting of cars on the premises.

''9. All cars belonging to visitors, patrons or employees shall be parked on the site at all times.

(2.2) (a) (2). In so finding, as the plaintiff contends, the board expressly (1) applied variance standards provided in the local zoning regulations, instead of certificate of approval standards provided in § 14-55, and (2) based its decision on the defendant's private "deprivation," instead of basing its decision on the suitability of the proposed use. We agree with the court that "the board's certificate of approval looks and reads like a variance."[9]

"[W]here a board is acting pursuant to a statute or an ordinance which requires a specific finding made after a consideration of enumerated factors, the minutes of the board should show that due consideration was given to those factors and that the conclusion reached was within the power given to the board." *Dubiel* v. *Zoning Board of Appeals*, 147 Conn. 517, 522–23, 162 A.2d 711 (1960); see also *New Haven College, Inc.* v. *Zoning Board of Appeals*, 154 Conn. 540,

"10. No vehicle repairs shall be permitted outside of the building.

"11. No impact tools shall be used outside of the building.

"12. No storage of inoperative vehicles shall be permitted outside of the building.

"13. Outside visible storage of any automotive equipment, including tires, batteries, auto parts, etc., shall not be permitted.

"14. The location, size, and appearance of the building and improvements shall be as per plan depicted on IMPROVEMENT LOCATION SURVEY, dated revised [July 15, 2016], copies of which are on file in the office of the [board].

"The applicant is allowed one year from the effective date of approval in which to obtain a building permit." (Emphasis omitted.)

[9] During the pendency of the plaintiff's appeal to the Superior Court, the board issued a "Revised Certificate of Decision" (revised decision), stating: "NOTE—This corrected Certificate eliminates 'variance' language on the original Certificate of Decision . . . since [the Pisano application] . . . is an application for [certificate of approval] of a Used Car Dealership." This revised decision was submitted to the Superior Court in a supplemental return of record. The record contains no indication as to how this revised decision was made, and it does not appear to have been issued in accordance with the modification procedures set forth in General Statutes § 4-181a et seq. It does not appear that the Superior Court considered the revised decision when rendering its judgment. We also have not considered it in rendering our opinion.

543–44, 227 A.2d 427 (1967); *Ferreira* v. *Zoning Board of Appeals*, 48 Conn. App. 599, 603–604, 712 A.2d 423 (1998).

Pursuant to § 14-55; see P.A. 03-265; the board must consider a number of suitability factors: "No [certificate of approval] shall be issued until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway and effect on public travel." See *New Haven College, Inc.* v. *Zoning Board of Appeals*, supra, 154 Conn. 543 (zoning board of appeals should consider "suitability of the proposed location in view of the proximity of schools, churches, theaters, or other places of public gatherings, intersecting streets, traffic conditions, width of the highway and the effect of public travel . . . [and should also indicate] that use of the proposed location will not imperil the safety of the public"). Although the board need not "exalt technicality" in the manner in which it states its findings, it is in the interests of "facilitat[ing] judicial review . . . assur[ing] a more careful administrative consideration, and . . . keep[ing] the administrative agency within the bounds of its functions and powers"; *Dubiel* v. *Zoning Board of Appeals*, supra, 147 Conn. 523; to ensure that the record evinces the board's due consideration of the requisite suitability factors.

Although the suitability factors prioritize public concerns, a variance application does not require the board to consider those same factors. "[T]he authority of a zoning board of appeals to grant a variance . . . requires the fulfillment of two conditions: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the

general purpose of the zoning plan." (Internal quotation marks omitted.) *Grillo* v. *Zoning Board of Appeals*, 206 Conn. 362, 368, 537 A.2d 1030 (1988).

In this case, the board issued only one factual finding, in which it referenced the need to permit the defendant to make reasonable use of the land. Although the board heard evidence that, to some extent, could pertain to suitability, and also issued several conditions of approval that accommodate potential concerns within the neighborhood, the board issued no findings as to the suitability factors enumerated under § 14-55. The reasons that the board provided in its certificate of approval and the conditions provided therein were made with reference to an application for a variance, even though the Pisano application was a matter to which § 14-55 applies. We, therefore, direct the board on remand to consider the Pisano application in accordance with § 14-55.[10]

III

The plaintiff claims that the court erred in searching beyond the board's stated reason for approval to find a basis for the board's decision. It argues that the court improperly upheld the board's decision on alternative grounds, not stated in the board's decision. In response, the defendant and Pisano Brothers essentially maintain that the court's reasoning and conclusion were sound. We agree with the plaintiff.

"When considering [an] application for [a certificate of approval] . . . [a] zoning board of appeals act[s] as

[10] Our conclusion that § 14-55 was not repealed and sets forth the applicable certificate of approval application procedures, in effect, resolves several of the plaintiff's remaining claims. Therefore, we do not reach their merits. See *First Church of Christ, Scientist* v. *Friendly Ice Cream*, 161 Conn. 223, 228–29, 286 A.2d 320 (1971) ("The plaintiffs have pursued several other assignments of error. We need not review these conclusions, however, since they would not affect the final result.").

a special agent of the state. . . . When receiving, hearing and eventually deciding whether to grant the application, the [board] does not act pursuant to either the municipal zoning ordinance or the zoning statutes. . . . Thus, the [board] does not act as the voice of the people . . . . Rather, it acts in a special capacity, serving as the local agency named by the General Assembly to determine whether a certificate of approval should be issued . . . .

"As an agent of the state, the [board] must follow the statutory criteria in determining whether to issue the certificate of approval. . . . [Section] 14-55 sets forth the criteria to be followed by an agency when making its decision. The [board] cannot grant a certificate until the application has been approved and such location has been found suitable for the business intended, with due consideration to its location in reference to schools, churches, theaters, traffic conditions, width of highway, and effect on public travel. . . .

"Because the [board] acts as a special agent of the state in issuing certificates of approval, the trial court's scope of review of the [board's] decision is governed by the [UAPA]." (Citations omitted; internal quotation marks omitted.) *Vicino* v. *Zoning Board of Appeals*, 28 Conn. App. 500, 504–505, 611 A.2d 444 (1992). Section 4-183 (j) provides in relevant part that the trial court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . ." "When a [board] states its reasons in support of its decision on the record, the court goes no further, but if the [board] has not articulated its reasons, the

court must search the entire record to find a basis for the [board's] decision." (Internal quotation marks omitted.) *Azzarito* v. *Planning & Zoning Commission*, 79 Conn. App. 614, 618, 830 A.2d 827, cert. denied, 266 Conn. 924, 835 A.2d 471 (2003). "Neither this court nor the trial court may retry the case . . . ." (Internal quotation marks omitted.) *Okeke* v. *Commissioner of Public Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012).

In this case, the board found that strict application of the municipal zoning regulations would deprive the defendant of reasonable use of the land and that granting the Pisano application would be necessary to afford the defendant such reasonable use. Because the board stated its reason for approval, the court was not permitted to search the record for evidence that could support alternative grounds on which the board could have granted the Pisano application. See *Azzarito* v. *Planning & Zoning Commission*, supra, 79 Conn. App. 618.

In the present case, having concluded that § 14-55 applied, the court, thereafter, provided its own inferences as to how the board might have classified and weighed the public hearing testimony. On the basis of the transcript of the September 14, 2016 public hearing, the court was satisfied that the board had given due consideration to the effect the proposal would have on neighboring residences, and, accordingly, the court concluded that the proposal would constitute a suitable use.

Although the board heard testimony that, to some extent, could pertain to the suitability of operating a business at the given location, the board did not make any findings on that point. When the court reviewed the record to determine whether the evidence, nonetheless, could support a conclusion that the suitability requirement was satisfied, the court was incorrect in substituting its own judgment for that of the board. See id. By

reviewing the evidence beyond the board's finding, the court conducted its own de novo review of the Pisano application rather than reviewing the board's decision under the appropriate abuse of discretion standard. Moreover, it was incumbent upon the board to make the requisite suitability findings. See *New Haven College, Inc.* v. *Zoning Board of Appeals*, supra, 154 Conn. 543–44 (concluding that trial court did not err in sustaining plaintiff's appeal where board failed to consider specific suitability factors). We, therefore, conclude that the court employed an incorrect standard of review.

The judgment is reversed and the case is remanded to the trial court with direction to remand the case to the board for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

TYRONE D. CAROLINA *v.* COMMISSIONER OF CORRECTION (AC 41500)

Bright, Devlin and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of multiple counts of risk of injury to a child, sought a writ of habeas corpus, claiming, inter alia, that his right to due process was violated when the respondent Commissioner of Correction wrongly classified him as a sex offender with treatment needs. The petitioner claimed that there was no basis for his classification as a sex offender because he was never convicted of a sexual assault and that he was not afforded sufficient procedural protections before being classified as a sex offender. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, as the respondent was entitled to rely on the petitioner's conviction in classifying him as a sex offender; although the petitioner sufficiently alleged that he had a protected liberty

interest, he was on notice that he could be classified as a sex offender because he was convicted of risk of injury to a child, which included the necessary element that he had had intimate contact with a child under the age of sixteen in a sexual and indecent manner, and the petitioner failed to present any evidence to prove that his right to due process had been violated.

Argued May 28—officially released September 3, 2019

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Kwak*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Tyrone D. Carolina, self-represented, the appellant (petitioner).

Edward Wilson, *Jr.*, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Tyrone D. Carolina, appeals, following the denial of his petition for certification, from the judgment of the habeas court denying his petition for a writ of habeas corpus in which he claimed that he was wrongly classified as a sex offender. On appeal, the petitioner claims that the habeas court improperly concluded that the classification by the respondent, the Commissioner of Correction, did not violate his constitutional right to due process. We dismiss the appeal.

The following facts and procedural history are relevant to this appeal. The petitioner was convicted, following a jury trial, of two counts of risk of injury to a

child in violation of General Statutes § 53-21 (a) (2),[1] two counts of risk of injury to a child in violation of § 53-21 (a) (1),[2] and one count of tampering with a witness in violation of General Statutes § 53a-151.[3] See *State* v. *Carolina*, 143 Conn. App. 438, 440 and n.1, 69 A.3d 341, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013).[4] The petitioner appealed to this court, which affirmed his conviction on direct appeal and determined that the jury reasonably could have found the following facts: "The [petitioner] was close friends with [the parents of the victim, K]. . . . On May 11, 2009, when K returned home from school, W, a family friend, noticed that K's behavior was unusual. K's cousin and her sister also were present at that time. They began questioning K, and she reluctantly revealed that the [petitioner] had had sexual contact with her. A few hours later, K's older brother, L, arrived at the house and saw that K was upset and shaking. He asked her to accompany him in his car so that they could talk in private. In response to L's questions, K told him of a recent incident in which the [petitioner] had sexually molested her. The Danbury

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ."

[3] General Statutes § 53a-151 provides in relevant part: "(a) A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding . . . ."

[4] The jury found the petitioner not guilty of three charges of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1).

police department was contacted and officers arrived at K's house later that evening. Thereafter, the [petitioner] was arrested and charged with offenses related to his sexual contact with K." (Footnote omitted.) Id., 441.

While the petitioner was incarcerated, the respondent classified him as a sex offender and recommended that he participate in sex treatment education pursuant to the Department of Correction's offender classification manual.[5] On August 27, 2014, the self-represented petitioner filed a petition for a writ of habeas corpus. In his petition, he claimed that his incarceration is illegal because the respondent improperly classified him as a sex offender. The petitioner appeared to claim, in the habeas trial, that he was not afforded sufficient procedural protections before being classified as a sex offender. Following a trial on the merits, the habeas court rejected the petitioner's claims by way of a memorandum of decision filed on December 13, 2017. The habeas court concluded that "[a]lthough the petitioner protests [the respondent's] classification of him as a sex offender with treatment needs, the petitioner has failed to present any evidence and [to] prove that his right to due process has been violated," and, thus, failed to meet his burden of proof. Accordingly, the habeas court denied the petitioner's petition for a writ of habeas

[5] The offender classification manual "explains the State of Connecticut Department of Correction inmate classification system and procedures for usage of the classification instrument." The respondent created the offender classification manual pursuant to his authority under General Statutes § 18-81 to "establish rules for the administrative practices and custodial rehabilitative methods . . . in accordance with recognized correctional standards." The offender classification manual defines classification as "the ongoing process of collecting and evaluating information about each inmate to determine the inmate's risk and need level for appropriate confinement location, treatment, programs, and employment assignment whether in a facility or the community." Consistent with the initial classification procedures, the respondent considers seven factors to determine the inmate's "[n]eeds [a]ssessment," including "[s]ex treatment need."

corpus and rendered judgment in favor of the respondent. The court then denied the petitioner's petition for certification to appeal. This appeal followed.

On appeal, the petitioner claims that the habeas court improperly denied his petition for a writ of habeas corpus. Specifically, he argues that the respondent violated his right to due process when he improperly classified the petitioner as a sex offender. In support of this claim, the petitioner argues that he was never convicted of a sexual assault and, therefore, there was no basis for his classification as a sex offender. The respondent argues in response that he appropriately classified the petitioner as a sex offender. We agree with the respondent.

We initially note that the petitioner, "[f]aced with a habeas court's denial of a petition for certification to appeal . . . 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 162 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . . To prove 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." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 4, 790 A.2d 463, cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002). In order to determine if the habeas court abused its

discretion we must consider the merits of the petitioner's claim.

"In order to state a claim for a denial of procedural due process . . . a prisoner must allege that he possessed a protected liberty interest, and was not afforded the requisite process before being deprived of that liberty interest. . . . A petitioner has no right to due process . . . unless a liberty interest has been deprived . . . . Our first inquiry, therefore, is whether the petitioner has alleged a protected liberty interest. That question implicates the subject matter jurisdiction of the habeas court." (Citation omitted; internal quotation marks omitted.) *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 674–75, 166 A.3d 614 (2017).

In support of his claim, the petitioner argues that, just as in *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 668, the improper classification as a sex offender violated his due process rights. In *Anthony A.*, the petitioner "claim[ed] that he was incorrectly classified as a sex offender . . . ." Id., 670. The petitioner in that case "had not been convicted of a sex offense and had no prior history as a sex offender." Id., 672. Our Supreme Court, applying the stigma plus test, asked "whether the allegations of the petition demonstrate that the classification was wrongful and stigmatized the petitioner, and that the consequences suffered by the petitioner were 'qualitatively different' from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss." Id., 680–81. Our Supreme Court stated that the petitioner met the "stigma" prong of the test because the classification as a sex offender is "uniquely stigmatizing."[6] Id., 681.

[6] Our Supreme Court previously has stated: "Constitutional privacy interests are implicated . . . because . . . [t]he damage to [citizens'] reputations resulting from [disclosure] stigmatizes them as currently dangerous sex offenders, can harm their earning capacities, and can cause them to be objects of derision in the community." (Internal quotation marks omitted.)

Ultimately, our Supreme Court in *Anthony A.* concluded that the petitioner met the jurisdictional threshold to confer jurisdiction because he sufficiently alleged a protected liberty interest. Id., 686.

As in *Anthony A.*, we conclude that the petitioner in the present case sufficiently alleged a protected liberty interest under the stigma plus test because he was classified as a sex offender, which implicates a liberty interest. The question then is whether the petitioner was provided constitutionally sufficient process in connection with his classification. The court in *Anthony A.* did not address what process was required before an inmate is classified as a sex offender because the only issue in that case was whether the petitioner had a protected liberty interest in his classification. We note, however, that the facts and circumstances in *Anthony A.* are distinguishable from the present case. In *Anthony A.*, "[t]he department classified the petitioner as a sex offender, despite the fact that he had not been convicted of a sex offense and had no prior history as a sex offender." Id., 672. By contrast, in the present case, the petitioner was convicted of offenses that included the necessary element that the petitioner had intimate contact with a child under the age of sixteen in a sexual and indecent manner.

We also note that in *Anthony A.*, our Supreme Court stated that the petitioner alleged that he was not provided notice that he could be classified as a sex offender in light of the underlying charges. Id., 672 n.4. By contrast, in the present case the petitioner was on notice that he could be classified as a sex offender because

State v. *Misiorski*, 250 Conn. 280, 295, 738 A.2d 595 (1999); see also *State* v. *Elias V.*, 168 Conn. App. 321, 344, 147 A.3d 1102 (recognizing "stigmatizing effects of this [sex offender] classification"), cert. denied, 323 Conn. 938, 151 A.3d 386 (2016).

he was convicted of risk of injury to a child in violation of § 53-21 (a) (2).[7]

Unlike in *Anthony A.*, where there was no conviction of a sex related offense on which to base the sex offender classification, in this case the respondent was entitled to rely on the petitioner's conviction in classifying him as a sex offender. The petitioner, on the facts of this case, was due no other process. On the basis of the foregoing, we cannot conclude that the habeas court abused its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

MAYA BOREEN *v.* KEVIN A. BOREEN
(AC 41155)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting the defendant's motion to terminate alimony, to determine overpayments and to set a repayment schedule. The trial court found that the plaintiff was living with R, her boyfriend, within the meaning of the applicable statute (§ 46b-86 [b]), and, therefore, that the defendant's alimony obligation terminated under the terms of the parties' separation agreement, which had been incorporated into the dissolution judgment and provided that the defendant's alimony obligation would terminate on the date the court determined that the plaintiff commenced "living with another person." *Held:*

1. The trial court did not err in finding that the plaintiff was "living with another person" for purposes of § 46b-86 (b): although the plaintiff claimed that she and R maintained separate residences and were together less than all of the time, ample evidence supported the court's finding that the plaintiff was living with R, including evidence that the couple resided under the same roof for approximately half the week,

[7] Section 53-21 (a) (2) involves contact with the intimate parts of a child under sixteen years of age or contact by a child under the age of sixteen with the intimate parts of the petitioner in a sexual and indecent manner. See footnote 1 of this opinion.

took many meals together, regularly communicated by cell phone, and frequently traveled together, and that R provided for the plaintiff's health insurance coverage under his own policy as a result of the couple holding themselves out as being in a domestic partnership, and allowed the plaintiff to keep a rent-free art studio in his home, and even though the plaintiff and R maintained separate homes and did not sleep in the same residence every night, the plaintiff's living arrangements changed such that she no longer needed the same financial support as at the time of the original alimony order; moreover, the court properly relied on the fact that R provided the plaintiff with health insurance coverage in concluding that the plaintiff was living with him, as the plaintiff and R held themselves out as a couple who were in a nonmarital union as domestic partners when R added the plaintiff to his health insurance policy, and the court properly considered the attendant financial benefits the plaintiff received as a result of the free health insurance coverage when determining whether her financial needs changed as a result of her living with R such that the defendant's alimony obligation should be terminated.

2. The trial court did not err in finding that the only remedy available under the terms of the separation agreement, upon a finding that the plaintiff was "living with another person," was to terminate the defendant's alimony obligation: the provision of the separation agreement stating that the plaintiff shall be deemed to have been living with another person in the event a court makes a finding that the alimony should terminate or be reduced "pursuant to" § 46b-86 (b) did not reflect an intent to broadly incorporate all aspects of § 46b-86 (b), as the only remedy explicitly provided in the agreement upon a finding that the plaintiff commenced living with another person was to terminate alimony, the language in the agreement that alimony "shall" terminate when the plaintiff commenced living with another person was mandatory in nature, and the separation agreement treated cohabitation as an event akin to death or remarriage, both of which are events that ordinarily terminate a periodic alimony obligation; moreover, a finding that alimony could be modified upon a finding of cohabitation, as opposed to terminated, would be inconsistent with the structure of the separation agreement as a whole, which contained provisions governing discrete circumstances in which one or both parties could seek to modify the alimony obligation.

Argued April 23—officially released September 3, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, granted the motion

filed by the defendant to terminate alimony, to determine overpayments and to set a repayment schedule, and the plaintiff appealed to this court; subsequently, the court, *Hon. Michael E. Shay*, judge trial referee, denied the motion for articulation filed by the plaintiff; thereafter, the plaintiff filed a motion for review with this court, which granted the plaintiff's motion for review but denied the relief requested. *Affirmed.*

James H. Lee, for the appellant (plaintiff).

Thomas M. Shanley, for the appellee (defendant).

Opinion

DIANA, J. The plaintiff, Maya Boreen, appeals from the judgment of the trial court granting the postjudgment motion filed by the defendant, Kevin A. Boreen, to terminate alimony, to determine overpayments, and to set a repayment schedule on the ground that, under the parties' separation agreement, the defendant's alimony obligation terminated upon the court's finding that the plaintiff was "living with another person." The plaintiff claims that the court (1) erred in finding that she was "living with another person" pursuant to General Statutes § 46b-86 (b),[1] and (2) improperly concluded that the only remedy available upon a finding that she was "living with another person" was to terminate the defendant's alimony obligation. We disagree and, accordingly, affirm the judgment of the trial court.

[1] General Statutes § 46b-86 (b) provides in relevant part: "In an action for divorce, dissolution of marriage, legal separation or annulment brought by a spouse, in which a final judgment has been entered providing for the payment of periodic alimony by one party to the other spouse, the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party."

The following procedural history and facts, as found by the trial court, are relevant to this appeal. The twenty-four year marriage between the parties was dissolved on September 29, 2009. The parties executed a separation agreement, which was approved by the court and incorporated in the dissolution decree by reference. The separation agreement provides that the defendant was to pay alimony to the plaintiff "until the earliest of the [defendant's] death, the [plaintiff's] death, the [plaintiff's] remarriage or 'living with another person' as defined in [Article] 2.2 [of the separation agreement]." Article 2.2 of the agreement provides in relevant part: "The [defendant's] obligation to pay alimony shall terminate on the date . . . the [c]ourt determines [the plaintiff] commenced 'living with another person.' . . . For purposes of this Agreement, the [plaintiff] shall be deemed to have been 'living with another person' in the event a court of competent jurisdiction makes a finding that the alimony should terminate or be reduced pursuant to the provisions of [General Statutes] § 46b-8[6] (b)."[2]

In December, 2009, the plaintiff began dating Robert Rodriguez. On March 13, 2017, the defendant filed a motion to terminate alimony, to determine overpayments, and to set a repayment schedule, claiming that, although the plaintiff still maintained her own home, she had been living with Rodriguez within the meaning of § 46b-86 (b) since July, 2013, such that her financial needs had been altered. At the hearing on the defendant's motion, Rodriguez testified that, although he began dating the plaintiff in 2009, he had only owned and maintained a home in Wilton since July, 2013. The

[2] Article 2.2 of the separation agreement references General Statutes § 46b-84 (b), titled "Parents' obligation for maintenance of minor child. Order for health insurance coverage." Although neither party mentions this apparent error, § 46b-84 (b) is irrelevant to the subject of Article 2.2, alimony, and both parties refer to § 46b-86 (b) throughout their appellate briefs. We, therefore, correct the quoted provision to reflect the correct statutory reference.

plaintiff's home, which she purchased in August, 2011, is also located in Wilton. Rodriguez testified that the couple spends "between three and four" nights together each week at one of their respective homes, but that neither of them contribute to the maintenance of the other's residence. He further testified that the plaintiff typically cooks for the couple twice per week and that he pays for their meals when they eat out more than half, and possibly as much as 75 percent of the time. Further, the plaintiff, who works part-time as an artist, keeps a rent-free art studio at Rodriguez's home in Wilton.

Importantly, Rodriguez admitted that in approximately January, 2015, he added the plaintiff to his health insurance policy and indicated on the enrollment form that the plaintiff was his "domestic partner." Before receiving health insurance coverage as a domestic partner under Rodriguez' policy, the plaintiff's insurance company required her to pay annually a $6000 deductible and a 20 percent copay. Under Rodriguez' health insurance policy, the deductible is $750 per incident. The plaintiff's total estimated share of the health insurance premium payments that had been made on her behalf by Rodriguez was, at the time of trial, in excess of $26,000. Although Rodriguez testified that the plaintiff had agreed to reimburse him for her portion of the health insurance premium, that agreement was not reduced to writing and the plaintiff had made no reimbursement payments to Rodriguez at the time of the hearing on the defendant's motion.

The court granted the defendant's motion in a memorandum of decision dated October 31, 2017, finding that "at least since January, 2015, the parties have been living together, and that the arrangement has altered the financial needs of [the plaintiff] within the meaning of General Statutes § 46b-86 (b)." On that basis, the court terminated the defendant's alimony obligation.

The court further determined that from January 1, 2015, until October 31, 2017, the defendant had paid alimony to the plaintiff in the amount of $358,216, and ordered the plaintiff to repay the overage in full in semiannual installments of $30,000 each without interest. On November 20, 2017, the plaintiff filed a motion for reargument and reconsideration, which the court denied on November 30, 2017. This appeal followed. Additional facts and circumstances will be set forth as necessary.

I

The plaintiff first claims that the court erred in finding that she had been "living with another person" within the meaning of § 46b-86 (b). Specifically, the plaintiff argues that the court erred in finding that she was living with Rodriguez because (1) they maintain separate residences and "are together less than all the time" and (2) the court improperly considered that Rodriguez had provided for her health insurance coverage under his own policy in making its determination about her living arrangements.[3] We are not persuaded.

[3] The plaintiff also argues that the court improperly considered the romantic nature of the plaintiff's relationship with Rodriguez in finding that the plaintiff was living with another person pursuant to § 46b-86 (b). The plaintiff urges us to adopt the reasoning of this court in *Spencer* v. *Spencer*, 177 Conn. App. 504, 520, 173 A.3d 1 (2017), ("because the definition of cohabitation in § 46b-86 (b) has only two elements, neither of which is evidence of a romantic or sexual relationship, the defendant was not required, pursuant to the dissolution judgment, to present evidence of a romantic or sexual relationship"), cert. granted, 328 Conn. 903, 177 A.3d 565 (2018). On January 31, 2018, our Supreme Court granted the plaintiff's petition for certification to appeal. *Spencer* v. *Spencer*, 328 Conn. 903, 177 A.3d 565 (2018). One of the issues certified by our Supreme Court was: "Did the Appellate Court properly affirm the trial court's finding of cohabitation on the basis of a definition of cohabitation that does not require a romantic or sexual relationship between the alimony recipient and the individual with whom they reside?" (Internal quotation marks omitted.) Id. On August 5, 2019, our Supreme Court dismissed the appeal following the death of the plaintiff and the failure of the administrator to file a motion to substitute pursuant to Practice Book § 62-5.

We, however, need not reach this issue in the present case. Whether the plaintiff was "living with another person" is a factual determination to be

The court made the following additional findings relevant to this claim: "In this case, the testimony and evidence clearly support a finding that [Rodriguez] and [the plaintiff] have entered into a long-time, committed, and monogamous relationship that meets their emotional needs, and comes with significant financial benefits for the latter. The couple resides under the same roof for approximately half the week, take many of their meals together, regularly communicate by cell phone, and frequently travel together. Both described the relationship as exclusive, and [Rodriguez] called [the plaintiff] his 'best friend.' More importantly, he also described her as his 'domestic partner,' and, since January, 2015, he has made provision for her health insurance coverage under his own policy at no cost to her. For her part, on her Facebook page she has referred to the workshop at [Rodriguez'] home in Wilton as 'her studio' and posted photos of it and her artwork. Accordingly, the court finds that at least since January, 2015, the parties have been living together, and that the arrangement has altered the financial needs of [the plaintiff] within the meaning of General Statutes § 46b-86 (b)."

"The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor

made by the trial court that will not be disturbed on appeal unless the finding is clearly erroneous in light of the evidence and the pleadings in the record as a whole. See, e.g., *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 678 A.2d 469 (1996). As discussed in part I of this opinion, we conclude that there was ample evidence in the record for the court to have concluded that the plaintiff was living with Rodriguez, regardless of the nature of the relationship between them.

of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's 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. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Emerick* v. *Emerick*, 170 Conn. App. 368, 378, 154 A.3d 1069, cert. denied, 327 Conn. 922, 171 A.3d 60 (2017).

A

The plaintiff first argues that the court erred in finding that she was living with Rodriguez within the meaning of § 46b-86 (b) because they maintain separate residences and are together "less than all the time." We disagree.

Section 46b-86 (b) provides, in relevant part, that a court may modify a dissolution judgment and "suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party." Thus, "a finding of cohabitation requires that (1) the alimony recipient was living with another person and (2) the living arrangement caused a change of circumstances so as to alter the financial needs of the alimony recipient." *Fazio* v. *Fazio*, 162 Conn. App. 236,

240 n.1, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

Whether an individual is "living with another person" is a fact specific determination. *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 486, 678 A.2d 469 (1996). "The fact-finding function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us. Appellate review of a factual finding, therefore, is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court. . . .

"A factual finding may not be rejected on appeal merely because the reviewing judges personally disagree with the conclusion or would have found differently had they been sitting as the factfinder. . . . A factual finding may be rejected by this court only if it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Kaplan* v. *Kaplan*, 186 Conn. 387, 391–92, 441 A.2d 629 (1982).

In *Kaplan*, our Supreme Court considered whether the trial court properly found that a couple was not living together pursuant to § 46b-86 (b) where, "(a)lthough at times the defendant slept in [her significant other's] bedroom . . . and, [he] would often take meals with the defendant and her children, they maintained completely separate households . . . ." (Internal quotation marks omitted.) Id., 390. Our Supreme Court concluded that, because the question of whether an individual is living with another person is a fact specific determination, it could not reject the trial court's finding that the couple was not living together as defined by § 46b-86 (b) because there was ample

evidence in the record to support such a finding. Id., 392. Our Supreme Court, however, noted that there was ample evidence in the record to support the opposite finding as well, and that § 46b-86 (b) was "clearly intended by the General Assembly to apply to the situation alleged by the plaintiff." Id., 390–91. Indeed, the stated purpose of the bill which was eventually enacted as Public Acts 1977, No. 77-394, now § 46b-86 (b), was "[t]o correct the injustice of making a party pay alimony when his or her ex-spouse is living with a person of the opposite sex, without marrying, to prevent the loss of support." H.B. 6174, 1977 Sess.

In the present case, we conclude that the trial court had ample evidence to support its finding that the plaintiff had been living with Rodriguez within the meaning of § 46b-86 (b) since January, 2015. The couple resided under the same roof for approximately half the week, took many of their meals together, regularly communicated by cell phone, and frequently traveled together. Rodriguez, moreover, provided for the plaintiff's health insurance coverage under his own policy as a result of the couple holding themselves out as being in a domestic partnership. Further, Rodriguez allows the plaintiff to keep a rent-free art studio at his home. The totality of these facts form a reasonable basis to support the court's finding that the plaintiff has been "living with another person" pursuant to § 46b-86 (b) since January, 2015. As our Supreme Court stated in *Kaplan*, § 46b-86 (b) was written broadly and was clearly intended by the legislature to encompass a factual situation such as the present case where, although the plaintiff and Rodriguez maintain separate homes and do not sleep in the same residence every night, the plaintiff's living arrangements have changed such that she no longer needs the same financial support as at the time of the original alimony order. See *Kaplan* v. *Kaplan*, supra, 186 Conn. 389.

B

The plaintiff next argues that the court improperly relied on the fact that Rodriguez provided her health insurance coverage in concluding that the plaintiff was living with him. We disagree.

In order to decide the merits of the defendant's motion, the court was required to perform a two part analysis to determine whether alimony should be terminated under the separation agreement. See *Fazio* v. *Fazio*, supra, 162 Conn. App. 240 n.1 (finding of cohabitation requires finding that alimony recipient was living with another person and living arrangement caused change of circumstances so as to alter financial needs of alimony recipient). The court enumerated the facts that it had found, which supported both a finding that the plaintiff was living with Rodriguez and a finding that that living arrangement had altered the plaintiff's financial needs. The court did not distinguish which facts it had found supported a finding under each prong of the analysis required by § 46b-86 (b).

There is no indication that the court conflated or misunderstood the factual findings that it was required to make in order to determine whether the couple was living together pursuant to § 46b-86 (b). See *De Almeida-Kennedy* v. *Kennedy*, 188 Conn. App. 670, 687, 205 A.3d 704 ("[w]hen the decision of the trial court does not make the factual predicates of its findings clear, we will . . . assume that the trial court acted properly" [internal quotation marks omitted]), cert. denied, 332 Conn. 909, 210 A.3d 566 (2019). Rather, it appears from the memorandum of decision that the court properly considered that the plaintiff and Rodriguez were holding themselves out as a couple who were in a nonmarital union as domestic partners, as they indicated when Rodriguez added the plaintiff to his

health insurance policy, in finding that the couple was living together pursuant to § 46b-86 (b).

The court also properly considered the attendant financial benefits that the plaintiff received as a result of this free health insurance coverage, among other pertinent facts, when determining whether the plaintiff's financial needs were changed as a result of her living with Rodriguez such that the defendant's alimony obligation should be terminated. We, therefore, conclude that the court did not err in considering the couple's health insurance policy when making its finding that the plaintiff was living with another person. For the foregoing reasons, we conclude that the trial court did not err in finding that the plaintiff was living with Rodriguez pursuant to § 46b-86 (b).

II

The plaintiff next claims that the court improperly determined that, upon finding that the plaintiff was living with another person, the only remedy available under the terms of the separation agreement was to terminate the defendant's alimony obligation. We agree with the trial court that the sole remedy available under the terms of the separation agreement upon a finding that the plaintiff was living with another person was to terminate alimony.

The following additional facts are relevant to this claim. Article 2 of the separation agreement between the parties is titled "Alimony." Article 2.1 (a) of the separation agreement provides that the defendant's alimony obligation continues "until the earliest of the [defendant's] death, the [plaintiff's] death, the [plaintiff's] remarriage or living with another person as defined in [Article] 2.2 . . . ." (Internal quotation marks omitted.) Article 2.2 of the agreement provides in relevant part: "The [defendant's] obligation to pay alimony shall terminate on the date . . . the [c]ourt

determines [the plaintiff] commenced 'living with another person.' . . . For purposes of this Agreement, the [plaintiff] shall be deemed to have been 'living with another person' in the event a court of competent jurisdiction makes a finding that the alimony should terminate or be reduced pursuant to the provisions of [General Statutes] § 46b-8[6] (b)." Articles 2.3, 2.4, and 2.6 provide for discrete circumstances in which the defendant or the plaintiff may bring a motion to modify the defendant's alimony obligation, none of which include a finding that the plaintiff is living with another person.[4]

After concluding that the plaintiff was living with Rodriguez under circumstances that altered her financial needs, the court then turned to the relief available to the defendant under the agreement. The trial court concluded that "together as a whole, Articles 2.1 (b) and 2.2 are clear and unambiguous and provide that where a court finds that the recipient of the alimony is 'living with another person' as defined by General Statutes § 46b-86 (b), the obligation to pay alimony terminates effective as of the date that the living with another person commenced . . . and that neither party has claimed any ambiguity in the agreement itself

[4] Article 2.3 (b) provides in relevant part that the defendant "shall not be entitled to bring any motion . . . the effect of which is to downward modify his obligation to pay alimony . . . unless [the plaintiff] shall have gross annual earned income of at least forty thousand . . . dollars . . . in any calendar year . . . ." Article 2.3 (d) provides that "[a]ny decrease in the [defendant's] income resulting from his unilateral change of employment shall not constitute a significant change in circumstances justifying a modification of alimony." Article 2.4 provides in relevant part that "[u]pon motion of either party, the court shall retain jurisdiction to modify the definition of 'gross annual earned income' . . . ." Finally, Article 2.6 provides in relevant part: "In the event the [defendant] is terminated from his employment and receives a severance package, which caused his gross annual earned income to exceed $775,000 . . . the [plaintiff] shall have the right to move to modify the earning cap subject to alimony of $775,000 in the year in which the severance package is received." (Internal quotation marks omitted.)

or requested an opportunity [to] offer any credible extrinsic evidence as to the meaning of the relevant provisions thereof." (Citation omitted.)

The court reasoned that "[w]hile the language of the last sentence of Article 2.2 is somewhat imprecise (i.e. 'should terminate or be reduced'), nevertheless, given the preceding language, the court finds that the only logical explanation is that [the reference] is merely [intended to direct] the court to apply both the factual and financial analysis called for in General Statutes § 46b-86 (b). Any other reading would simply fly in the face of the clear intent of the parties to terminate alimony in such circumstances, and that it was never intended to give the court the option to modify the alimony award. Were the court to apply that literal reading, it would render those remedial provisions of the agreement that call for the termination of the alimony and the triggering of obligation to repay alimony meaningless." (Emphasis omitted.)

We begin our analysis by setting forth the applicable standard of review and principles of law. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic

evidence is always admissible, however, to explain an ambiguity appearing in the instrument." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Isham* v. *Isham*, 292 Conn. 170, 180–81, 972 A.2d 228 (2009).

"If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law [and our review is plenary]. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 355, 999 A.2d 713 (2010).

Accordingly, "[t]he threshold determination in the construction of a separation agreement . . . is whether, examining the relevant provision in light of the context of the situation, the provision at issue is clear and unambiguous, which is a question of law over which our review is plenary. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . The proper inquiry focuses on whether the agreement on its face is reasonably susceptible of more than one interpretation. . . . It must be noted, however, that the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . ." (Citations omitted; internal quotation marks omitted.) *Isham* v. *Isham*, supra, 292 Conn. 181–82.

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language

of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383–84, 107 A.3d 920 (2015).

The plaintiff contends that the parties intended to incorporate the entirety of § 46b-86 (b) into the separation agreement, including the alternative remedial measures provided for in the statute, when they used the language "alimony should terminate or be reduced pursuant to the provisions of General Statutes § 46b-8[6] (b)." (Emphasis omitted.)

In *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 187–88, 112 A.3d 144 (2015), our Supreme Court rejected a similar argument from the plaintiff, who argued that "the agreement's reference to § 46b-86 (b) means that the alimony award is not terminated upon cohabitation, although that is the sole remedy set forth in the agreement, because any reference to § 46b-86 (b) in the agreement means that the court has the authority in the event of cohabitation to modify the amount of, to suspend or to terminate alimony, despite any limitation of or delineation of a remedy in the agreement." (Internal quotation marks omitted.) The provision at issue in *Nation-Bailey* read as follows: "Unallocated alimony and child support shall be paid until the death of either party, the [plaintiff's] remarriage or cohabitation as defined by . . . § 46b-86 (b), or until August 1, 2011." (Internal quotation marks omitted.) Id., 185.

Our Supreme Court rejected the plaintiff's argument and found that "the trial court lacked any remedial

powers to suspend the defendant's unallocated support obligation for the duration of the plaintiff's cohabitation because the plain language contained within . . . the agreement permanently terminated the defendant's unallocated support obligation upon that cohabitation." Id., 191. Our Supreme Court reasoned that "given the provision's use of the word until without further qualification," while requiring the payment of unallocated support "until the death of either party, the [plaintiff's] remarriage or cohabitation as defined by . . . § 46b-86 (b), or until August 1, 2011," the agreement was clear and unambiguous, and provided for "permanent termination of the unallocated support obligation [as] the sole remedy upon cohabitation by the plaintiff . . . . [T]he use of the word until, standing alone, indicates that the defendant's unallocated support obligation was terminated upon the plaintiff's cohabitation because the obligation cease[d] to exist at that point of time or . . . event. Black's Law Dictionary (6th Ed.1990); see also *In re Marriage of Schu*, 231 Cal. App. 4th 394, 396, 179 Cal. Rptr. 3d 886 (2014) (interpreting marital settlement agreement reserving court's jurisdiction to award spousal support until wife is released from prison and holding that jurisdiction did not expire immediately after wife's release where motion was filed prior to her release and hearings on that motion had been continued) . . . ." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 93–94.

The plaintiff urges us to adopt the reasoning of this court in *Fazio* v. *Fazio*, supra, 162 Conn. App. 245, in which we concluded that the language from a similar provision in the parties' separation agreement did not convey the clear and precise intent of the parties. In *Fazio*, the provision at issue was substantially similar to the language from the present case, stating, in relevant part: "Commencing on June 1, 2006, the [defendant] shall pay to the [plaintiff] unallocated alimony

and child support in cash until the death of either party, the remarriage or cohabitation of the [plaintiff] *pursuant to* Section 46b-86 (b) of the . . . General Statutes, or May 31, 2013, whichever event shall first occur . . . .'' (Emphasis added; internal quotation marks omitted.) Id., 238. In concluding that the agreement was ambiguous, this court reasoned that ''our Supreme Court has indicated, albeit in dicta, that the use of the phrase 'pursuant to' in a virtually identical provision of a separation agreement might be reflective of an intent to broadly incorporate all aspects of § 46b-86 (b), not just the definitional language. Conversely, if the parties had intended to reference § 46b-86 (b) solely for definitional purposes, they could have used the phrase 'as defined by.' Thus, our Supreme Court has suggested that the use of 'pursuant to' may show an intent by the parties to incorporate more than the definition of 'cohabitation' from § 46b–86 (b).'' Id., 246.

We conclude that, unlike the provision at issue in *Fazio*, the provision's use of ''pursuant to'' in the present case does not reflect an intent to broadly incorporate all aspects of § 46b-86 (b) and, thus, agree with the trial court that the parties clearly and unambiguously intended for the defendant's alimony obligation to terminate upon a court's finding that the plaintiff had commenced living with another person. The only remedy explicitly provided for in the separation agreement upon such a finding is to terminate the defendant's alimony obligation. We are unpersuaded, moreover, that the agreement's use of the words ''pursuant to'' conveys an intent to incorporate the remedial provisions of § 46b-86 (b) as suggested in *Fazio*. As we noted in *Fazio*, the broader language *may* indicate an intent to incorporate the statute. We cannot conclude, however, that the parties in the present case intended for the words ''pursuant to'' to incorporate the statute into the provision in its entirety.

In the present case, the language employed by the parties in the separation agreement to direct terminating the alimony obligation is mandatory, not permissive. The parties first agreed that alimony shall continue "until" the plaintiff commences living with another person. The word "until" suggests that the obligation ceases to exist at a certain point in time, specifically, when the plaintiff begins living with another person. Further, the agreement provides that alimony "shall" terminate when the plaintiff commenced living with another person. The use of the word "shall" usually connotes a requirement, unlike the word "may," which implies some degree of discretion. See *Kingdomware Technologies, Inc.* v. *United States*, U.S. , 136 S. Ct. 1969, 1977, 195 L. Ed. 2d 334 (2016). Thus, like the separation agreement in *Nation-Bailey*, the agreement in the present case "treats cohabitation as an event akin to death or remarriage, both of which are events that ordinarily terminate a periodic alimony obligation absent an express provision to the contrary in the court's decree or incorporated settlement agreement." *Nation-Bailey* v. *Bailey*, supra, 316 Conn. 195.

Further, as noted by the trial court, a finding that alimony could be modified upon a finding of cohabitation, as opposed to terminated, would be inconsistent with the structure of the separation agreement as a whole, which contains separate provisions governing discrete circumstances in which one or both parties could seek to modify the alimony obligation. We, therefore, agree with the trial court that the parties clearly and unambiguously intended that the defendant's alimony obligation be terminated upon a court's finding that the plaintiff is living with another person.

The judgment is affirmed.

In this opinion the other judges concurred.

TOBY A. BERTHIAUME *v.* STATE OF CONNECTICUT (AC 41496)

Lavine, Devlin and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of the crime of burglary in the first degree, filed a petition for a new trial on the basis of newly discovered evidence regarding the alleged ulterior motives of a witness for the respondent state of Connecticut for testifying at the petitioner's criminal trial. Following his conviction, the petitioner filed a motion for a new trial on the basis of newly discovered evidence in his criminal case pursuant to the applicable rule of practice (§ 42-53). The criminal court denied the motion, concluding that the petitioner's evidence was insufficient to support his motion because, although the evidence was newly discovered, it was immaterial, cumulative and unlikely to produce a different result at trial. Thereafter, the petitioner brought the present action by filing in the trial court the subject petition for a new trial pursuant to statute (§ 52-270). The trial court granted the state's motion for summary judgment and rendered judgment in favor of the state, concluding that the petitioner's claim of newly discovered evidence had been fully and fairly litigated in the criminal proceeding, and, therefore, his petition was barred by res judicata. Subsequently, the petitioner, on the granting of certification, appealed to this court. *Held* that the trial court improperly rendered summary judgment in favor of the state on the basis of the preclusive effect of the proceeding in the criminal court, as the criminal court lacked the authority under the applicable rule of practice (§ 42-55) to rule on the petitioner's claim of newly discovered evidence; because § 42-55 requires that a petition for a new trial based on newly discovered evidence be brought only in civil court, the criminal court lacked the authority to rule on such a claim or to award the petitioner the relief he requested of a new trial, and, therefore, because the criminal court could not have rendered a valid, final decision on the petitioner's motion for a new trial, res judicata did not preclude the petitioner's petition for a new trial in the civil action.

Argued May 28—officially released September 3, 2019

Procedural History

Petition for a new trial following the petitioner's conviction of the crime of burglary in the first degree, brought to the Superior Court in the judicial district of Hartford, where the court, *Dewey*, *J.*, granted the

respondent's motion for summary judgment and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Deborah G. Stevenson, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom were *Gail P. Hardy*, state's attorney, and *Thomas Garcia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DEVLIN, J. This is an appeal from the summary judgment rendered by the trial court in favor of the respondent, the state of Connecticut, on a civil petition for a new criminal trial filed by the petitioner, Toby A. Berthiaume. This case presents an issue that our courts have not previously addressed: Whether res judicata precludes a civil petition for a new trial based on a claim of newly discovered evidence when that same claim previously was litigated before the criminal court that had jurisdiction over the criminal matter but nonetheless lacked the authority to adjudicate the claim under our rules of practice. We conclude that, because the criminal court lacked the authority to rule on such a claim, it could not have issued a valid final decision, and, thus, the court's rendering summary judgment on the basis of the preclusive effect of that proceeding was improper. Accordingly, we reverse the judgment of the trial court and remand the case for further proceedings.[1]

[1] On appeal, the petitioner raised the following five alternative reasons for reversing the court's judgment: (1) The state failed to meet its burden of proof for summary judgment, (2) structural error in the trial court resulted in prejudice per se, (3) because of public policy concerns, there should be an exception to res judicata to protect against the type of errors that occurred here, (4) this error was so pervasive and significant that the petitioner is entitled to a new criminal trial, and (5) the criminal court violated the petitioner's due process rights. Because the improper application of res judicata is dispositive, we need not address these additional claims.

Following a jury trial, the petitioner was convicted of burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), and his conviction was affirmed on direct appeal. *State* v. *Berthiaume*, 171 Conn. App. 436, 438, 157 A.3d 681, cert. denied, 325 Conn. 926, 169 A.3d 231, cert. denied, U.S. , 138 S. Ct. 403, 199 L. Ed. 2d 296 (2017).

On direct appeal, this court set forth the following relevant facts. "In mid-2013, the victim, Simone LaPointe, was ninety-three years old and resided at 126 Windsor Street in Enfield, her home for over four decades. She suffered from dementia and short term memory loss, and although she lived alone, was accompanied by either a friend or one of her surviving eleven children 'most of the time.' Typically, the victim's friend stayed with her overnight, and her children took turns visiting her throughout the day. Despite this visitation schedule, there were gaps of time throughout the day in which the victim was home alone. Because the victim neither drove nor owned a car, her driveway would be empty during these gap periods, thus indicating that she was alone.

"On May 6, 2013, Marita Cunningham, one of the victim's daughters, arrived at 126 Windsor Street around noon, and departed, leaving the victim home alone, at approximately 12:50 p.m. When Cunningham left 126 Windsor Street, nothing inside the residence looked out of order and the victim was uninjured. About one hour later, Jessica Navarro-Gilmore, while passing by in a motor vehicle, saw the [petitioner] and another white man 'walking suspiciously' on a road near the victim's home while carrying what appeared to be 'a twenty inch flat screen . . . TV or monitor . . . .' The two men were 'walking quickly and looking over their shoulder[s] suspiciously.' Drawing on her own experience committing theft offenses, Navarro-Gilmore immediately suspected that the two men had stolen something

from a home in the neighborhood. After doubling back to get a better look at the men, Navarro-Gilmore called the police at 1:53 p.m. and reported what she had seen.

"At approximately 3 p.m., the victim called Norma Shannon, another of her daughters, and told Shannon that her knee was bleeding. Shannon went to 126 Windsor Street in response to the call, and upon entering, noticed that 'the house had been ransacked . . . .' Various drawers and cabinets inside the house had been left open, jewelry and other items were lying on the victim's bed and dresser 'as if they had been dumped there,' and the dining room chandelier was broken. There was blood on the floor of the dining room, and the phone line in the living room, which was adjacent to the dining room, had been cut. The victim's knee was bandaged, and she had sustained a 'mark on her nose,' a bruise on her face, and a chipped tooth. A search of the home revealed that the victim's ring, which contained fourteen birthstones, and her nineteen inch flat screen television, had been stolen.

"At 3:44 p.m., the [petitioner] sold what was later determined to be the victim's ring and television at the Money Shop, a pawn shop and jewelry store located in Springfield, Massachusetts. In order to make the sales, the [petitioner] provided Jeffrey Fiske, the owner of the pawn shop, with his identification and had his photograph taken. The [petitioner] also provided his address, 116 Windsor Street, and telephone number. Fiske identified the [petitioner] as the person who received the sales proceeds.

"Thereafter, police showed Navarro-Gilmore a sequential photographic array that did not include a photograph of the [petitioner], and she did not identify anyone as one of the men she saw carrying the television on May 6, 2013. After developing the [petitioner] as a suspect, Detective Brian Callaghan of the Enfield Police

Department searched the New England State Police Information Network, a database wherein local pawn shops record their daily transactions, which returned information on the Money Shop. On June 11, 2013, Fiske provided Detective Callaghan with sales slips, the [petitioner's] photograph, and the victim's television and ring.

"The [petitioner] was arrested on July 3, 2013, and charged with burglary in the first degree and several other offenses. Two days later, the [petitioner's] booking photograph, along with an article referencing the burglary, was published in the Enfield Patch, a local online newspaper. While browsing online, Navarro-Gilmore saw the [petitioner's] photograph and immediately recognized him as one of the men she saw carrying the television on May 6, 2013. Thereafter, Detective Callaghan contacted Navarro-Gilmore to request that she view another photographic array. Navarro-Gilmore indicated that she already had seen the [petitioner's] photograph in the Enfield Patch and therefore could not fairly participate in an identification procedure." (Footnotes omitted.) Id., 438–41.

On June 10, 2014, after the jury's verdict, the trial court in the petitioner's criminal case, *Mullarkey*, *J.*, held a hearing originally intended for sentencing. Instead, the prosecutor notified the court that one of the state's witnesses, Navarro-Gilmore, recently had contacted the prosecutor's office seeking assistance regarding an arrest warrant for the witness' daughter. In response to this new information, the court postponed the sentencing and scheduled a subsequent hearing to allow the parties to question Navarro-Gilmore about this newly discovered information. Defense counsel then requested additional time to file a motion for a new trial.

On June 27, 2014, the court convened the first of a series of hearings regarding Navarro-Gilmore's telephone call to the prosecutor. Although defense counsel had not yet filed a motion for a new trial, she presented a number of witnesses to testify in support of this anticipated motion. Then, on August 8, 2014, defense counsel filed a petition for a new trial pursuant to Practice Book § 42-55 and General Statutes § 52-270. The petitioner sought a new trial on the basis of newly discovered evidence regarding Navarro-Gilmore's alleged ulterior motives in testifying. This prompted a lengthy colloquy in which the court discussed whether this petition was proper:

"The Court: All right. So, as we discussed before court, this [petition] needs to be filed with the civil clerk's office because it is a civil action. . . .

"[The Prosecutor]: Is it a civil motion for a new trial since he hasn't been sentenced yet?

"The Court: Well, [he's] filed a petition for new trial.

"[Defense Counsel]: I filed the petition under . . . Practice Book [§] 42-55, which is under the Superior Court rules for criminal matters and—which does not make any reference to its being a civil action. . . .

"The Court: Well, I wished it were under the criminal rules, or it remained under the criminal rules, but it doesn't. . . . All I'm telling you is the [rules of] practice [require] you to file it across the street, and I will go forward with whatever evidence you have today. And if you both agree, I will use the evidence that we have already heard on this issue. . . . And as long as the state goes along with that, we will treat it as evidence. All I can say to you is that I have no expertise in these civil concerns, but I have two or three others of these pending, and they are all filed across the street. . . .

"[Defense Counsel]: I will try to learn as soon and as much as I can about the proper way to file the motion. I'd just like to be clear—

"The Court: My—my job is to make the decisions based on the evidence, and the arguments, and the law, which I'm prepared to go forward with today, and you go over and square up whatever you have to do with those people. I don't interfere with them or their processes. . . .

"[The Prosecutor]: Your honor, I think the more appropriate motion is filed under [Practice Book §] 42-53, which is a motion for new trial.

"The Court: I'm not saying I disagree with you, but the [petitioner] has filed this motion. I cannot tell [him] what to file.

"[The Prosecutor]: I understand. But I think if it comes in as a petition for new trial, they don't have a perfected record for you to even entertain it because no—it's—it's not a disposed of matter. He hasn't even been sentenced yet. I believe the petitions require just that, and that's why it is separated from one to the other. And I think the court holds exclusive jurisdiction over a matter that is not yet sentenced. So, it wouldn't even be a civil filing where we would agree to this court hearing this.

"The Court: Well, there are a bunch of cases concerning this and there's a law annotation after . . . [§] 52-[2]70. But we'll worry about that at a later date. For now, there's a witness here subpoenaed by the defense and—or whatever you're gonna call it. I'd like to hear what the evidence is."

Subsequently, on November 26, 2014, defense counsel withdrew the petition for a new trial and, on December 17, 2014, filed a motion for a new trial pursuant to Practice Book § 42-53. The motion relied on the same

evidence and same claims as the petition, i.e., that the petitioner was entitled to a new trial on the basis of newly discovered evidence regarding Navarro-Gilmore's alleged ulterior motives. After recognizing the new motion before it, the court granted defense counsel's motion to consider the testimony in the hearings prior to the filing of this new motion. At the close of testimony at this hearing, the parties offered their arguments on the motion for a new trial.

In the course of these arguments, there was a dispute over what legal standard should apply to decide a motion for a new trial. The prosecutor argued that "what the court needs to do is analyze the situation in the rubric provided by *Asherman* [v. *State*, 202 Conn. 429, 521 A.2d 578 (1987)]." Defense counsel argued that a "motion for [a] new trial shall be granted for any other error which the defendant can establish was materially injurious to him or her" under Practice Book § 42-53 (a) (2). On February 5, 2015, the court issued an oral decision denying the motion for a new trial. In its subsequent written memorandum of decision, the court applied the *Asherman* standard, as proffered by the prosecutor, to determine whether a new trial was warranted. The court concluded that the evidence, though newly discovered, was immaterial, cumulative, and unlikely to produce a different result at trial. On the basis of these findings, the court determined that the petitioner's evidence was insufficient to support the motion for a new trial and denied the motion.

On May 19, 2015, the petitioner commenced the present action by filing a petition for a new trial pursuant to § 52-270 in the civil trial court. Like the motions previously filed in the criminal court, this petition alleged that the new information regarding Navarro-Gilmore constituted newly discovered evidence that warranted a new trial. The state moved for summary judgment, asserting that the claim of newly discovered

evidence had been fully and fairly litigated in the criminal proceeding such that the petition was barred by res judicata. The trial court, *Dewey, J.*, agreed and rendered summary judgment in favor of the state. This appeal followed.

Before addressing the merits of the petitioner's claim, we first set forth the proper standard of this court's review and certain well settled principles that guide our resolution of res judicata claims. The issue of whether res judicata applies "is a question of law subject to plenary review." *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 712, 200 A.3d 1118 (2019). "[W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *Stamford Hospital* v. *Schwartz*, 190 Conn. App. 63, 97, 209 A.3d 1243 (2019).

"The doctrine of res judicata provides that [a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties . . . upon the same claim or demand. . . . Res judicata prevents a litigant from reasserting a claim that has already been decided on the merits. . . . Stated another way, res judicata is based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . [W]here a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding." (Internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, supra, 330 Conn. 712–13.

The petitioner claims on appeal that, because Practice Book § 42-55 requires that petitions for a new trial

on the ground of newly discovered evidence may be brought only in the civil court, the criminal court lacked either the authority or jurisdiction to rule on a petition for a new trial and, consequently, its ruling can have no res judicata effect on the civil proceeding. This court has held that the improper filing of a petition for a new trial with the criminal court "[does] not deprive the court of subject matter jurisdiction . . . ." *State* v. *Gonzalez*, 106 Conn. App. 238, 261, 941 A.2d 989, cert. denied, 287 Conn. 903, 947 A.2d 343 (2008). This court further explained, however, that "the trial court should not exercise its authority in cases . . . where a party fails properly to serve a writ of summons and complaint on the adverse party in accordance with Practice Book § 42-55." (Emphasis omitted; internal quotation marks omitted.) Id. Thus, the criminal court in this case had jurisdiction, but lacked the authority, to hear the petitioner's claim of newly discovered evidence. That determination, however, does not end our inquiry. We must now determine whether the lack of authority in the criminal court, in which the petitioner's claim for a new trial undisputedly was fully litigated,[2] deprives a petitioner of the opportunity to bring the same claim in a second court with the authority to decide the petition.

To resolve this complex issue, which has not been specifically addressed in Connecticut law, we begin with an examination of why the criminal court lacked the authority to grant the petitioner a new trial on the basis of a claim of newly discovered evidence. In the context of a petition for a new trial, courts are granted authority by statute. See, e.g., *Wojculewicz* v. *State*, 142 Conn. 676, 677, 117 A.2d 439 (1955) ("[p]roceedings in this state for procuring a new trial, whether in a civil or a criminal case, are controlled by statute"). General Statutes § 54-95 (a) authorizes defendants in criminal

[2] We note that the criminal court was well-intentioned in its efforts to immediately address the claim of witness bias.

cases to file petitions for new trials in the same manner as in civil cases, and § 52-270 (a), which governs new trials in civil actions, provides in relevant part: "The Superior Court may grant a new trial of any action that may come before it, for mispleading, the discovery of new evidence . . . or for other reasonable cause, according to the usual rules in such cases. . . ."

Relatedly, Practice Book § 42-55 provides: "A request for a new trial on the ground of newly discovered evidence shall be called a petition for a new trial and shall be brought in accordance with General Statutes § 52-270. The judicial authority may grant the petition even though an appeal is pending." When claiming newly discovered evidence, a party cannot obtain a new trial except under Practice Book § 42-55. "*It is well established that to obtain a new trial on the ground of newly discovered evidence, a defendant must bring a petition under Practice Book § 42-55* . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 106 Conn. App. 260. Alternatively, a motion for a new trial brought pursuant to Practice Book § 42-53 is limited to trial errors and cannot be based on newly discovered evidence. Id., 262.

Procedurally, a petition for a new trial is always brought in a separate civil proceeding, while a motion for a new trial is filed in the court in which the original proceeding was held. "The petition [for a new trial] is instituted by a writ and complaint served on the adverse party; although such an action is collateral to the action in which a new trial is sought, it is by its nature a distinct proceeding. The judgment on the petition terminates the suit which renders it final. On the contrary, a motion for a new trial is filed in a case then in progress or pending and is merely a gradation in that case leading to a final judgment." *State* v. *Asherman*, 180 Conn. 141, 144, 429 A.2d 810 (1980). For this reason, we have particularly stressed in the past that "the distinction

between a petition and a motion is not one of mere nomenclature"; (internal quotation marks omitted] *State* v. *Gonzalez*, supra, 106 Conn. App. 262; and that "*the trial court should not exercise its authority in cases . . . where a party fails properly to serve a writ of summons and complaint on the adverse party in accordance with Practice Book § 42-55.*" (Emphasis in original; internal quotation marks omitted.) Id., 261.

Compliance with the summons and complaint requirements is not enough. We have held previously that even when a petitioner properly served a writ of summons and complaint in connection with a petition for a new trial, the petition was actually a motion for a new trial because the process was served under the same docket number as the original proceeding and "failed to institute a separate and distinct proceeding for the purpose of having the court determine whether a new trial was warranted . . . ." *Redding* v. *Ellfire*, 98 Conn. App. 808, 820, 911 A.2d 1141 (2006). Similarly, when the original trial court concludes that a motion for a new trial is brought on the basis of "newly discovered evidence, it lack[s] authority to consider the relief sought by the defendant in his motion pursuant to Practice Book § 42-53." *State* v. *Bennett*, 324 Conn. 744, 776–77, 155 A.3d 188 (2017).

Furthermore, it is never proper to bring a petition for a new trial based on a claim of newly discovered evidence in the criminal court. The procedural requirements of a writ of summons and complaint are not available in the criminal courts; this service is filed pursuant to the procedures of the civil courts. See Practice Book § 10-12. Relatedly, we have previously elaborated that "[i]n an action on a petition for a new trial, a petitioner is not a criminal defendant but rather is a *civil* petitioner. . . . A proceeding on a petition for a new trial, therefore, is not a criminal action. Rather, it

is a distinct proceeding that is commenced by the service of civil process and is prosecuted as a civil action." (Citation omitted; emphasis in original.) *Small* v. *State*, 101 Conn. App. 213, 217, 920 A.2d 1024 (2007), appeal dismissed, 290 Conn. 128, 962 A.2d 80, cert. denied, 558 U.S. 842, 130 S. Ct. 102, 175 L. Ed. 2d 68 (2009).

In the absence of controlling precedent on the specific issue with which we are now faced, we turn to cases in which a court's authority has been discussed in conjunction with its jurisdiction and cases presenting analogous circumstances. Our Supreme Court has recognized the delineation between authority and jurisdiction and, moreover, that both are necessary for a valid decision. "Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999). Stated differently, although a court may properly exercise its subject matter jurisdiction in a given matter, its decision could nevertheless be invalid for want of authority if it exceeds its authority in awarding a remedy. *See New England Pipe Corp.* v. *Northeast Corridor Foundation*, 271 Conn. 329, 336, 857 A.2d 348 (2004) ("Under [General Statutes] § 52-422, a trial court is empowered to grant injunctive relief during an ongoing arbitration proceeding only when such relief is 'necessary' to protect the rights of a party prior to the rendering of an award. Conversely, if such relief is not 'necessary' to protect a party's rights during the pendency of the arbitration proceeding, the trial court is not authorized to grant relief under § 52-422.").

Moreover, underlying the concept of res judicata are principles of finality and validity. 1 Restatement (Second), Judgments § 12, comment (a), p. 116 (1982). There is a strong jurisprudential interest in according finality to a decision in a proceeding where the parties have had a full opportunity to litigate the controversy on its merits. Id. Yet, the principle of finality rests on the premise that the proceeding had the sanction of law. Id. "The essential problem is therefore one of selecting which of the two principles [finality or validity] is to be given greater emphasis." Id., p. 117.

Our Supreme Court previously has addressed the distinction between authority and jurisdiction in the framework of res judicata, albeit specifically in the context of the family court. In *Delahunty* v. *Massachusetts Mutual Life Ins. Co.*, 236 Conn. 582, 587–88, 674 A.2d 1290 (1996), the family court certainly had subject matter jurisdiction to adjudicate the dissolution matter; however, it did not have the authority to award certain remedies. In particular, the plaintiff sought punitive, double, and treble damages for fraud committed by her husband during their marriage. Id., 585. These claims required a jury trial, which was a procedure that was not available to the plaintiff in her dissolution action. Id., 593. Thus, the plaintiff subsequently brought a second action in the civil court seeking these civil tort damages. Id. The civil court applied res judicata, reasoning that the tort claims could have been brought in the family court. Id., 586–87. Our Supreme Court, however, disagreed, concluding that "because there are significant differences between a tort action and a dissolution action, the maintenance of a separate tort action will not subject the courts and the defendant to the type of piecemeal litigation that [res judicata] was intended to prevent." Id., 592. The court stressed that the primary distinction between these actions was the difference in remedies. Id. "A tort action, the purpose of which is to redress a legal wrong by an award of damages, is not

based on the same underlying claim as an action for dissolution, the purpose of which is to sever the marital relationship, to fix the rights of the parties with respect to alimony and child support, and to divide the marital estate. Although in a dissolution action, the trial court must consider the conduct of the parties, the judgment in a dissolution action does not provide direct compensation as such to a party for injuries suffered during the marriage. Alimony is intended to provide economic support for a dependent spouse, and the division of marital property is intended to recognize and equitably recompense the contributions of the parties to the marital partnership." (Footnote omitted.) Id., 592–93. In short, because the plaintiff in *Delahunty* could not obtain the same remedies in her dissolution action as she could in her tort action, she was not precluded by res judicata from bringing her second claim.

As in *Delahunty*, the petitioner in the present case could not obtain the relief that he requested from the criminal court—a new trial based on a claim of newly discovered evidence. To be sure, the hearings and the legal analysis that the petitioner seeks in the civil court may well be nearly identical to the proceedings in the criminal court. Moreover, having fully litigated his claim in the criminal court, the petitioner may arguably be a "litigant who is undeserving of the accompanying benefit that will redound to him." 1 Restatement (Second), supra, § 12, comment (d), p. 122. Nonetheless, the criminal court did not have the authority to decide the motion on its merits, nor to award the petitioner a new trial, and it, therefore, could not have rendered a valid, final decision on the motion for a new trial. For these reasons, res judicata does not preclude the petitioner's petition for a new trial here.[3]

[3] The state argues that, even if res judicata does not apply, the petitioner should nonetheless be precluded from challenging res judicata because (1) the petitioner induced the erroneous ruling from the criminal court, and (2) the petitioner has procedurally defaulted on this claim. We conclude that neither of these doctrines apply to the present case.

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

In this opinion the other judges concurred.

CHARLES H. GADDY *v.* MOUNT VERNON FIRE INSURANCE COMPANY ET AL.
(AC 41130)

Bright, Devlin and Eveleigh, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court granting the motion for summary judgment filed by the defendants. The plaintiff claimed that the trial court improperly concluded that his claims were barred by the applicable statute of limitations. *Held* that the trial

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First, "[t]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the [allegedly] erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . The invited error doctrine rests [on principles] of fairness, both to the trial court and to the opposing party." (Internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, supra, 330 Conn. 724.

Notably, the doctrine of induced error is premised on fault for the error lying solely with the challenging party. This element is not present in the current case. To be sure, the petitioner filed the petition in the wrong court. However, the petitioner subsequently corrected this error and properly filed a motion for a new trial instead. Additionally, the state effectively argues that, by bringing a motion for a new trial based on new evidence, the petitioner induced the criminal court to unwittingly hold pointless hearings. However, from the time that the petitioner initially filed a petition for a new trial with the criminal court, the criminal court openly recognized that this type of petition is solely filed in the civil court. Overall, it appears that there is no single party at fault for the errors of the criminal court; instead, the inertia of these hearings and the mutual mistake of all the parties involved are the most likely culprits of these errors.

Second, procedural default does not apply, because the petitioner could not have properly brought his claim of newly discovered evidence on direct appeal. Procedural default applies where the "petitioner could have filed such a motion 'at any time,' including the present time . . . [but] failed to follow the proper procedures by which to correct his sentence or to preserve his challenge to the sentence before having filed this petition . . . ." (Citation omitted.) *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 39–40, 779 A.2d 80, 86 (2001). The petitioner had no right to the remedy he seeks on direct appeal; it is only available through a collateral petition. Thus, the petitioner could not have filed this petition at any time and has not procedurally defaulted. See id., 39.

court properly granted the defendants' motion for summary judgment and rendered judgment for the defendants; the claims that the plaintiff raised on appeal were essentially the same claims that he raised in the trial court and, because those issues were properly resolved in the trial court's thoughtful and comprehensive memorandum of decision, this court adopted that court's well reasoned memorandum of decision as a statement of the facts and the applicable law on those issues.

Argued May 28—officially released September 3, 2019

Procedural History

Action seeking, inter alia, to recover proceeds allegedly due under an insurance policy issued by the defendants, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment, and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Mario Cerame, with whom, on the brief, were *Juri E. Taalman*, *Joseph R. Serrantino* and *Timothy Brignole*, for the appellant (plaintiff).

Beverly Knapp Anderson, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Charles H. Gaddy, appeals from the summary judgment rendered by the trial court in favor of the defendants, Mount Vernon Fire Insurance Company and United States Liability Insurance Group. On appeal, the plaintiff claims that the court improperly concluded that his claims were barred by the applicable statute of limitations. We disagree.

The claims raised by the plaintiff on appeal essentially are the same claims he raised in the trial court when he opposed the defendants' motion for summary judgment and argued in favor of his own motion for summary

judgment. We have examined the record on appeal, including the briefs and arguments of the parties, and we conclude that the judgment of the trial court should be affirmed. The issues raised by the plaintiff were resolved properly in the thoughtful and comprehensive memorandum of decision filed by the trial court, *Noble, J.* Because Judge Noble's memorandum of decision also fully addresses the arguments raised in the present appeal,[1] we adopt the trial court's well reasoned decision as a statement of the facts and the applicable law on those issues. See *Gaddy* v. *Mount Vernon Fire Ins. Co.*, Superior Court, judicial district of Hartford, Docket No. CV-16-6066237-S (October 16, 2017) (reprinted at 192 Conn. App. 340, A.3d). It would serve no useful purpose for us to repeat those facts or the discussion here. See, e.g., *Tzovolos* v. *Wiseman*, 300 Conn. 247, 253–54, 12 A.3d 563 (2011).

The judgment is affirmed.

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[1] In addition to the claims he raised before the trial court, the plaintiff, on appeal, also argues that a recent case, *Cadle Co.* v. *Ogalin*, 175 Conn. App. 1, 167 A.3d 402, cert. denied, 327 Conn. 930, 171 A.3d 454 (2017), establishes that, pursuant to General Statutes § 52-598, he, as a judgment creditor, has twenty-five years to bring suit against the defendants, which he claims are judgment debtors. We disagree that *Cadle Co.* applies to the plaintiff's situation. Because the plaintiff has never obtained a judgment against these defendants, they, as a matter of law, are not judgment debtors in this case. In an attempt to avoid this obvious conclusion, the plaintiff argued, for the first time in a motion for reargument and reconsideration, that the defendants are the "alter ego" of their insured, the actual judgment debtor. The court denied the plaintiff's motion, and the plaintiff has not argued on appeal that it was error for the court to do so. Furthermore, other than a bald assertion that the defendants are the alter ego of their insured, neither the plaintiff's principal brief nor his reply brief contain any analysis of such a claim. For these reasons, any such claim is deemed abandoned. See *NRT New England, LLC* v. *Jones*, 162 Conn. App. 840, 856, 134 A.3d 632 (2016).

APPENDIX

CHARLES H. GADDY *v.* MOUNT VERNON FIRE INSURANCE COMPANY ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-16-6066237-S

Memorandum filed October 16, 2017

Proceedings

Memorandum of decision on motions for summary judgment. *Defendants' motion granted*; *plaintiff's motion denied.*

Juri E. Taalman and *Joseph R. Serrantino*, for the plaintiff.

Beverly Knapp Anderson and *Carmine Annunziata*, for the defendants.

Opinion

NOBLE, J. Before the court are motions for summary judgment by each party. For the reasons set forth below, the defendants' motion for summary judgment is granted, and the plaintiff's motion for summary judgment is denied.

FACTS

On February 19, 2016, the plaintiff, Charles Gaddy, commenced the present action against the defendants, the Mount Vernon Fire Insurance Company (Mount Vernon) and the United States Liability Insurance Group (USLI).[1] In the amended complaint dated March 6, 2017, the plaintiff alleges that his former insurance agent, the Hunt Group, LLC (Hunt Group), was insured by Mount Vernon and USLI. The plaintiff owned property, which was insured under a policy of insurance (policy) for

* Affirmed. *Gaddy* v. *Mount Vernon Fire Ins. Co.*, 192 Conn. App. 337, A.3d (2019).

[1] USLI is Mount Vernon's parent company. USLI and Mount Vernon will be collectively referred to as the defendants.

property and casualty loss with the Scottsdale Insurance Company (Scottsdale.) On May 19, 2003, the plaintiff provided the Hunt Group with funds for the renewal of the policy. On or before June 14, 2003, the Hunt Group failed to timely forward the funds to Scottsdale, which caused the policy to lapse. On that date, the plaintiff experienced a fire loss to the property that was to have been insured by Scottsdale.

The plaintiff brought suit in 2006 against the Hunt Group, claiming negligence. See *Gaddy* v. *Hunt Group, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-06-05003718-S. The defendants thereafter filed a complaint against Hunt Group in the United States District Court for the District of Connecticut (District Court action) seeking a declaratory judgment that it had no duty to indemnify or defend the Hunt Group for its failure to cooperate with the defendants. See *Mount Vernon Fire Ins. Co.* v. *Hunt Group, LLC*, United States District Court, Docket No. 3:06 CV-02006 (CFD) (D. Conn. 2006). In the District Court action, service of process was made on "Mr. Michael Hunt, as agent for Hunt Group, Inc.," and not "Hunt Group, LLC."

On March 29, 2007, the District Court entered a default judgment for failure to appear. See *Mount Vernon Fire Ins. Co.* v. *Hunt Group, LLC*, supra, United States District Court, Docket No. 3:06 CV-02006 (CFD). On April 4, 2007, the District Court entered an amended default judgment (federal declaratory judgment) for failure to appear, and held that Mount Vernon had no duty to defend or indemnify Hunt Group for the plaintiff's fire loss in the underlying Superior Court action. See id. The defendants successfully moved to withdraw their defense of the Hunt Group in the Superior Court action. See *Gaddy* v. *Hunt Group, LLC*, supra, Superior Court, Docket No. CV-06-05003718-S. On January 26, 2009, the plaintiff recovered a judgment against Hunt Group in the amount of $823,919.99 for the plaintiff's

fire loss. See id. The plaintiff commenced the current action against the defendants pursuant to General Statutes § 38a-321,[2] and is, by law, subrogated to the Hunt Group's rights to enforce the policy.

On May 19, 2017, both parties filed motions for summary judgment. The plaintiff's motion asserts that the federal court's declaratory judgment was null and void ab initio because it was obtained by the defendants without proper service on the Hunt Group, and thus, in a manner that amounted to a fraud on the court. The defendants' motion is based on the ground that the plaintiff's claims are time barred under all applicable statutes of limitation and submits the following: (1) the District Court's amended default judgment, dated April 4, 2007; (2) the District Court's default judgment, dated March 29, 2007; (3) the District Court's case docket; (4) the marshal's return of service to "Mr. Michael Hunt of Hunt Group, Inc.," for the District Court action (return of service), dated December 20, 2006; (5) the underlying Superior Court's docket entries; (6) certified Secretary of the State record on Hunt Group; (7) Secretary of the State's Commercial Recording Service (C.O.N.C.O.R.D.) record for Hunt Group; (8) the underlying Superior Court motion to withdraw appearance hearing transcript (*Tanzer*, *J.*); and (9) the signed and sworn affidavit of Beverly Knapp Anderson, the defendants' attorney.

[2] General Statutes § 38a-321 provides in relevant part: "Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied *within thirty days* after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment." (Emphasis added.)

On June 19, 2017, the plaintiff filed an opposition to the defendants' motion for summary judgment. In his opposition, the plaintiff incorporated his motion for summary judgment, dated May 19, 2017, and submits the following: (1) the signed and sworn affidavit of Robert Enos;[3] (2) the signed and sworn affidavit of Mary Hemsley;[4] (3) the underlying Superior Court judgment; (4) the District Court's complaint, dated December 15, 2006; (5) the District Court's appearance of counsel for Mount Vernon; (6) the return of service; (7) C.O.N.-C.O.R.D. business inquiry; (8) the District Court's motion for entry of default, dated January 10, 2007; (9) the District Court's motion for entry of default, dated January 30, 2007; (10) Mount Vernon's memorandum of law regarding service of process in the District Court action, dated March 26, 2007; (11) the District Court action civil docket; (12) the signed and sworn affidavit of Attorney Joseph R. Serrantino;[5] (13) the District Court default judgment, dated March 29, 2007; (14) the District Court amended default judgment, dated April 4, 2007; (15) the District Court motion to withdraw as counsel; and (16) the plaintiff's amended complaint, dated March 6, 2017. On June 19, 2017, the defendants submitted an objection to the plaintiff's summary judgment motion. On July 5, 2017, the plaintiff submitted a reply to the defendants' objection. The court heard oral argument at short calendar on July 10, 2017.

I

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any

[3] Robert Enos is the New England district manager of Custard Insurance Adjusters, Inc.

[4] Mary Hemsley is a second vice president/claims examiner for USLI.

[5] Attorney Joseph R. Serrantino is an attorney for Brignole & Bush, LLC.

material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534, 51 A.3d 367 (2012). "Summary judgment may be granted where the claim is barred by the statute of limitations. . . . Summary judgment is appropriate on statute of limitations grounds when the material facts concerning the statute of limitations [are] not in dispute . . . ." (Citation omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 313, 77 A.3d 726 (2013).

The defendants argue that their motion for summary judgment should be granted on the grounds that (1) counts one and two of the amended complaint are time barred under the six year statute of limitations in General Statutes § 52-576 (a);[6] and (2) counts three and four are time barred under the three year statute of limitations in General Statutes § 52-577.[7] In the alternative, the defendants argue that the plaintiff cannot demonstrate that the scrivener's error in the summons or marshal's return of service rendered the federal declaratory judgment void ab initio. In support of their argument, the defendants argue that under the reasoning of *Grannis* v. *Ordean*, 234 U.S. 385, 395, 34 S. Ct. 779, 58 L. Ed. 1363 (1914), they are entitled to summary judgment because "if a person is sued by a wrong name, and he fails to appear and plead the misnomer in abatement, the judgment binds him." See also *Morrel* v. *Nationwide Mutual Fire Ins. Co.*, 188 F.3d 218, 224 (4th Cir. 1999) (absence of Inc. in corporate name of defendant in affidavit of service did not render default

[6] General Statutes § 52-576 (a) provides in relevant part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

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

judgment defective where any confusion would have been dispelled by allegations in other documents); *Barsten* v. *Dept. of Interior*, 896 F.2d 422, 423 (9th Cir. 1990) (technical misnaming of defendant is insignificant, as accompanying documents made defendant's identity clear); *United States* v. *A. H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947) (inclusion of Inc. in corporate name of defendant and Lumber in other case did not make complaint defective).

In response, the plaintiff argues that the defendants' motion for summary judgment should be denied and his motion granted because (1) the federal declaratory judgment was null and void ab initio, and was obtained by the defendants in a manner that amounted to fraud on the court; (2) the defendants fraudulently and in bad faith presented the declaratory judgment as the basis for their request to be withdrawn from the underlying Superior Court case; and (3) the defendants' claimed statute of limitations does not apply because the plaintiff's amended complaint is based upon a judgment that can be brought within twenty-five years of the date upon which judgment was entered pursuant to General Statutes § 52-598.[8]

[8] General Statutes § 52-598 (a) provides in relevant part: "[N]o action based upon such a judgment may be instituted after the expiration of twenty-five years from the date the judgment was entered . . . ."

The parties disagree on the applicable statute of limitations. The defendants argue that the statute of limitations for tort cases under § 52-577 is three years, and the statute of limitations for breach of contract cases under § 52-576 (a) is six years. The plaintiff argues that this is an action to collect a prior judgment, and therefore, the statute of limitations is twenty-five years under § 52-598. The court rejects the plaintiff's argument that the twenty-five year statute of limitations in § 52-598 applies in the present action because the plaintiff does not have a judgment against either of the defendants to enforce, and the defendants received a declaratory judgment, which discharged their duty to indemnify and defend Hunt Group. Our courts have previously reasoned that § 52-598 is applicable when the plaintiff has proven that the defendants are the alter ego of the entity that was subject to the previous judgment, which the plaintiff has not demonstrated here. See *Wm. Passalacqua Builders, Inc.* v. *Resnick Developers South, Inc.*, 933 F.2d 131, 142–43 (2d Cir. 1991); *Pullicino* v. *Jensen*, Superior Court,

A

Service of Process

The only defect in the service of process that the plaintiff identifies is the naming of "Hunt Group, Inc.," as the defendant, rather than "Hunt Group, LLC." However, "[a] defendant who is clearly identified by a summons and complaint and who has been served with those documents may not avoid the jurisdiction of the district court merely because he is incorrectly named in them." *Tremps* v. *Ascot Oils, Inc.*, 561 F.2d 41, 44 (7th Cir. 1977). Service is proper despite a misnomer if the complaint is "not susceptible to any reasonable doubt or confusion about who it was the plaintiff intended to sue." (Internal quotation marks omitted.) *Conner-Cooley* v. *AIG Life Brokeradge*, 282 F.R.D. 431, 435 (E.D. Wis. 2012).

In support of their argument, the defendants argue that the return of service naming "Hunt Group, Inc.," rather than "Hunt Group, LLC," was a scrivener's error and that there is no evidence that Hunt Group was misled or confused in any way from the misnomer. The plaintiff counters that the District Court did not have personal jurisdiction over the Hunt Group, as it was never properly served with process.

In the present case, service of process in the District Court was made upon "Mr. Michael Hunt as agent for Hunt Group, Inc., at 71 Barbonsel Road, East Hartford." This error could not have created reasonable doubt or confusion about the identity of the intended defendant because there is no "Hunt Group, Inc.," registered in Connecticut, the proper authorized agent for service of process of Hunt Group, "Mr. Michael Hunt at 71 Barbonsel Road, East Hartford," was served, and Hunt

judicial district of Waterbury, Docket No. CV-13-6019108-S (December 27, 2013) (*Roche, J.*) (57 Conn. L. Rptr. 372, 374).

Group was the named defendant on the complaint and on both the summons and complaint's captions. On December 20, 2006, Mount Vernon's process server delivered a copy of the summons and complaint to Hunt, who was Hunt Group's authorized agent for service of process. Accordingly, the District Court had personal jurisdiction over Hunt Group, as Hunt Group was properly served with the summons and complaint on December 20, 2006.[9]

II

STATUTES OF LIMITATIONS

"[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014).

The defendants argue that counts one and two of the amended complaint are time barred under the six year statute of limitations in § 52-576 (a), and counts three and four are time barred under the three year statute of limitations in § 52-577. The plaintiff counters that the statutes of limitations were tolled by the continuing course of conduct doctrine or by the doctrine of equitable estoppel. Specifically, the plaintiff argues that the defendants acted fraudulently when Mount Vernon

[9] The defendant does not argue, and this court does not consider, whether this court has authority or jurisdiction to find that an action brought, and judgment rendered, in the United States District Court, is void ab initio.

obtained the federal declaratory judgment because Hunt Group was never served with process, and therefore, the District Court did not have personal jurisdiction over Hunt Group. The plaintiff further argues that the defendants acted fraudulently when they submitted the original declaratory judgment, instead of the amended declaratory judgment, to the Superior Court. At no time has the plaintiff moved to open or vacate the judgment of the District Court.

A

Section 52-576 (a)

The defendants argue that counts one and two are time barred under § 52-576 (a) because the plaintiff became subrogated to the Hunt Group's rights on February 25, 2009, and therefore, was required to commence suit within six years of that date. Section 52-576 (a) provides in relevant part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ." "[Our Appellate Court] and our Supreme Court have held that, in the absence of some other controlling statutory or contractual provision, § 52-576 (a) is the applicable statute of limitation for bringing claims under insurance policies." *Gohel* v. *Allstate Ins. Co.*, 61 Conn. App. 806, 821, 768 A.2d 950 (2001).

In the present case, it is undisputed that the Superior Court in the underlying action entered judgment against Hunt Group on January 26, 2009. See *Gaddy* v. *Hunt Group, LLC*, supra, Superior Court, Docket No. CV-06-05003718-S. Pursuant to § 38a-321, the plaintiff became subrogated to the Hunt Group's rights thirty days after the judgment was rendered. The plaintiff could have brought a subrogation action beginning on February 25, 2009, and therefore, was required to commence suit within six years from that date. Because the only statute

of limitations applicable to the plaintiff's claim was that set forth in § 52-576 (a), namely, six years, and because the plaintiff brought suit on that claim after six years, on February 17, 2016, the defendants' motion for summary judgment as to counts one and two should be granted unless the statute of limitations is tolled under one of the exceptions.

B

Section 52-577

Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." "[S]ection 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs." (Internal quotation marks omitted.) *Pagan* v. *Gonzalez*, 113 Conn. App. 135, 139, 965 A.2d 582 (2009). "When conducting an analysis under § 52-577, the only facts material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed." (Internal quotation marks omitted.) Id.

In the present case, the District Court issued the amended judgment on April 4, 2007. The plaintiff argues that the defendants acted fraudulently when they submitted the motion to withdraw their appearance in the underlying Superior Court action. The Superior Court granted the motion to withdraw the appearance on June 6, 2007. See *Gaddy* v. *Hunt Group, LLC*, supra, Superior Court, Docket No. CV-06-05003718-S. Therefore, the plaintiff was required to commence suit by June 6, 2010, at the latest. The plaintiff, however, did not commence suit until February 17, 2016. Therefore, the defendants' motion for summary judgment as to counts three and four should be granted unless the statute of limitations

is tolled under one of the exceptions argued by the plaintiff.

C

Continuing Course of Conduct Doctrine

One of the exceptions to toll the statute of limitations is the continuing course of conduct doctrine. The defendants argue, inter alia, that the continuing course of conduct doctrine does not apply because the plaintiff cannot establish that the defendants committed an initial wrong against the plaintiff since service of process on "Hunt Group, Inc.," instead of "Hunt Group, LLC," did not make the federal declaratory judgment void ab initio, and therefore, the defendants did not have a duty to defend and indemnify Hunt Group. The plaintiff, however, argues that the federal declaratory judgment that relieved the defendants from their continuing duty to defend and indemnify Hunt Group was void ab initio, and therefore, the defendants had a continuing duty to defend and indemnify, which the defendants breached.

"[W]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 311. "[I]n deciding . . . the defendant's motion for summary judgment, [the court] must determine if there is a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) Id., 313.

In the present case, the plaintiff has failed to produce evidence that the defendants have committed an initial

wrong upon the plaintiff. "[A] precondition for the operation of the continuing course of conduct doctrine is that the defendant must have committed an initial wrong upon the plaintiff." (Internal quotation marks omitted.) Id., 312.

Simply put, there is no evidence that the defendants committed common-law fraud, or any fraud, on the court. The federal declaratory judgment was not void ab initio because service of process was proper, and therefore, it was not fraudulent for the defendants to present this court with the federal declaratory judgment. As the plaintiff has failed to demonstrate the precondition for the operation of the continuing course of conduct doctrine, it does not apply to the present case.

D

Doctrine of Equitable Estoppel

A second exception to toll the statute of limitations is the doctrine of equitable estoppel. "The doctrine of equitable estoppel is well established. [W]here one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is [precluded] from averring a different state of things as existing at the time. . . . In its general application, we have recognized that [t]here are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief, and that the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done." (Internal quotation marks omitted.) *Coss* v. *Steward*, 126 Conn. App. 30, 41, 10 A.3d 539 (2011). "[T]here must generally

be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury." (Internal quotation marks omitted.) Id., 41–42. "In the absence of prejudice, estoppel does not exist." (Internal quotation marks omitted.) Id., 42.

The defendants argue that the doctrine of equitable estoppel does not apply here because there is no evidence that the defendants induced the plaintiff to refrain from bringing the action prior to the expiration of the statute of limitations. The defendants further argue that equitable estoppel does not apply because the service of process on "Hunt Group, Inc.," was not intentional and was a mere scrivener's error, and there is no evidence that Hunt Group was confused or misled by such misnomer. To counter, the plaintiff argues that the defendants are equitably estopped from asserting the statute of limitations defense because Mount Vernon fraudulently obtained a withdrawal of representation of Hunt Group in the underlying Superior Court case on the basis of a federal declaratory judgment that was void ab initio for lack of service of process on Hunt Group.

In the present case, similar to *Carroll* v. *Safeco Ins.*, Superior Court, judicial district of Waterbury, Docket No. 117750 (April 5, 1994) (*Sullivan*, *J.*) (11 Conn. L. Rptr. 271, 273), "[t]he plaintiff has neither alleged nor shown any facts that the defendant misrepresented or misled [him] about the state of limitations." A mere mistake, such as a misnomer, does not afford a basis for estoppel. See *Krupa* v. *Kelley*, 5 Conn. Cir. Ct. 127, 132, 245 A.2d 886 (1968). The doctrine of equitable estoppel, therefore, is not applicable.

III

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is granted and the plaintiff's motion for summary judgment is denied.

STATE OF CONNECTICUT *v.* JAMES HENRY WATSON
(AC 41299)

DiPentima, C. J., and Keller and Noble, Js.

Syllabus

Convicted, following a jury trial, of the crimes of strangulation in the second degree, assault in the third degree, unlawful restraint in the first degree and threatening in the second degree, the defendant appealed to this court. The defendant's conviction resulted from an incident in which the defendant, who had been hanging out and drinking beer with the victim, accompanied the victim to his apartment, where he restrained, assaulted and choked her over the course of several hours, in different areas of the apartment. On appeal, he claimed, inter alia, that the trial court improperly made the determination of whether the charges of assault and unlawful restraint were "upon the same incident" as the strangulation charge for purposes of the statute ([Rev. to 2015] § 53a-64bb [b]) that provides that no person shall be found guilty of strangulation in the second degree and unlawful restraint or assault "upon the same incident," but that such person may be charged and prosecuted for all three offenses upon the same information. *Held*:

1. The defendant's unpreserved claim that the determination of whether the charges were "upon the same incident" was a question of fact for the jury, not the court, to determine was unavailing; this court has determined previously, under similar factual circumstances, that it was proper for the trial court, rather than the jury, to determine whether the charges were "upon the same incident" for purposes of § 53a-64bb (b), and denied the defendant's request that the present case be heard en banc in order to overturn that prior case law.
2. The defendant could not prevail on his claim that the trial court violated § 53a-64bb (b) and his right to be free from double jeopardy when it punished him for assault, unlawful restraint and strangulation, which was based on his claim that the separate charges of assault and unlawful restraint, as charged in the information and based on the evidence, were not established as wholly separate claims from the strangulation:

although the defendant claimed that the fact that the information, which alleged that all of the crimes occurred in the defendant's apartment at approximately 2 a.m., indicated that the charges arose from the same incident, the record revealed numerous criminal acts committed over the course of a longer period of time that demonstrated that the charges did not arise from the same act or transaction, including evidence that the victim informed the police that the defendant kept her in his apartment against her will for approximately nine hours and that the defendant assaulted and chocked the victim in different areas of the apartment for a few hours of this approximately nine hour period; moreover, the victim's testimony established that the assault and the unlawful restraint did not arise from the same incident as the strangulation, because even though the conduct constituting assault and strangulation in the present case did not occur in distinct locations, the fact that the assault and strangulation involved distinct violent acts that resulted in distinct types of physical injury supported the trial court's conclusion that those charges did not arise out of the same act or transaction, and the defendant's conduct toward the victim established unlawful restraint on a separate basis from his acts of strangulation, as the defendant restrained the victim in his apartment for approximately nine hours by taking the victim's cell phones from her, restricting her movement to smaller areas of the apartment and physically preventing her from escaping, none of which occurred while the defendant was strangling the victim; accordingly, because the defendant's double jeopardy claim was contingent on whether the charges arose from the same act or transaction, and because this court concluded that they did not, the defendant's double jeopardy claim necessarily failed.

3. The defendant could not prevail on his claim that the trial court violated his constitutional rights to confrontation and to present a defense by restricting his cross-examination of the victim, which was based on his claim that he should have been allowed to question the victim regarding past conduct, including a call she had made to the police in May, 2017, concerning an incident of assault separate from that underlying the charges in this case; although the defendant couched his claim in terms of his constitutional rights, those rights entitled him only to elicit relevant evidence, and the trial court properly determined that the evidence regarding the May, 2017 police call was not relevant for the purposes of impeachment, and, therefore, the defendant's constitutional rights to confrontation and to present a defense were not violated.

Argued May 21—officially released September 3, 2019

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, strangulation in the second degree, assault in the third degree,

unlawful restraint in the first degree and threatening in the second degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J.*; thereafter, the court denied the defendant's motion to admit evidence regarding the sexual conduct of the victim; verdict of guilty of strangulation in the second degree, assault in the third degree, unlawful restraint in the first degree and threatening in the second degree; subsequently, the court denied the defendant's motion for a judgment of acquittal as to the charges of assault in the third degree and unlawful restraint in the first degree and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, James Henry Watson, appeals from the judgment of conviction, rendered following a jury trial, of assault in the third degree in violation of General Statutes § 53a-61 (a) (1), unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), strangulation in the second degree in violation of General Statutes (Rev. to 2015) § 53a-64bb (a),[1] and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). The defendant claims that the trial court (1) improperly determined whether the charges of assault in the third degree and unlawful restraint in the first degree were "upon the

[1] Hereinafter, unless otherwise indicated, all references to § 53a-64bb in this opinion are to the 2015 revision of the statute.

same incident" as the charge of strangulation in the second degree for the purposes of § 53a-64bb (b); (2) violated § 53a-64bb (b) and his right to be free from double jeopardy when it punished him for assault in the third degree, unlawful restraint in the first degree and strangulation in the second degree; and (3) violated his right to confrontation when it restricted his cross-examination of the victim. We disagree and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On October 19, 2016, at approximately 3 p.m., the defendant and the victim were "hanging out" and drinking beer on the front porch of an apartment building at 850 Hancock Avenue in Bridgeport wherein the defendant resided. The victim stated that she needed to use the bathroom, and the defendant stated that she could use the bathroom in his apartment. The defendant accompanied the victim to his apartment, which was on the second floor of the building, and the victim went into the bathroom. When the victim tried to exit the bathroom, the defendant blocked the door and stated, "I'm going to get some of your fucking pussy."

The defendant ultimately allowed the victim to leave the bathroom, but he then blocked the victim's access to the front door, forcing the victim into the living room. The defendant closed the curtains in the living room and increased the volume on the radio that was playing. The victim later testified that she did not try to leave the apartment at this point because there was a "certain way" to open the front door, and she did not know how to do so.

The defendant then grabbed the victim and pushed her onto the couch in the living room while stating that he "wanted to get [the victim's] pussy." The victim attempted to push the defendant off of her, but the

defendant held her down on the couch and began to rip off her pants and underwear. The defendant also punched and hit the victim in the face.[2]

Additionally, the defendant continually choked the victim and hit her in the face. Periodically, the choking would cause the victim to have difficulty breathing. Whenever this happened, the victim would kick her feet at the defendant, and the defendant would briefly let go of her throat. Thereafter, the defendant would resume choking her. At one point during this episode, the defendant stated "I want to kill you" and "I know I'm going to pay for this." The victim asked the defendant to return her cell phones,[3] which he had taken from her prior to the first episode where he attacked her, so that she could call her son. The defendant did not return the victim's cell phones to her and continued to hit her repeatedly. In an attempt to resist the defendant, the victim bit his pinky finger. The victim also tried to run toward the door in order to escape from the apartment, but the defendant prevented her from doing so by grabbing the hood of the sweatshirt she was wearing.

After attacking the victim in the living room, the defendant brought her into his bedroom, threw her onto the bed, and commenced a second attack, continuing to hit and choke her. The defendant also ripped the victim's T-shirt off of her body and used it to choke her. Throughout this second episode, the defendant stated repeatedly that he wanted to kill the victim.

The defendant then took the victim back into the living room and threw her onto a different couch than he had thrown her onto earlier. During this third attack,

[2] The victim testified that during each of the three episodes in which she was attacked, the defendant had nonconsensual vaginal intercourse with her. We note that the jury acquitted the defendant of the charge of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1).

[3] The victim had two cell phones, however, one was out of prepaid minutes and, therefore, was inoperable.

the defendant "beat [the victim] some more" and choked her. Sometime thereafter, the defendant stopped attacking the victim. Even after the defendant stopped attacking the victim, he would not allow her to leave the apartment.

Sometime in the early morning, on October 20, 2016, the victim was able to convince the defendant to allow her to leave the apartment by begging him to let her go to the store to purchase a drink and promising that she would return to the apartment afterward. The defendant accompanied the victim outside of the apartment building, but she was able to run away from him.

The victim ran to a nearby gas station, where she asked an employee if she could use the phone to call the police because she had just been raped. The employee did not allow the victim to use the phone, so the victim left the gas station and continued walking down the street away from the defendant's apartment. While she was walking down the street, the victim saw an ambulance driving toward her. She waved down the ambulance and told the paramedics in the vehicle that she had been raped. One of the paramedics observed that the victim "had an abrasion of approximately four inches [on] the neck," as well as abrasions and swelling on her left eye and left ear.

The paramedics parked the ambulance at the intersection of Fairfield Avenue and Norman Street in Bridgeport and contacted the police. The police arrived at approximately 2:30 a.m. and spoke with the victim. One of the police officers observed that the victim "had some red marks around her neck and some bruising to the face." The victim directed the police to 850 Hancock Street and informed them that the assault had occurred in an apartment on the second floor of the building. The police entered the building and spoke with the defendant in his apartment. The defendant admitted

that he and the victim had sexual intercourse but claimed that it had been consensual. While the police were in the defendant's apartment, they noticed a pair of ripped women's underwear in the garbage can and took possession of them for evidentiary purposes. The police also asked the defendant whether he had in his possession the victim's cell phones and charging cord, because she had stated that they were "missing." The defendant gave the police the victim's cell phones and charger.

The police then brought the defendant down to the front of the building, where the victim was waiting. The victim identified the defendant as the individual who had attacked her, and the police placed him under arrest.

The victim then was transported to Bridgeport Hospital, where a nurse examined her and administered a sexual assault kit. The nurse observed that the victim "had ligature marks on her neck and some red marks and abrasions on her neck and chest." The victim complained of a headache and dizziness and stated that she had been punched in the face. The victim was prescribed Tylenol and Ibuprofen, as well as Meclizine for dizziness and Zofran or Ondansetron for nausea.

The defendant thereafter was charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) (sexual assault), assault in the third degree in violation of § 53a-61 (a) (1) (assault), unlawful restraint in the first degree in violation of § 53a-95 (a) (unlawful restraint), strangulation in the second degree in violation of § 53a-64bb (a) (strangulation), and threatening in the second degree in violation of § 53a-62 (a) (1) (threatening). The substitute information alleged that all of the crimes of which he was accused had occurred on October 20, 2016, at approximately 2 a.m.

The defendant's case was tried before a jury in September, 2017. The jury returned a verdict in which it found the defendant guilty of the charges of strangulation, assault, unlawful restraint, and threatening, and not guilty of the charge of sexual assault. Before sentencing, the court ordered that the parties "submit a memorandum of law concerning whether and to what extent [§ 53a-64bb (b)] applies in the present case and, if so, the appropriate remedy to be implemented by the court at the time of sentencing."

On October 3, 2017, in response to the court's order, the defendant filed a motion for a judgment of acquittal as to the charges of assault and unlawful restraint. On October 25, 2017, the state filed a response to the court's order, in which it requested that the court impose separate sentences on each of the charges of which the defendant was found guilty and deny the defendant's October 3, 2017 motion for a judgment of acquittal. The state argued that § 53a-64bb (b) did not prohibit punishment for each offense "because the jury reasonably could have found the defendant guilty of unlawful restraint and assault for discrete acts that were separate from the act of strangling the victim."

On December 1, 2017, the court heard argument on the defendant's motion for a judgment of acquittal. Defense counsel argued: "[I]t's our position that the incident itself that took place at . . . 850 Hancock Avenue was one transaction. Even though the transaction may have occurred over a time period extending an hour, two hours, three hours . . . . [T]herefore, [the defendant] should receive acquittals on [the counts of assault and unlawful restraint] pursuant to [§ 53a-64bb (b)] and be sentenced on the guilty verdict on the other two counts." In response, the state argued that the evidence presented at trial indicated that the assault and unlawful restraint were separate from the strangulation.

The court denied the defendant's motion for a judgment of acquittal and concluded that, based on the evidence presented at trial, the assault and unlawful restraint were not "upon the same incident" as the strangulation and, therefore, that § 53a-64bb (b) did not preclude the imposition of punishment for the counts at issue. The court sentenced the defendant on all the charges of which the jury had found him guilty, for a total effective term of twelve years of incarceration, execution suspended after seven years of mandatory incarceration, followed by three years of probation.[4] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly determined whether the charges of assault and unlawful restraint were "upon the same incident" as the charge of strangulation for the purposes of § 53a-64bb (b). Specifically, the defendant argues that whether the crimes were "upon the same incident" was a question of fact that should have been properly submitted to and decided by the jury, not the court.[5] We disagree.

[4] Specifically, the court sentenced the defendant on the assault to one year of incarceration, execution suspended, followed by three years of probation; on the unlawful restraint to five years of incarceration, execution suspended after three years of mandatory incarceration, followed by three years of probation; on the strangulation to five years of incarceration, execution suspended after four years of mandatory incarceration, followed by three years of probation; and on the threatening to one year of incarceration, execution suspended, followed by three years of probation. The court imposed all of the sentences to run consecutively.

[5] The defendant also appears to argue, as part of this claim, that the court's determination of whether the charges were "upon the same incident" involved instructional error in that the trial court should have instructed the jury on § 53a-64bb (b), so that the jurors could have made the determination themselves. The defendant in *State* v. *Morales*, 164 Conn. App. 143, 156 n.7, 157 n.8, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016), made a similar argument, contending that, by failing to instruct on § 53a-64bb (b), the court committed instructional error. In *Morales*, this court concluded that the defendant waived any claim of instructional error under *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). *State* v. *Morales*,

Section 53a-64bb (b) provides in relevant part: "No person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information. . . ."

We note that the defendant argues that this claim is preserved and, in the alternative, that it can be reviewed

supra, 156 n.7, 159–60 n.9. Similarly, in the present case, we conclude that, to the extent that the defendant has raised a claim of instructional error on appeal, he has waived this claim under *Kitchens*; see *State* v. *Kitchens*, supra, 482–83 ("when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal").

In the present case, the defendant never requested that the jury be instructed on § 53a-64bb (b). The court first provided counsel with a copy of its proposed draft charge on September 27, 2017. The draft charge, like the court's final charge delivered to the jury, did not contain an instruction pursuant to § 53a-64bb (b). The next day, the court twice solicited comments from counsel regarding the proposed charge. Defense counsel did not object to the proposed charge at either point that day. Thereafter, when the court instructed the jury, defense counsel again failed to object to the instructions as given or request that the court instruct the jury on § 53a-64bb (b).

On appeal, the defendant argues that he did not request that the jury be instructed on § 53a-64bb (b) or object to the instructions as given because the case was tried shortly after this court's decision in *Morales* was officially released and "the trial court would not have charged the jury that it was to determine whether the charges occurred 'upon the same incident,' even if the defendant had made such a request." The defendant, however, has failed to provide any support for his argument that because he believed the court would refuse to instruct the jury on § 53a-64bb (b), his failure to object does not support a *Kitchens* waiver. To the contrary, this court previously has recognized that "[a] trial court has no independent obligation to instruct, sua sponte, on general principles of law relevant to all issues raised in evidence . . . . Rather, it is the responsibility of the parties to help the court in fashioning an appropriate charge." (Internal quotation marks omitted.) *State* v. *Crawley*, 93 Conn. App. 548, 568, 889 A.2d 930, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006). As such, we conclude that any instructional error claimed by the defendant was waived under *Kitchens*.

under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[6] We conclude that the claim was not preserved because the defendant never objected to the court determining whether the charges of assault and unlawful restraint were "upon the same incident" as the charge of strangulation. Thus, we assess whether *Golding* review is appropriate. We conclude that the record is adequate for review, as the trial court's remarks are set forth in the transcript of the sentencing hearing, and that the issue is of a constitutional magnitude because it implicates the defendant's right to a jury trial. See *State* v. *Morales*, 164 Conn. App. 143, 160, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016). We conclude, however, that the defendant cannot prevail on his claim because there was no constitutional violation.[7] See id.

[6] "Under [the *Golding*] test, [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. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; internal quotation marks omitted.) *State* v. *Dunbar*, 188 Conn. App. 635, 644–45, 205 A.3d 747, cert. denied, 331 Conn. 926, 207 A.3d 27 (2019).

[7] The defendant also argues that, even if this court declines to review this claim under *Golding*, it should do so under the plain error doctrine or this court's supervisory authority. We disagree.

We first note that plain error is a doctrine of reversibility, not reviewability. See *State* v. *Jamison*, 320 Conn. 589, 595–97, 134 A.3d 560 (2016). For the reasons set forth in part I of this opinion, we conclude that it was not error, let alone obvious error, for the court to determine that the charges of assault and unlawful restraint were not "upon the same incident" as the charge of strangulation. See id. Thus, the defendant has failed to demonstrate that this court should afford him relief under the plain error doctrine.

We likewise decline to exercise our supervisory authority to review this claim because we conclude that the defendant has failed to demonstrate

In support of his claim, the defendant argues that *State* v. *Morales*, supra, 164 Conn. App. 159–61, wherein this court concluded that *a jury* is not required to determine whether crimes are "upon the same incident" for the purposes of § 53a-64bb (b), is "incorrect on both constitutional and statutory grounds." After filing his reply brief in this appeal, the defendant filed a motion in which he requested that the present case be heard en banc and that the panel overturn *Morales*. See, e.g., *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 68 n.9, 6 A.3d 213 (2010) ("[T]his court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." [Internal quotation marks omitted.]), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011). A panel of this court denied the motion. Thereafter, at oral argument before this court, the defendant conceded that the present case is controlled by *Morales*. We conclude that *Morales* controls our resolution of this issue.

In *Morales*, as in the present case, the trial court made factual findings as to whether the defendant's convictions of strangulation, unlawful restraint, and assault were "upon the same incident" and, therefore, whether the defendant could be sentenced on all three crimes under § 53a-64bb (b). See *State* v. *Morales*, supra, 164 Conn. App. 159, 160 n.10. The defendant in *Morales* claimed that the trial court's finding that the convictions were not upon the same incident violated *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), wherein the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

that this claim is one that is relevant to the perceived fairness of the judicial system as a whole. See *State* v. *Elson*, 311 Conn. 726, 771, 91 A.3d 862 (2014).

doubt." (Internal quotation marks omitted.) *State* v. *Morales*, supra, 159–60. In *Morales*, this court concluded that the trial court's finding did not violate *Apprendi* because the court "did not find any fact that enhanced the defendant's sentence beyond the statutory maximum permitted by the jury's verdict." Id., 161. Pursuant to our decision in *Morales*, we conclude that, in the present case, it was proper for the trial court, rather than the jury, to determine whether the charges were "upon the same incident" for the purposes of § 53a-64bb (b).

II

The defendant next claims that the trial court violated § 53a-64bb (b) and his right to be free from double jeopardy when it punished him for assault, unlawful restraint and strangulation. Specifically, the defendant argues that "[t]he separate charges of assault and unlawful restraint, as charged in the information and based on the evidence in this case, were not established as wholly separate claims from the strangulation." We disagree.

We begin by noting that the defendant preserved this claim for appeal by filing a posttrial motion for a judgment of acquittal on October 3, 2017, in which he argued: "[T]o be compliant with [§ 53a-64bb (b)], the court should modify the verdict according to required law and direct acquittals to [the charges of assault and unlawful restraint]." See *State* v. *Brown*, 118 Conn. App. 418, 422, 984 A.2d 86 (2009) ("motion for judgment of acquittal on specific charge preserves charge for appeal"), cert. denied, 295 Conn. 901, 988 A.2d 877 (2010). Additionally, the defendant preserved this claim with regard to his right to be free from double jeopardy when, on October 26, 2017, he filed a memorandum in support of his motion for a judgement of acquittal, wherein he stated: "Pursuant to . . . [§] 53a-64bb (b)

. . . *and* the double jeopardy protections provided through the fifth and fourteenth amendments [to] the United States constitution, and the Connecticut constitution, the defendant requests that this court enter acquittals on the convictions rendered on the counts of unlawful restraint . . . and assault . . . .'' (Emphasis added.)

We next assess the defendant's claim with regard to § 53a-64bb (b). Whether the defendant's punishment for these charges violated § 53a-64bb (b) is a question of statutory construction over which this court has plenary review. *State* v. *Miranda*, 142 Conn. App. 657, 661–62, 64 A.3d 1268 (2013), appeal dismissed, 315 Conn. 540, 109 A.3d 452 (2015) (certification improvidently granted). ''When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . 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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and its relationship to exiting legislation and to [common-law] principles governing the same general subject matter . . . .'' (Internal quotation

marks omitted.) *State* v. *Buckland*, 313 Conn. 205, 224, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015).

The relevant text of § 53a-64bb, in which the phrase "the same incident" appears, provides as follows: "(a) A person is guilty of strangulation in the second degree when such person restrains another person by the neck or throat with the intent to impede the ability of such other person to breathe or restrict blood circulation of such other person and such person impedes the ability of such other person to breathe or restricts blood circulation of such other person.

"(b) No person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information. For the purposes of this section, 'unlawful restraint' means a violation of section 53a-95 . . . and 'assault' means a violation of section . . . 53a-61 . . . ."

"The manifest purpose of § 53a-64bb, so written, is to make an act of strangulation in the second degree, as defined in subsection (a) of the statute, separately punishable as a class D felony, whether that act, as committed in the circumstances of a given case, also supports a conviction for assault or unlawful restraint in any degree, or both, but not to enhance the punishment for that act beyond the five year maximum for a class D felony even if, as proven, it is also sufficient to constitute assault and/or unlawful restraint. By that logic, the same incident to which the statute refers is an incident of strangulation, necessarily involving restraint of another person by the neck or throat either with the intent to impede the ability of that person to breathe or to restrict the blood circulation of such other person and which, in fact, either impedes the ability

of such other person to breathe or restricts his blood circulation, not an event or course of conduct in which an act of strangulation occurs, but is preceded, followed or even accompanied by other, separate acts of assault or unlawful restraint not based, in whole or in part, upon one or more acts of strangulation. . . .

"[T]he question that must be answered in ruling on the defendant's challenge to his sentence is whether the factual basis on which he [was charged with assault and unlawful restraint] demonstrated conduct by the defendant, wholly separate from his strangulation of the victim . . . that established his guilt of [assault and] unlawful restraint . . . . If there is such conduct, then the defendant's separate convictions and sentences in this case did not violate § 53a-64bb." *State* v. *Miranda*, supra, 142 Conn. App. 663–64.

In support of his claim, the defendant argues that the fact that the information alleged that all of the crimes occurred in the same location, at the same time, indicates that the charges arose from the same incident. "[W]e [however] are not limited to a review of the state's information in order to determine whether the defendant's crimes arose from the same act or transaction. Our review of the case law leads us to conclude that the fact that the state charged him in the information with committing the subject crimes on the same date and at approximately the same time and place does not dispose of this portion of the . . . analysis; rather, we are permitted to look at the evidence presented at trial." *State* v. *Morales*, supra, 164 Conn. App. 152.

In the present case, although the state alleged in the information that the crimes occurred in the defendant's apartment at approximately 2 a.m. on October 20, 2016, the record reveals numerous criminal acts committed over the course of a longer period of time. In fact, there was evidence that the victim informed the police that the defendant kept her in his apartment against her will for approximately nine hours. For "[a] few hours" of

this approximately nine hour period, the defendant assaulted the victim in different areas of the apartment, specifically, the living room and the bedroom. The assault consisted of the defendant hitting and punching the victim in the head and face. In addition to assaulting the victim, the defendant repeatedly choked her with his hands and, later, a T-shirt, which he had ripped off of the victim's body, making it difficult for the victim to breathe. While the defendant was choking the victim, he stated, "I want to kill you."

The defendant also argues that the victim's testimony "described actions that were wholly intertwined with the actions of . . . strangulation, not separate and discrete crimes." We are unpersuaded by this argument and conclude that the victim's testimony established that the assault and unlawful restraint did not arise from the same incident as the strangulation.

First, we assess whether the defendant's conduct toward the victim established assault on a separate basis from his act of strangulation. Section 53a-61 (a) provides in relevant part: "A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person . . . ." The assault in the present case, which was comprised of the defendant punching and hitting the victim in the head and face, caused the victim physical injury, as demonstrated by the bruising on her face and the abrasions and swelling on her left eye and ear. The victim complained of a headache and dizziness as a result of being punched in the face and the head. Although the assault and strangulation occurred relatively close in time, "[i]t is not dispositive in a double jeopardy analysis that multiple offenses were committed in a short time span and during a course of conduct that victimized a single person." *State* v. *Urbanowski*, 163 Conn. App. 377, 393, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017).

In support of his argument that the acts constituting assault were intertwined with the strangulation, the defendant attempts to distinguish the facts of the present case from those in *State* v. *Urbanowski*, supra, 163 Conn. App. 391. In *Urbanowski*, "the defendant threw the victim across a room in his residence, causing her to strike her head on a wall in the kitchen. Next, the defendant threw the victim into a porch area near the kitchen of the residence, causing further injury to her head. While the victim was still on the porch, the defendant repeatedly punched her in the face. Next, the defendant dragged the victim by her feet outdoors, down the driveway, at which time he punched and kicked the victim about the face and head. Finally, the defendant positioned the victim inside of her automobile, where he held her down and repeatedly strangled her by wrapping his hands around her neck and pushing." Id. This court concluded that the fact that the assault and strangulation involved distinct violent acts that resulted in distinct types of physical injury supported the trial court's conclusion that the charges did not arise out of the same act or transaction. Id., 392. As in *Urbanowski*, in which the assault caused the victim a brain injury and the strangulation caused the victim to be unable to breathe; id.; in the present case, the assault caused the victim a headache, dizziness, bruising on her face and abrasions and swelling on her left eye and ear, whereas the strangulation caused the victim to be unable to breathe and resulted in ligature marks around her neck. Thus, although the conduct constituting assault and strangulation in the present case did not occur in distinct locations, as it did in *Urbanowski*, we conclude that the state presented sufficient evidence to demonstrate that the charges did not arise upon the same act or transaction.

Next, we assess whether the defendant's conduct toward the victim established unlawful restraint on a

separate basis from his acts of strangulation. Section 53a-95 (a) provides: "A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury." "A person restrains another person, within the meaning of § 53a-95, when, inter alia, he restrict[s] a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty . . . by confining him . . . in the place where the restriction commences . . . without consent." (Internal quotation marks omitted.) *State* v. *Miranda*, supra, 142 Conn. App. 664.

In the present case, the defendant restrained the victim in his apartment for approximately nine hours, during which time the victim could not leave because she did not know how to open the front door. Moreover, the defendant had taken the victim's cell phones from her and would not allow the victim to call her son or otherwise seek help. During that nine hour period, the defendant also restricted the victim's movement to smaller areas of the apartment. Specifically, when the victim initially came up to the apartment to use the bathroom, the defendant stood in front of the bathroom door, making it impossible for her to leave the room. When the defendant finally moved aside and allowed the victim to exit the bathroom, he blocked the front door, forcing the victim to remain in the living room. When the victim tried to escape from the apartment, the defendant prevented her from leaving by grabbing the hood of the sweatshirt she was wearing. None of this conduct occurred while the defendant was strangling the victim.

The defendant argues that *Miranda* and *Morales*, wherein this court concluded that there was sufficient evidence to support a charge of unlawful restraint on a separate basis from a charge of strangulation, are distinguishable from the present case. In *Miranda*, there was evidence that the defendant confined the

victim to a bathroom by pointing a flame in her direction. Id., 664–65. In *Morales*, the defendant restrained the victim by "grabb[ing] her" when she tried to escape through the front door. *State* v. *Morales*, supra, 164 Conn. App. 156. Although the defendant in the present case used his body, rather than a flame, to block the victim's exit, his actions, like those of the defendant in *Miranda*, made it impossible for her to leave the bathroom. Thus, contrary to the defendant's argument, we conclude that *Miranda* is factually similar to the present case. Additionally, like the defendant in *Morales*, who grabbed the victim when she tried to escape, there was evidence that the defendant in the present case physically prevented the victim's attempt to escape the apartment through the front door by grabbing the hood of the sweatshirt she was wearing. Thus, we find the defendant's attempts to distinguish these cases unavailing and conclude that the evidence presented at trial was sufficient to support the court's finding that the charges of assault and unlawful restraint were based on separate acts.

We next turn to an evaluation of the defendant's argument that the court violated his right to be free from double jeopardy when it sentenced him for assault, unlawful restraint, and strangulation.

"A defendant's double jeopardy challenge presents a question of law over which we have plenary review. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . .

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Urbanowski*, supra, 163 Conn. App. 387–88.

The defendant's double jeopardy claim, like his claim that the court violated § 53a-64bb (b), is contingent upon whether the charges arose from the same act or transaction. See *State* v. *Miranda*, supra, 142 Conn. App. 665–66. Because we have concluded that the charges at issue in the present case did not arise from the same act or transaction, namely the incident of strangulation, the defendant's double jeopardy claim necessarily fails. The assault and unlawful restraint could have been established through acts distinct from the throttling of the victim.

III

Finally, the defendant claims that the court violated his constitutional rights to confrontation and to present a defense by restricting his cross-examination of the victim. Specifically, the defendant argues that he should have been allowed to question the victim regarding past conduct, including a call she made to the police in May, 2017, concerning a separate incident of assault from that underlying the charges in this case. We disagree.

The following additional facts are relevant to the present claim. On September 19, 2017, the defendant filed a motion to admit evidence regarding the sexual conduct of the victim pursuant to General Statutes § 54-86f.[8] The defendant argued that the evidence he sought

[8] Although the defendant's motion was titled "Motion to Admit Evidence of Sexual Conduct," and cited § 54-86f, which contains the exceptions to the rape shield statute, the evidence he sought to introduce did not relate specifically to the victim's sexual conduct. In fact, at argument on the motion, defense counsel stated "I don't really intend to focus on . . . [the victim's]

to introduce was being "[o]ffered on the issue of the credibility of the [victim]" and was "[s]o relevant and material to a critical issue in the case that excluding it would violate [his] constitutional rights."

On September 25, 2017, before the victim began her testimony, the court heard argument on the motion. At this time, defense counsel proffered: "During some of our investigation of the [victim] in this case, it's come to our knowledge [that] there have been situations in the recent past where [the victim] has done this kind of conduct before, where she has basically lived with individuals for a couple of weeks with the lifestyle that [involves] a lot of drinking and drugs, and once the drinking and drugs sort of run out, there's a dispute between the parties who are engaged in the drinking and drugs, and sometimes the police are called and charges are filed. I have one incident—it's not an incident report but just a teletype where she called the police [in May, 2017]." Defense counsel clarified that the May, 2017 incident did not involve the defendant. The court stated that it would defer ruling on the motion until the state completed its direct examination of the victim.

After the state completed its direct examination of the victim, the defendant renewed his motion outside of the presence of the jury. At this point, defense counsel proffered that he had obtained a copy of the police dispatch report of the victim's May, 2017 police call. Defense counsel further stated: "[The victim] called the police and . . . told [the police dispatcher] that she was punched two days ago and bitten by a party she knows . . . . [T]he [police] dispatcher indicated that she sounded . . . intoxicated. . . . [The victim]

sexual history." Moreover, when the victim called the police in May, 2017, she did not allege that she had been sexually assaulted. Rather, she alleged that someone had punched and bitten her.

call[ed] twenty minutes later, indicating that she was okay and didn't want an officer [dispatched]." Defense counsel argued that the evidence "goes to [the victim's] credibility."

The state objected to the admission of the evidence, and the court sustained the state's objection, stating: "I don't think that it is relevant in any respect to the issues the jury has to determine in this case. It's well after the fact here, and it's just . . . putting her in the light of somebody who drinks, calls the police, maybe changes her mind. It just has nothing to do with anything in this case. . . . And I just don't see the value of it for purposes of the jury deciding what the facts are here and its prejudicial value compared to any probative value . . . [is] extremely high."

As a preliminary matter, we set forth the applicable standard of review. "When a trial court improperly excludes evidence in a criminal matter, the defendant's constitutional rights may be implicated. It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. . . . In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . The right of confrontation is the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . .

"Nevertheless, [i]t is well established that a trial court has broad discretion in ruling on evidentiary matters, including matters related to relevancy. . . . Accordingly, the trial court's ruling is entitled to every reasonable presumption in its favor . . . and we will disturb the ruling only if the defendant can demonstrate a clear

abuse of the court's discretion. . . . Further, [w]e have emphasized in numerous decisions . . . that the confrontation clause does not give the defendant the right to engage in unrestricted cross-examination. . . . A defendant may elicit only relevant evidence through cross-examination. . . . The court determines whether the evidence sought on cross-examination is relevant by determining whether that evidence renders the existence of [other facts] either certain or more probable." (Citations omitted; internal quotation marks omitted.) *State* v. *Thomas*, 177 Conn. App. 369, 384–85, 173 A.3d 430, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017); see also *State* v. *Rivera*, 169 Conn. App. 343, 380, 150 A.3d 244 (2016) ("[a] defendant . . . may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right [to present a defense] is not violated" [internal quotation marks omitted]), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017).

We now turn to our analysis of the defendant's claim. As previously mentioned, he claims that the court violated his constitutional rights to confrontation and to present a defense by excluding evidence of the victim's prior conduct. Although the defendant couches his claim in terms of his constitutional rights, those rights entitle the defendant only to elicit relevant evidence, and thus, we begin this inquiry by assessing whether the evidence at issue in the present case was relevant for the purposes of impeachment, as the defendant argued at trial.

We conclude that the evidence sought regarding the victim's May, 2017 police call was not relevant for the purposes of impeachment. Contrary to the defendant's argument that this call showed that the victim engaged in a pattern of accusing individuals of assault and subsequently recanting such accusations, we observe that there was no proffered evidence that the victim

recanted her statement to the police concerning the May, 2017 incident. When the victim called back the police shortly after her initial report, she stated that she was "okay" and did not want a police officer to be dispatched. In stating that she did not want the police to respond to her call, the victim did not, in any way, deny that the assault had happened or state that she had fabricated her earlier report. Rather, the victim indicated that she had changed her mind about pursuing the matter with law enforcement.[9]

"It is axiomatic that the defendant bears the burden of establishing the relevance of the proffered testimony and that unless a proper foundation is established, the evidence is not relevant." (Internal quotation marks omitted.) *State* v. *Grant*, 68 Conn. App. 351, 358, 789 A.2d 1135 (2002). We conclude that the defendant failed to meet that burden and, therefore, that the court properly determined the evidence regarding the May, 2017 police call to be irrelevant. Thus, the defendant's constitutional rights to confrontation and to present a defense were not violated.

The judgment is affirmed.

In this opinion the other judges concurred.

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[9] The state also argues in its brief that the May, 2017 police call was irrelevant to the facts at issue in the case because it occurred almost seven months after the events giving rise to the present case and because it involved an individual other than the defendant. We, however, note that we must evaluate relevancy in accordance with the theory of admissibility and/or relevancy argued at trial, not on appeal. See *State* v. *Papineau*, 182 Conn. App. 756, 769–70, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018). Thus, we must assess the relevance of the May, 2017 police call exclusively for the purposes of impeachment.