# WATSON REAL ESTATE, LLC *v.* WOODLAND RIDGE, LLC, ET AL.
## (AC 40450)

Alvord, Moll and Bear, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendants for, inter alia, breach of contract. K, a member of the plaintiff, had purchased a lot in a residential subdivision owned by the defendant W Co. In connection therewith, the parties entered into an escrow agreement to cover the costs of, inter alia, the paving of a common driveway to the subdivision. Pursuant to the agreement, W Co. was required to complete the common driveway to the point at which it became an individual driveway for each lot, but was not to put the final layer of pavement on the common driveway until construction of all four houses was complete, as indicated by the issuance of a certificate of occupancy, or five years from the date of the agreement, whichever occurred first. The agreement provided a procedure by which the plaintiff could contract with a third party to complete the work and seek reimbursement from the escrow funds if W Co. failed to complete the work in a timely manner. After the construction of K's home was completed, K contracted and paid a third party to pave the portion of the common driveway that connected to K's individual driveway in order to obtain a certificate of occupancy, and K also paid an unpaid bill incurred by an agent for W Co. related to an easement map for the common driveway. Thereafter, W Co. contracted to have a third party pave the final portion of the common driveway but did not have a second final layer of pavement installed, which K

believed was required under the escrow agreement. The plaintiff never submitted invoices to be reimbursed for the costs it expended in extending the common driveway to the entrance of its property and settling the invoice for the easement map, as required under the escrow agreement, and it, thus, was never reimbursed for those expenditures. The plaintiff subsequently brought this action, claiming, inter alia, that W Co. breached the agreement by failing to install a second, final layer of pavement over the common driveway. The trial court rendered judgment in favor of W Co. and determined that because there was no meeting of the minds as to the specifics of the common driveway, the plaintiff failed to sustain its burden in proving its breach of contract claim. Thereafter, the court denied the plaintiff's request for leave to amend its revised complaint to add a new count of unjust enrichment, and the plaintiff appealed to this court. *Held:*

1. The plaintiff could not prevail on its claim that the trial court improperly failed to find that there was a meeting of the minds between the parties as to the number of layers of pavement to be applied to the common driveway, which was based on its claim that the trial court should have drawn an adverse inference against W Co. for its failure to call a certain witness to rebut certain parol evidence presented by the plaintiff; even if the fact finder could properly draw an adverse inference from a party's failure to call an available witness, it is not required to do so, as the drawing of an adverse inference is permissive rather than mandatory, and, therefore, the trial court's failure to draw such an inference in the present case was not improper as a matter of law.
2. The plaintiff's claim that the trial court improperly failed to find that W Co. breached the escrow agreement by not reimbursing the plaintiff for the costs it had incurred was not reviewable; although the plaintiff correctly asserted that there was undisputed evidence presented at trial establishing that the plaintiff had incurred costs to have the common driveway extended and to settle the invoice for the easement map, the plaintiff did not allege in the revised complaint or at trial that W Co. was contractually required to reimburse the plaintiff for those costs, and it, thus, could not now attempt to recover those sums on appeal by refashioning its request for damages as an independent breach of contract claim that was neither alleged in the complaint nor actually litigated at trial.
3. The plaintiff could not prevail on its claim that the trial court improperly denied its request for leave to amend its revised complaint to add a claim of unjust enrichment related to W Co.'s failure to reimburse the plaintiff for the costs of extending the common driveway and settling the invoice for the easement map; although the record did not reflect the court's reasoning in denying the plaintiff's request for leave to amend its revised complaint, the court nevertheless acted within its discretion in denying the request, as the plaintiff did not seek to amend the complaint until well after the trial had ended and almost four months after the court had rendered its judgment.

Argued September 26, 2018—officially released January 22, 2019

*Procedural History*

Action to recover damages for, inter alia, alleged breach of contract, brought to the Superior Court in the judicial district of Hartford, where the defendant Peter J. Alter filed a counterclaim and cross claim; thereafter, the court, *Elgo*, *J.*, granted the motion for partial summary judgment filed by the named defendant et al. and rendered judgment in part thereon; subsequently, the defendant Leonard Bourbeau was defaulted for failure to plead; thereafter, the matter was tried to the court, *Dubay*, *J.*; judgment in part for the named defendant; subsequently, the court, *Dubay*, *J.*, granted the plaintiff's motion to reargue, but denied the relief requested therein, and sustained the named defendant's objection to the plaintiff's request for leave to amend the revised complaint, and the plaintiff appealed to this court. *Affirmed.*

*Jeffrey J. Mirman*, for the appellant (plaintiff).

*Frank A. Leone*, for the appellee (named defendant).

*Opinion*

BEAR, J. This action arises out of an escrow agreement entered into by the parties in conjunction with the purchase of a lot in a residential subdivision owned by the defendant Woodland Ridge, LLC.[1] The plaintiff, Watson Real Estate, LLC, appeals from the judgment of the trial court, rendered following a bench trial, in favor of the defendant on the plaintiff's breach of contract claim, as well as from the court's subsequent order denying the plaintiff's request for leave to amend its revised complaint.[2] The plaintiff claims on appeal

[1] Daniel Zak, Peter J. Alter, and Leonard Bourbeau were also named as defendants in this action, but they are not participating in this appeal. We, therefore, refer to Woodland Ridge, LLC, as the defendant.

[2] The plaintiff had also appealed from the trial court's rendition of summary judgment in favor of Zak on all counts of the plaintiff's operative, revised complaint directed against him, but this court dismissed that portion of the appeal as untimely.

that the court (1) improperly failed to find that there was a meeting of the minds between the parties as to the specifications of the common driveway that the defendant was required, under the escrow agreement, to install within the subdivision,[3] (2) improperly failed to find that the defendant breached the escrow agreement by not reimbursing the plaintiff for costs it incurred in relation to certain work that the defendant was required under the agreement to complete, and (3) abused its discretion in denying the plaintiff's request for leave to amend its revised complaint to conform to the evidence adduced at trial. We affirm the judgment of the trial court.

The following facts, which either were found by the trial court or are undisputed in the record, and procedural history are relevant to this appeal. The defendant was the owner and developer of a four lot residential subdivision located on the westerly side of Woodland Street in Glastonbury. The subdivision consists of two front lots abutting Woodland Street (lots 1 and 2) and two rear lots abutting the western boundaries of the front lots (lots 3 and 4). A common driveway providing ingress and egress to the subdivision runs west from Woodland Street past the entrances to lots 1 and 2 and terminates at the entrances to the rear lots.

In May, 2006, H. Kirk Watson, a member of the plaintiff,[4] entered into an agreement with the defendant for

[3] The plaintiff also claims that the court improperly failed to find that the defendant breached the escrow agreement by failing to complete the common driveway in accordance with the specifications called for in the agreement. Because we conclude that the court did not err in failing to find a meeting of the minds as to the specifics of the common driveway, we necessarily reject this claim. See *Tedesco* v. *Agolli*, 182 Conn. App. 291, 307, 189 A.3d 672 ("[i]n order for an enforceable contract to exist, the court must find that the parties' minds had truly met" [internal quotation marks omitted]), cert. denied, 330 Conn. 905, 192 A.3d 427 (2018).

[4] Watson testified at trial that the plaintiff was formed in order to purchase the subject property, but there is nothing in the purchase agreement to indicate that he was contracting in his capacity as a member of the plaintiff.

the purchase of lot 1. At the time of the execution of the purchase agreement, the common driveway had been paved only from Woodland Street to a point 118 feet before the entrance to lot 1; the remainder of the driveway, including the portion passing along the entrance to lot 1, remained unpaved. Consequently, Watson, in his capacity as a member of the plaintiff, entered into an agreement with the defendant and Attorney Peter J. Alter to create an escrow fund from a portion of the defendant's proceeds from the sale of lot 1 to assure the defendant's completion of the common driveway and certain other improvements and construction that remained to be completed (escrow agreement). Under the escrow agreement, the defendant was to deposit with the escrow agent, Alter, the sum of $51,000, which represented "a fair estimate of the cost of completion of the [w]ork."

The particular items that remained to be completed were set forth in a punch list that was attached to the escrow agreement as exhibit A. Pursuant to exhibit A, the defendant was required to "complete the common driveway to the point at which it becomes an individual driveway for each approved lot," but the defendant was not to "put the final course of bituminous pavement on the common driveway until construction of all four houses [was] complete (as indicated by the issuance of a certificate of occupancy), or five (5) years from the date of [the escrow agreement], whichever shall first occur." The stated rationale for this delay was to "avoid damage to the final pavement as may be caused by heavy construction vehicles using the driveway during home construction." As Watson later testified at trial, at the time he executed the escrow agreement, he believed that this language required the defendant to initially extend the existing layer of pavement along the remainder of the driveway and, then, at the appropriate time, install a second layer of pavement over the entire

length of the driveway. Per exhibit A, the defendant was also required to install a common electric power service from which each lot could secure individual service.

Because the parties recognized that the work needed to be completed before the plaintiff could secure a building permit and a certificate of occupancy, the escrow agreement provided for a procedure by which the plaintiff could contract with a third party to complete the work and seek reimbursement from Alter out of the escrow funds if the defendant failed to complete the work in a timely manner. Pursuant to this procedure, the plaintiff was to give written notice to the defendant that the plaintiff's construction project required that the work be completed within a reasonable time. If the defendant subsequently failed to complete the work within thirty days, the plaintiff was then authorized to contract for the completion of the work, and, "upon subymission of an invoice or contract for performance from a third party contractor, [Alter] shall advance the funds from the escrow agreement to satisfy the invoice or contract provisions."

Upon the closing of the transaction, Watson took title to the property in the name of the plaintiff and began developing the property. Between the time of closing and the completion of the plaintiff's house, no additional paving of the common driveway was done. Watson was told by the town, however, that in order to obtain a certificate of occupancy, the paved portion of the common driveway needed to be extended to the entrance of the plaintiff's property. Consequently, in 2008, Watson contracted with a third party to pave this portion of the common driveway at a cost of $4914, which Watson paid. The remainder of the driveway, however, remained a dirt road. Watson also paid $530.70 to Megson & Heagle Civil Engineers & Land Surveyors, LLC (Megson & Heagle), to satisfy an unpaid bill

incurred by Daniel Zak, an agent for the defendant, in connection with the preparation of a Connecticut Light and Power Company easement map (easement map) for the common driveway.[5]

Between 2008 and 2011, no additional paving was done on any portion of the common driveway. In September, 2011, Zak notified Alter that the defendant intended to complete all of the remaining work required under the escrow agreement. The defendant, thereafter, engaged R & J Paving, LLC (R & J Paving), to pave the final portion of the common driveway, from the entrance of the plaintiff's property to the entrances to lots 3 and 4. The defendant did not, however, have a second, final layer of pavement installed, which Watson believed was required under the escrow agreement. Upon receipt from Zak of the paving invoice, Alter released $9000 to R & J Paving and divided the remainder of the escrow funds between Zak and Leonard Bourbeau, a member of the defendant. The plaintiff was never reimbursed for the costs it expended in extending the common driveway to the entrance to its property and settling the invoice for the easement map. The plaintiff, however, had not submitted invoices for these expenditures to Alter as required under the escrow agreement.

The plaintiff commenced the present action in March, 2013. In count two of the operative, revised complaint—the only count at issue in this appeal[6]—the plaintiff alleged, inter alia, that the defendant breached the

[5] Megson & Heagle had originally invoiced Zak for $1752, but Watson reached an agreement with Megson & Heagle, whereby he and Kevin Burton, the owner of lot 2, would each pay one third of the billed amount, and Megson & Heagle would write off the remaining third.

[6] The plaintiff also brought a claim against the defendant for violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The trial court, *Elgo*, *J.*, rendered summary judgment in favor of the defendant on this claim. The plaintiff has not appealed from this judgment.

escrow agreement by improperly seeking the release of escrow funds.[7] The plaintiff further alleged that, as a result, it sustained damages, including the costs to complete the work that the defendant had failed to perform.[8] The matter was tried to the court on September 20 and 22, 2016.

At trial, the plaintiff appeared to abandon its claim that the defendant improperly sought the release of the escrow funds. The plaintiff, instead, proceeded under a theory that the defendant breached the escrow

[7] More specifically, the plaintiff alleged that the defendant breached the escrow agreement by "seeking to cause [Alter] to release the funds from escrow while a dispute [was] pending, as set forth in [p]aragraph 12 [of count 2 of the revised complaint], *and regarding the [d]efendant's failure to complete the remaining construction and improvements*, and before the completion of the work . . . ." (Emphasis added.) When considered in isolation, this allegation is arguably ambiguous as to whether the emphasized language states a second specification of breach of contract. Indeed, in its memorandum of decision, the trial court construed this claim as alleging two breaches of the escrow agreement: (1) by improperly seeking the release of the escrow funds; and (2) by failing to complete the common driveway according to the parameters set forth in the agreement. A review of the relevant procedural history, however, makes clear that the allegation, as pleaded, contains only one specification of breach of contract.

Preliminarily, we note that "[t]he interpretation of pleadings presents a question of law over which our review is plenary." *Landry* v. *Spitz*, 102 Conn. App. 34, 41, 925 A.2d 334 (2007). In its original complaint, the plaintiff alleged: "In seeking to cause [Alter] to release the funds from escrow while a dispute is pending, and before the completion of the work [the defendant] breached the escrow agreement." It is clear from this language that the plaintiff's original claim asserted only one breach of the agreement. On May 28, 2013, the defendant requested that the plaintiff revise this allegation by specifying "the particular dispute that was allegedly pending." In response to this request, the plaintiff added the phrase, "and regarding the [d]efendant's failure to complete the remaining construction and improvements." It is, therefore, clear that this additional language serves only to further qualify the nature of the "dispute" referred to in the original complaint and was not meant to add an additional specification of breach of contract.

[8] The plaintiff also alleged in count two that the defendant breached the purchase and sale agreement by failing to pave the common driveway in accordance with the specifications called for in that agreement. The court rendered judgment in the defendant's favor on this claim, and the plaintiff does not challenge it on appeal.

agreement by failing to install a second, final layer of pavement over the common driveway.[9] The principal issue at trial was whether the defendant's obligation under the agreement to install a "final course of bituminous pavement" was intended to require the defendant to apply *two* layers of pavement. On this issue the parties presented contradictory evidence.

In its case-in-chief, the plaintiff presented parol evidence that, according to the plaintiff, tended to show that the parties had intended that the defendant be required to install two layers of pavement. Specifically, the plaintiff elicited the testimony of Watson, who testified that, prior to entering into the purchase agreement for lot 1, he and Zak had discussed the issue of the completion of the common driveway, and Zak had represented that there would be a "first paving and a second paving." Watson testified that he understood Zak's comments to mean that there would first be an "initial layer" of pavement sufficient for use during the construction of houses in the subdivision and that this would eventually be followed by a "final layer" of pavement. According to Watson, the escrow agreement was meant to memorialize this understanding.

As additional support for its position, the plaintiff elicited the testimony of Kevin Burton, the owner of one of the other lots in the subdivision, as well as the testimony of Roger Tabshey, the co-owner of the paving company with which the plaintiff had contracted to extend the common driveway. Burton testified that he

[9] Although this claim was not pleaded in the revised complaint; see footnote 7 of this opinion; it was actually litigated at trial without objection from the defendant. It was, therefore, proper for the court to adjudicate this unpleaded claim. See *Landry* v. *Spitz*, supra, 102 Conn. App. 43–44 ("in the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded cause of action actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity").

purchased lot 2 from the defendant in late 2007 or early 2008 and that he likewise spoke with Zak prior to the purchase. According to Burton, Zak had represented that the entire common driveway would be completed as part of the development and that the "finish point" would be the second coat of the driveway. Tabshey testified that, in building a common driveway within a subdivision, it is common practice to install an initial layer of asphalt and then, after most of the home construction is complete, apply a second, final layer.

In its case-in-chief, the defendant adduced evidence that, according to the defendant, tended to show that the parties had intended for the defendant to install only one layer of pavement. Specifically, the defendant elicited testimony from Alter, who had represented the defendant in connection with the sale of lot 1 and had negotiated the terms of the escrow agreement with the plaintiff's attorney, Nicholas Paindiris. Alter testified that he and Attorney Paindiris had arrived at the $51,000 figure, in part, from a written proposal from R & J Paving to "extend [the] common driveway from [the] existing pavement to [the] edge of [the driveway for] [l]ot #4." Alter further testified that he had faxed a copy of this proposal to Attorney Paindiris before the escrow agreement was executed. The defendant, therefore, took the position in its posttrial brief that the parties had anticipated only an *extension* of the common driveway and not a repaving of the entire driveway.

In addition to the contradictory evidence of the parties' intent concerning the completion of the common driveway, the parties also presented contradictory evidence as to which of the two versions of the escrow agreement admitted at trial represented the complete agreement. The two versions differ in several respects, but the most important difference is that the defendant's version incorporates the R & J Paving proposal as an

attachment.[10] Alter testified that the version of the agreement submitted by the defendant represented the full agreement. Watson, however, testified that the version of the agreement submitted by the plaintiff, which contains no such attachment, was the version that he had executed and represented the complete agreement.

In its memorandum of decision issued on January 10, 2017, the court found that the amount of the escrow fund had been agreed on by the parties' attorneys and had been determined, in part, by the R & J Paving proposal. The court did not, however, make a determination as to whether this proposal had, in fact, been incorporated into the parties' escrow agreement. Rather, the court found that "[u]nless the R & J Paving proposal was part of the [e]scrow [a]greement as claimed by the [d]efendant, the [version of the] [e]scrow [a]greement [that] the [p]laintiff claims was executed by the parties does not contain any specifications regarding the thickness of the paving or the number of layers of bituminous pavement to be applied to the [c]ommon [d]riveway to satisfy the [d]efendant's obligations. The description of the work to be done by the [d]efendant . . . can only be found in [exhibit A to the agreement] which refers unfortunately and ambiguously to a 'final course of bituminous pavement.' " Consequently, the court determined that it could not "find that there was a meeting of the minds as to the specifics of the common driveway" and concluded that the plaintiff had failed to sustain its burden of proving its breach of contract claim. The court, therefore, rendered judgment in favor of the defendant on count two of the plaintiff's revised complaint.

[10] The two versions of the escrow agreement also differ in that the date of execution on the first page of the plaintiff's version is incomplete. Moreover, whereas paragraph 11 of the plaintiff's version identifies the buyer as "Watson Real Estate, LLC," the defendant's version identifies the buyer as "Dr. H. Kirk Watson, Watson Real Estate, LLC."

On January 27, 2017, the plaintiff filed a motion to reargue the court's January 10, 2017 decision, contending that the court had failed to consider certain evidence. Specifically, the plaintiff pointed to Watson and Burton's testimony regarding their conversations with Zak, which, according to the plaintiff, was uncontroverted and established that the defendant had been required under the escrow agreement to install a second layer of pavement. The plaintiff requested that the court, therefore, render judgment in its favor on all issues. Alternatively, the plaintiff requested that the court at least find "that the [d]efendant owes the [p]laintiff for the costs [it] incurred . . . in installing a first course . . . on the common driveway, and for the costs incurred in connection with the [easement] map, and enter judgment in favor of the [p]laintiff . . . ." The court granted the plaintiff's motion and heard additional argument on May 1, 2017, but it ultimately denied the relief requested.

At the May 1, 2017 hearing, the court agreed with the plaintiff that the defendant had been required under the escrow agreement to complete the common driveway and pay for the easement map and that the defendant had incurred costs with respect to these items. Nevertheless, the court disagreed that the plaintiff was entitled to recover these costs from the defendant as part of its breach of contract claim, stating that the plaintiff "was clearly entitled to that money on an extra contractual basis, but I'm not allowed to award it when it's not [pleaded]." The court further noted, however, that it had been "prepared to make a finding that there was unjust enrichment to that extent."

Consequently, on that same date, the plaintiff filed a request for leave to amend its revised complaint to add a new count alleging unjust enrichment. The defendant filed a written objection to this request the following

day, which the court sustained on May 15, 2017. This appeal followed.

I

The plaintiff first claims that the court improperly failed to find that there was a meeting of the minds between the parties as to the number of layers of pavement to be applied to the common driveway. The plaintiff argues that the court "should have drawn an adverse inference against the [defendant] for its failure to rebut [the plaintiff's parol] evidence . . . and should have therefore determined that the parties' [e]scrow [a]greement required the [d]efendant to install a second, final course over the entire length of the common driveway . . . ."[11] Specifically, the plaintiff points to the tes-

[11] The plaintiff also argues, in a conclusory fashion, that the court improperly failed to give any consideration to the plaintiff's parol evidence. We conclude that the plaintiff has not adequately briefed this argument. The plaintiff has not cited any authority nor pointed to anything in the record to support this contention but, rather, relies solely on the bare assertion in its brief that the court "fail[ed] to consider parol evidence." "It is well established that [w]e are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Internal quotation marks omitted.) *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 272 n.8, 146 A.3d 975 (2016). Consequently, we decline to address this argument.

It is difficult, in any event, for an appellant successfully to challenge a fact finder's consideration and weighing of evidence. "[T]he trier [of fact] is bound to consider all the evidence which has been admitted, as far as admissible, for all the purposes for which it was offered and claimed. . . . [W]e are not justified in finding error upon pure assumptions as to what the court may have done. . . . We cannot assume that the court's conclusions were reached without due weight having been given to the evidence presented and the facts found. . . . Unless the contrary appears, this court will assume that the court acted properly. . . . [Thus, if] . . . [a] statement [by the court may] suggest that the court did not consider [certain] testimony, we . . . are entitled to presume that the trial court acted properly and considered all the evidence." (Citations omitted; internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 229–30, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017).

timony of Watson and Burton regarding their conversations with Zak and the testimony of Tabshey regarding general practices in the paving industry. As the plaintiff notes, none of this testimony was directly controverted by the defendant at trial, despite Zak being present throughout the trial. The plaintiff claims that the court's failure to draw an adverse inference in such circumstances constituted an error of law. We disagree.

We begin by setting forth our standard of review. Preliminarily, we note that the issue of whether the parties' minds had truly met, as required for the formation of an enforceable contract, is a question of fact subject to the clearly erroneous standard of review. See *Murallo* v. *United Builders Supply Co.*, 182 Conn. App. 594, 600, 190 A.3d 969, cert. denied, 330 Conn. 913, 193 A.3d 49 (2018). In the present case, however, the plaintiff does not argue that the underlying facts found by the court fail to support its conclusion; nor does the plaintiff assign as clear error any of the court's factual findings on this issue. Rather, the plaintiff limits its claim on appeal to the narrow issue of whether the court's failure to draw an adverse inference was improper *as a matter of law*. Consequently, our review of this claim is plenary. See *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 643, 161 A.3d 562 (2017) (claim that court's use of adverse inference constituted error of law was subject to plenary review).

For decades, Connecticut recognized the "*Secondino*"[12] or "missing witness" rule, which "sanctioned a jury instruction that [t]he failure of a party to produce as a witness one who [1] is available and [2] . . . naturally would be produced permits the inference that such

[12] See *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 675, 165 A.2d 598 (1960), overruled in part by *State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000).

witness, if called, would have exposed facts unfavorable to the party's cause." (Internal quotation marks omitted.) *State* v. *Malave*, 250 Conn. 722, 728–29, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000). "That instruction . . . is now, for various policy reasons, prohibited by statute in civil cases; General Statutes § 52-216c; and by [Supreme Court] precedent in criminal cases. . . . Despite the statute and *Malave*, however, the substance of the 'missing witness' rule remains intact . . . . [A]lthough § 52-216c and *Malave* restricted the means by which the trier of fact is apprised of its ability to draw an adverse inference, it is clear that it remains permitted to do so." (Citation omitted; footnotes omitted.) *In re Samantha C.*, 268 Conn. 614, 637–38, 847 A.2d 883 (2004). This inference, however, "is a permissive rather than a mandatory one—that is, one which the [trier of fact] at all times is free to accept or to reject . . . ." *State* v. *Taylor*, 239 Conn. 481, 492, 687 A.2d 489 (1996), cert. denied, 521 U.S. 1121, 117 S. Ct. 2515, 138 L. Ed. 2d 1017 (1997). In other words, even if the fact finder may properly draw an adverse inference from a party's failure to call an available witness, it is certainly not *required* to do so. Consequently, we cannot conclude that the trial court's failure to draw such inference in the present case was improper as a matter of law.[13] The plaintiff

[13] Moreover, under the particular circumstances in the present case, it would not have been reasonable for the court to draw an adverse inference from the defendant's failure to offer Zak as a witness because Zak was equally available to both parties. Our Supreme Court has held on multiple occasions that "[w]hen a witness is equally available to both parties no inference unfavorable to either may be drawn." (Internal quotation marks omitted.) *State* v. *Kish*, 186 Conn. 757, 771, 443 A.2d 1274 (1982) (trial court properly refused to instruct jury that it might draw adverse inference from state's failure to call victim's husband as witness where victim's husband was equally available to both parties and was, in fact, in courtroom); *State* v. *Rosa*, 170 Conn. 417, 431, 365 A.2d 1135 (same), cert. denied, 429 U.S. 845, 97 S. Ct. 126, 50 L. Ed. 2d 116 (1976). Although the Supreme Court subsequently stated, in dictum, that "as long as the *Secondino* adverse inference instruction remains viable in Connecticut . . . the mere fact that a witness is equally available to both parties does not preclude a trial court

does not otherwise challenge the court's findings and conclusions with respect to this issue.

II

The plaintiff next claims that the trial court improperly failed to find that the defendant breached the escrow agreement by not reimbursing the plaintiff for the costs it had incurred. As the plaintiff correctly asserts, there was undisputed evidence presented at trial establishing that the plaintiff had incurred costs to have the common driveway extended and to settle the invoice for the easement map. The plaintiff appears to argue that, because these tasks were the responsibility of the defendant under the agreement, the defendant was, therefore, *contractually* required to reimburse the

from delivering a *Secondino* charge"; (citations omitted) *Hines* v. *Saint Vincent's Medical Center*, 232 Conn. 632, 637 n.8, 657 A.2d 578 (1995); this dictum is no longer persuasive in light of the court's subsequent abandonment of the *Secondino* rule in *State* v. *Malave*, supra, 250 Conn. 728. Additionally, Justice Berdon, the author of the majority opinion in *Hines*, explicitly disavowed this dictum the following year in his dissent in *State* v. *Taylor*, 239 Conn. 481, 509 n.4, 687 A.2d 489 (1996), cert. denied, 521 U.S. 1121, 117 S. Ct. 2515, 138 L. Ed. 2d 1017 (1997) (*Berdon*, *J.*, dissenting), wherein he opined that, "[i]n cases in which a witness is equally available to both parties, there is no logical basis for allowing an inference to be drawn from one party's failure to call that witness when the other party could have just as easily called that same witness. This is especially so because we have abandoned the voucher rule—that is, the common law rule that one could not impeach the credibility of his own witness." See also *State* v. *Malave*, supra, 733 ("In view of [the abandonment of the voucher rule] . . . [i]f a witness is available, he is equally available to both sides. If a witness has information favorable to one side, why shouldn't that side call that witness and bring out that information instead of relying on a negative inference based on ignorance that such a witness might have some unspecified information that might be unfavorable to the other party?" [Citations omitted; footnote omitted; internal quotation marks omitted.]).

In the present case, Zak was not only available for both parties to call as a witness, but he was in fact called as a witness and examined by the plaintiff. The plaintiff, however, did not seek to elicit any testimony from Zak regarding his conversations with Watson and Burton. In such circumstances, it would have been unreasonable for the court to draw an adverse inference against the defendant for failing to call Zak as a witness.

plaintiff for the costs it incurred in performing these tasks itself. Because this claim was not alleged in the revised complaint nor asserted at trial, we decline to review it.

"[T]he principle that a plaintiff may rely only upon what [it] has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of [its] complaint. . . . What is in issue is determined by the pleadings and these must be in writing. . . . Once the pleadings have been filed, the evidence proffered must be relevant to the issues raised therein." (Internal quotation marks omitted.) *Foncello* v. *Amorossi*, 284 Conn. 225, 233, 931 A.2d 924 (2007). In other words, "[a] plaintiff may not allege one cause of action and recover upon another." (Internal quotation marks omitted.) *Alaimo* v. *Alaimo*, 179 Conn. App. 769, 771, 181 A.3d 149 (2018). Indeed, "[a] judgment upon an issue not pleaded would not merely be erroneous, but it would be void." (Internal quotation marks omitted.) *Foncello* v. *Amorossi*, supra, 233. Consequently, our Supreme Court has stated that appellate courts have "no authority to consider a claim on appeal that was not alleged in the pleadings." Id., 235; see also Practice Book § 60-5 ("[an appellate] court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"); *Saye* v. *Howe*, 92 Conn. App. 638, 642, 886 A.2d 1239 (2005) ("claims not presented to or addressed by the trial court are not properly before us and, thus, not ordinarily considered by this court").

In the revised complaint in the present case, the plaintiff alleged only that the defendant breached the escrow agreement by improperly seeking the release of escrow funds. See footnote 7 of this opinion. At trial, the plaintiff additionally claimed that the defendant breached the agreement by failing to install a second, final layer of pavement over the common driveway. Although this

additional claim was not pleaded in the complaint, it was actually litigated at trial without objection from the defendant and was, therefore, properly before the court. See footnote 9 of this opinion. Conversely, at no point during the trial did the plaintiff claim that the defendant breached the escrow agreement by failing to reimburse the plaintiff for the costs it incurred in extending the common driveway and settling the invoice for the easement map.[14] Nor did the plaintiff reference such a claim in its posttrial brief. In its posttrial brief, the plaintiff contended only that it was entitled to recover these sums as *damages* for the defendant's failure to install a second layer of pavement. Because the trial court determined that the plaintiff had failed to meet its burden of proving this claim, it did not award the plaintiff any damages. The plaintiff cannot now attempt to recover these sums on appeal by refashioning its request for damages as an independent breach of contract claim that was neither alleged in the complaint nor actually litigated at trial. We, therefore, decline to review this claim. See *Foncello* v. *Amorossi*, supra, 284 Conn. 235 (declining to review plaintiff's claims alleging invasion of privacy for giving unreasonable publicity to plaintiff's private life where plaintiff had failed to allege invasion of privacy on that ground in his amended complaint).

III

Finally, the plaintiff claims that the trial court erred in denying its request for leave to amend its revised complaint to add a claim of unjust enrichment based on the defendant's failure to reimburse the plaintiff for the costs of extending the common driveway and settling the invoice for the easement map. The plaintiff

[14] Indeed, as the plaintiff declares in its reply brief on appeal, "the entire theory of the case . . . was that [the defendant] failed to apply a second coat of pavement over the entire length of the common driveway."

argues that it was an abuse of discretion for the court to deny the plaintiff's request where the court had previously recognized, at the hearing on the plaintiff's motion to reargue, that the plaintiff "was clearly entitled to this money on an extra contractual basis." We disagree.

"We review a trial court's decision to deny a request to amend a complaint for an abuse of discretion." *Motzer* v. *Haberli*, 300 Conn. 733, 747, 15 A.3d 1084 (2011). "The law is well-settled that belated amendments to the pleadings rest in the sound discretion of the trial court. . . . [Although] our courts have been liberal in permitting amendments . . . this liberality has limitations. Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial. . . . On rare occasions, this court has found an abuse of discretion by the trial court in determining whether an amendment should be permitted . . . *but we have never found an abuse of discretion in denying an amendment on the eve of trial, long after the conclusion of pretrial proceedings*." (Emphasis added; internal quotation marks omitted.) *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 691, 974 A.2d 764, cert. denied, 293 Conn. 916, 979 A.2d 488 (2009).

Turning to the present case, we first note that the record does not reflect the court's reasoning in denying the plaintiff's request for leave to amend its revised complaint. See *Bayview Loan Servicing, LLC* v. *Park City Sports, LLC*, 180 Conn. App. 765, 781, 184 A.3d 1277 ("[i]t is well established that the appellant bears

the burden of providing an appellate court with an adequate record for review" [internal quotation marks omitted]), cert. denied, 330 Conn. 901, 192 A.3d 426 (2018). Nevertheless, we have no difficulty in concluding that the court acted within its discretion in denying the plaintiff's request, as the plaintiff did not seek to amend the complaint until May 1, 2017—well after the trial had ended and almost four months after the court had rendered its judgment. See *Motzer* v. *Haberli*, supra, 300 Conn. 747 ("[b]ecause the plaintiff made the request [for leave to amend his complaint] after the start of the trial, we conclude that the trial court acted well within its discretion in denying the plaintiff's request"). We, therefore, reject this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

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## BRIAN FITZGERALD ET AL. *v.* CITY OF BRIDGEPORT ET AL.
## (AC 40130)

Alvord, Prescott and Flynn, Js.

*Syllabus*

The plaintiffs sought a temporary injunction to prevent the defendants from making appointments to the position of police captain based on the results of a police captain examination. In 2008, the defendant city of Bridgeport had twenty-one lieutenant positions within its police department. In 2010, a request from the police chief for an increase to twenty-two lieutenant positions was approved, even though the city charter required the submission of such a request to the city council for approval, and A was promoted to the rank of lieutenant, as the twenty-second lieutenant. In November, 2010, the employment of B as a lieutenant was terminated, leaving twenty-one members holding the rank of lieutenant until November, 2012, when M retired, which left twenty members holding the position of lieutenant. In February, 2014, C was promoted to lieutenant, and in May, 2015, the defendant Civil Service Commission announced that it would conduct a promotional examination for the position of captain, specifying that April 22, 2012, was the date by which candidates for the captain examination were required to have occupied

with tenure a position of lieutenant for not less than one year. The time that C occupied, with tenure, the position of lieutenant was calculated by the defendant D, the personnel director for the city, from the date on which C would have been appointed to lieutenant to fill the vacancy in the position held by B, which resulted in a determination in September, 2015, that C was eligible to take the captain examination. Underlying the calculation of C's seniority was the determination that the department had an authorized strength of twenty-two lieutenant positions, as no vacancy in the twenty-first lieutenant position occurred until M retired in November, 2012, and if C's seniority had been determined from that date, he would not have been eligible to sit for the examination. The captain examination was held in October, 2015, and C scored seventh. The plaintiffs thereafter brought this action, alleging that C lacked the necessary qualifications to sit for the captain examination. Specifically, they claimed that because the city council had not approved an increase in the number of lieutenant positions from twenty-one to twenty-two, C's seniority was improperly calculated on the basis of the vacancy occurring in the twenty-second lieutenant position created by the termination of B in November, 2010. After the trial court dismissed a counterclaim filed by C, the matter was tried to the court, which concluded that C did not meet the eligibility requirements for the captain examination and should not have been permitted to take the examination, and ordered C's name stricken from the promotion list. On C's appeal to this court, *held:*

1. The trial court properly dismissed C's counterclaim for lack of subject matter jurisdiction on the basis of his failure to exhaust his administrative remedies by appealing the time in grade date established in the May, 2015 announcement, as C's claim of error in the commission's selection of the date on which the vacancy in the rank of captain occurred was subject to the exhaustion requirement: although C claimed that he had no reason to appeal to the commission because he was not aggrieved by D's determination of his eligibility to take the captain's examination, C could not have been certain of his eligibility to take the captain examination from the date of the announcement in May, 2015, until after D's determination regarding C's eligibility in September, 2015, and despite that uncertainty he did not appeal to the commission the date of vacancy determination pursuant to the city charter, and the defendants had not presented this court with any reason why the date of vacancy was not the proper subject of an appeal before the commission, as the commission had the authority and expertise necessary to review that issue and to afford C the relief he sought from the court, and if C had presented to the commission his claim as to the proper date in the vacancy in the rank of captain, he might have received a satisfactory administrative disposition of that question and avoided the need for judicial review; moreover, the policies underlying the exhaustion doctrine would be best served by requiring C to bring his challenge to the

date of vacancy before the commission, as that determination was a fact bound inquiry, which the commission was uniquely qualified to undertake, and C, a municipal employee candidate for promotion to captain, clearly possessed a specific, personal and legal interest in the date establishing the candidates' eligibility for the captain examination, and that interest was adversely affected by the date selected, which was sufficient to establish aggrievement; accordingly, because C could have obtained review of the date of vacancy by way of an appeal to the commission pursuant to the city charter, he was required to do so before seeking redress in court.

2. The defendants' claim that the trial court improperly concluded that the twenty-second lieutenant position was not legally established under the city charter was unavailing, as the commission lacked the authority to increase the number of lieutenants; the plain language of the charter required that the city council establish the new lieutenant position, and the trial court properly concluded that the city council never established the twenty-second lieutenant position, as the defendants did not contest the trial court's finding that the commission never submitted its action authorizing the creation of the twenty-second position to the city council for approval, D did not submit any request or notification to the city council that the commission had approved the creation of the twenty-second lieutenant's position, and the informal recognition of an accomplished increase in the number of lieutenant positions did not satisfy the charter's mandate that the council establish any such positions.

3. The defendants could not prevail on their claim that even if the trial court properly determined that the twenty-second lieutenant position was not legally established under the charter, the court's conclusion that C was ineligible to sit for the captain examination constituted an improper sanction of an illegal appointment; although there did not appear to be a current ordinance addressing the number of positions in the department, the commission was unauthorized to fix the number of positions within the department, as the council was responsible for establishing new positions under the charter, and because the mere fact that an employee is occupying a position illegally does not permit the personnel director to consider that position vacant for purposes of determining the number of vacant positions within a class, A's position in the class of lieutenant remained filled despite the fact that his position initially had been created in violation of the city charter, and, thus, promoting C to a lieutenant position upon the vacancy created by B's termination would have constituted an illegal overfill.

Argued October 10, 2018—officially released January 22, 2019

*Procedural History*

Action for a temporary injunction to prevent, inter alia, the defendants from making appointments to the

position of police captain based on the results of a police captain examination, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Manuel Cotto filed a counterclaim; thereafter, the court, *Kamp*, *J.*, granted the plaintiff's motion to dismiss the counterclaim; subsequently, the matter was tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment for the plaintiffs, from which the defendant Manuel Cotto appealed to this court. *Affirmed.*

*Barbara M. Schellenberg*, with whom was *Richard L. Albrecht*, for the appellant (defendant Manuel Cotto).

*Thomas W. Bucci*, for the appellees (plaintiffs).

*John P. Bohannon, Jr.*, for the appellees (named defendant et al.).

*Opinion*

ALVORD, J. The defendant Manuel Cotto[1] appeals from the judgment of the trial court dismissing his counterclaim and in favor of the plaintiffs.[2] The court struck Cotto's name from the eligibility list for promotion to police captain after concluding that Cotto had not met the eligibility requirements and should not have been

[1] The city of Bridgeport, the Civil Service Commission of the City of Bridgeport, and David J. Dunn were also named as defendants in this action and adopted the brief of Manuel Cotto on appeal. Rebecca Garcia, Lonnie Blackwell, Stephen Shuck, and Richard Azzarito were also named as defendants in this action but did not appear before the trial court and have not participated in this appeal. We, therefore, refer in this opinion to Cotto, the city of Bridgeport, the Civil Service Commission of the City of Bridgeport, and Dunn, collectively as the defendants and individually by name where appropriate.

[2] The plaintiffs in this action are nine members of the Bridgeport Police Department who served in the position of lieutenant. They are Brian Fitzgerald, Brett Hyman, William Mayer, Albert Karpus, Steven Lougal, John Cummings, Kevin Gilleran, Mark Straubel, and Raymond Masek. Subsequent to the commencement of this action, some of the nine, including Fitzgerald, Straubel, and Lougal, were promoted to the position of captain.

allowed to take the captain examination. On appeal, Cotto claims that the court improperly (1) dismissed his counterclaim for lack of subject matter jurisdiction on the basis that he had failed to exhaust his administrative remedies, and (2) determined that a twenty-second lieutenant position was not established as required pursuant to § 206 (d) of the charter of the city of Bridgeport. He claims in the alternative that even if the trial court properly determined that the twenty-second lieutenant position was not established as required, the court's conclusion that he was ineligible to take the captain examination constituted an improper sanction of an illegal appointment. We affirm the judgment of the court.

The following facts, either found by the court or stipulated to by the parties,[3] and procedural history are relevant to this appeal. The defendant city of Bridgeport (city) is a municipal corporation and has as its governing document the charter of the city of Bridgeport (charter). Section 206 (a) (3) and (4) of the charter set forth the powers and duties of the defendant Civil Service Commission (commission), including "mak[ing] investigations, either on petition of a citizen or on its own motion, concerning the enforcement and effect of this chapter, requir[ing] observance of its provisions and the rules and regulation made thereunder," and "hear[ing] and determin[ing] complaints or appeals respecting the administrative work of the personnel department, appeals upon the allocations of positions or concerning promotions, the rejection of an applicant for admission to an examination and such other matters as may be referred to the commission by the personnel director." The personnel director for the city, defendant David J.

[3] The parties filed a stipulation of facts in the trial court, which incorporated the stipulated facts in full into its memorandum of decision.

Dunn, is responsible for formulating and holding competitive tests to determine the qualifications of persons seeking employment or promotion with the city.[4]

Section 211 of the city charter governs eligibility for promotion tests. Subsection (a) of § 211 provides in relevant part that a promotion test shall be open to those "who have held a position for a year or more in a class or rank previously declared by the commission to involve the performance of duties which tend to fit the incumbent for the performance of duty in the class or rank for which the promotion test is held. . . . A person who has served less than one year in a lower grade shall not be eligible for a promotion test." Section 211 (b) of the charter provides in relevant part that "[w]hen a position in a promotion class shall become vacant . . . the personnel director shall, within one hundred and twenty days of the date of the creation of the vacancy, hold a promotion test for such class."

Joseph L. Gaudett, Jr., became the chief of the city's police department (department) in October, 2008.[5] At the time of Gaudett's appointment, there were twenty-one lieutenant positions within the department. A nationally recognized police think tank, the Police Executive Research Forum (PERF), recommended that the city increase the number of lieutenant positions to twenty-three. In January, 2010, Gaudett wrote to Dunn to request that the number of lieutenants in the table of organization be increased from twenty-one to twenty-two. The city's chief administrative officer, Andrew Nunn, approved Gaudett's request. Gaudett appeared

[4] Specifically, he has the responsibility to "provide for, formulate and hold competitive tests to determine the relative qualifications of persons who seek employment or promotion to any class of position and as a result thereof establish employment and reemployment lists for the various classes of positions . . . ." Bridgeport Charter, c. 17, § 207 (6).

[5] Gaudett served as department chief from October, 2008 through March 1, 2016.

on February 9, 2010, before the commission, which voted to approve Gaudett's request. A "civil service position request form," requested the creation of and funding for a twenty-second lieutenant position, and was signed by Mayor Bill Finch, Nunn, Gaudett, and Dunn.

Section 206 (d) of the charter provides that "[w]henever the appointing authority of any department desires to establish a new permanent position in the classified service, the personnel director shall make or cause to be made an investigation of the need of such position and report his findings to the commission. If upon consideration of the facts the commission determines that the work of the department cannot be properly and effectively carried on without the position, it shall classify and allocate the new position to the proper class after the position has been established by the city council. If the commission determines that the position is not necessary and that the work of the department can be properly and effectively carried on without the position, it shall promptly transmit such determination to the city council. Such determination by the commission shall be final unless the city council, within two months of the date of such disapproving action by the commission, shall by its duly enacted resolution approve the establishment of such position. In such event the final action of the city council shall be promptly transmitted to the commission and the commission shall allocate the position or positions therein approved to its proper class in the classification plan. All classifications and allocations made pursuant to this subsection shall be based on the same procedure and formula called for in subsections (a) and (b) of this Section."

The commission did not submit its action authorizing the creation of the twenty-second position to the city council for approval. Nevertheless, Sergeant Richard Azzarito was promoted to the rank of lieutenant, as

the twenty-second lieutenant, in February, 2010, and remains a lieutenant. That is, beginning on March 18, 2010, there were twenty-two members of the department holding the rank of lieutenant, although there were only twenty-one lieutenant positions in the city budget.[6] The city used the reallocation of funds from a vacant emergency medical technician supervisor position to fund the twenty-second lieutenant position in 2010. On November 16, 2010, Christine Burns' employment as a lieutenant was terminated.[7] After her termination, there were twenty-one members of the department holding the rank of lieutenant until November 24, 2012, on which date lieutenant Matthew Cuminotto retired. After Cuminotto's retirement, there were twenty members of the department holding the rank of lieutenant. Since November 16, 2010, the department has never had more than twenty-one members holding the rank of lieutenant.

In November, 2013, Dunn administered a promotional examination for the class of lieutenant. Cotto, a well educated, second-generation city police officer who had served as a sergeant since March, 2008, scored first on the examination and was promoted to lieutenant on February 10, 2014.

On May 4, 2015, the commission announced that it would conduct a promotional examination for the position of captain. The announcement provided that the examination was "open to current members of the Bridgeport Police Department, who have occupied with tenure, a position of Police Lieutenant for not less than one year, prior to April 22, 2012." The captain examination was scheduled for October 21, 2015.

[6] The city has never budgeted more than twenty-one lieutenant positions, either in the 2009-2010 fiscal year, or in any fiscal year thereafter.

[7] Burns grieved her termination. Ultimately, she was reinstated but demoted to the position of patrol officer.

As previously discussed, if a position in a promotion class becomes vacant, the personnel director is required, pursuant to § 211 (b) of the charter, to hold a promotion test within 120 days of the date of vacancy in that class if there is no appropriate reemployment or employment list. Dunn did not hold an examination within 120 days of the date of vacancy in the captain class. As a result, Dunn was required, pursuant to a collective bargaining agreement between the city and the police union, to reconstruct the examination eligibility list to ensure that only those persons who satisfied the eligibility requirements on the date the test was required to be administered were permitted to take the examination.

The commission selected April 22, 2012, as the date by which candidates for the captain examination were required to have "occup[ied] with tenure, a position of Police Lieutenant for not less than one year." Dunn, considering the date that Burns' employment was terminated on November 16, 2010, calculated Cotto's time in grade as a lieutenant from the date on which Cotto would have been appointed lieutenant to fill the vacancy in the position held by Burns. Underlying Dunn's calculation of Cotto's seniority was his determination that the department had an authorized strength of twenty-two lieutenant positions, as no vacancy in the twenty-first lieutenant position occurred until Cuminotto retired on November 24, 2012. Dunn found that Cotto possessed tenure in the rank of lieutenant from March 16, 2011, which was 120 days following November 16, 2010, the date on which Burns' employment was terminated. Thus, Dunn determined that Cotto was eligible to take the captain examination because he had occupied a position of lieutenant for not less than one year as of April 22, 2012. Dunn announced his decision to that effect on September 23, 2015. The next day, the plaintiffs appealed Dunn's decision to the commission,

which denied the appeal on October 13, 2015. The captain examination was held on October 21, 2015, and Cotto scored seventh.

The plaintiffs commenced the present action alleging, inter alia, that Cotto lacked the necessary qualifications to sit for the captain examination. They alleged that because the city council had not approved an increase in the number of lieutenant positions from twenty-one to twenty-two, Dunn had improperly calculated Cotto's seniority on the basis of the vacancy occurring in the twenty-second lieutenant position created by the termination of Burns on November 16, 2010. Had Dunn properly calculated Cotto's seniority from the date of vacancy in the twenty-first position, Cotto would not have been eligible to sit for the examination. The plaintiffs sought temporary and permanent injunction and other relief.

On April 11, 2016, the city, the commission, and Dunn collectively filed an answer. That same day, Cotto individually filed an answer and counterclaim. The plaintiffs filed a motion to dismiss Cotto's counterclaim, which was granted on July 1, 2016. This action was tried to the court on September 14, 2016, and the parties filed posttrial briefs thereafter. On January 31, 2017, the court issued a memorandum of decision, in which it concluded that Cotto did not meet the eligibility requirements for the captain examination and, thus, should not have been permitted to take the examination. The court, accordingly, ordered Cotto's name stricken from the promotion list.

The court first analyzed whether the twenty-second lieutenant position had been created in conformity with the law, such that a vacancy in that position could serve as the basis for calculating Cotto's time in grade as a lieutenant. The court found that neither the commission nor Dunn had conducted an investigation of the need for such a position, as required by § 206 (d) of the

charter.[8] Moreover, the court found that the city council had never established the twenty-second position and that the commission lacked authority to approve Gaudett's request to increase the number of lieutenant positions from twenty-one to twenty-two. Thus, the twenty-second lieutenant position was not properly established, and Dunn's position that the department had an authorized strength of twenty-two lieutenant positions was incorrect. That incorrect determination led Dunn to calculate Cotto's time in grade of lieutenant from the date Burns' employment was terminated on November 16, 2010. After that date, the department was at its authorized strength of twenty-one lieutenants. Thus, the court found that no authorized lieutenant position became available until Cuminotto retired on November 24, 2012, the date from which Cotto's time in grade should have been calculated. Because Cotto had occupied the position of lieutenant for less than one year as of April 22, 2012, the court concluded that he was ineligible to sit for the captain examination and ordered his name struck from the eligibility list. Additional facts and procedural history will be set forth as necessary.

I

The defendants first claim that the trial court improperly dismissed Cotto's counterclaim on the basis of a failure to exhaust his administrative remedies. We disagree.

The following additional facts and procedural history are relevant to this claim. In Cotto's counterclaim, he alleged that April 22, 2012, the date by which candidates for the captain's examination were required to have "occup[ied] with tenure, a position of Police Lieutenant

[8] The court additionally rejected, as not supported by the evidence, Dunn's determination that, at all times relevant, there had been twenty-two lieutenant positions within the department.

for not less than one year," was incorrectly determined. He maintained that in 2001, the city council had raised the authorized number of captain's positions from nine to thirteen. Cotto claimed that although several captain vacancies had occurred between 2001 and 2009, the chief of police failed to serve notice on the personnel director within thirty days of each vacancy as to whether he desired to fill the vacancies. Accordingly, three captain positions were alleged by Cotto to have been abolished, returning the authorized number of captain positions to nine.[9] Cotto claims that the commission and the chief of police nevertheless continued to appoint captains, one of which was James Baraja, in excess of the nine authorized positions. Baraja again was promoted, to deputy chief, on December 22, 2011. The commission considered that date as the date of the vacancy in the captain's position and identified it as such in the May 4, 2015 revised announcement that it would conduct a captain examination. According to Cotto, the Baraja captain vacancy "was a phantom vacancy" created by an unauthorized captain appointment, and the first authorized vacancy in a captain position did not occur until Captain Viadero retired on June 28, 2014. Cotto alleged that he had "over a year seniority as a lieutenant measured from the Cuminotto vacancy of November 24, 2012, plus 120 days, to the retirement of Captain Viadero, plus 120 days."

In the event the court were to render judgment for the plaintiffs on their complaint, Cotto requested that the court then void the current promotion list and the promotions made therefrom and order the personnel director to convene a new promotional examination for the rank of captain tied to the proper vacancy dates.

On April 12, 2016, the plaintiffs filed a motion to dismiss Cotto's counterclaim on the basis that the court

[9] Cotto did not include any allegations resolving this numerical discrepancy.

lacked subject matter jurisdiction over it. Specifically, they argued that Cotto failed to appeal to the commission from the decision to use the date on which Baraja was promoted to deputy chief, rather than the date Viadero retired, to assess the eligibility of the candidates for promotion to captain. Cotto's failure to appeal from that decision, according to the plaintiffs, required that his counterclaim be dismissed for failure to exhaust his administrative remedies. Cotto filed a memorandum in opposition to the plaintiffs' motion to dismiss, in which he argued that the exhaustion requirement was inapplicable because he had received a favorable ruling from Dunn that he had sufficient time in grade to take the captain's examination. Because he was determined to be eligible to take the examination, Cotto claimed that he had no reason to appeal to the commission. In their reply brief, the plaintiffs argued: "When the plaintiffs filed their appeal with the civil service commission raising Cotto's eligibility, he became fully aware that his eligibility would be jeopardized if he did not challenge the April 22, 2012, date, since he would not have the requisite one year tenure as of that date if the plaintiffs succeed in their claim. Nevertheless, he remained silent, and accepted the . . . commission's determination, exposing him to disqualification based on his eligibility being measured from his filling a nonexistent twenty-second lieutenant's position."

After considering the motion on the papers, the court issued an order granting the plaintiffs' motion to dismiss Cotto's counterclaim. It reasoned: "While Cotto's argument that he had no reason to appeal a decision in his favor is logical, the court is not aware of any Connecticut case law that supports the proposition that a favorable decision renders the exhaustion requirement not applicable. Our Supreme Court has defined exceptions to the exhaustion requirement narrowly, and the defendant's failure to appeal the time in grade date to the

. . . commission is not exempted from the exhaustion requirement."

On appeal, the defendants claim that the exhaustion requirement is not applicable because Cotto was not aggrieved by Dunn's decision that he possessed the necessary time in grade to take the captain examination. They claim that the court's conclusion was based on an illogical interpretation of the appeal provision contained in § 206 (a) (4) of the charter. The plaintiffs respond that because Cotto failed to challenge the April 22, 2012 date, either by way of his own appeal to the commission or during the plaintiffs' appeal of Dunn's decision to the commission, the court properly dismissed his counterclaim on the basis that he had failed to exhaust his administrative remedies.

We first set forth our standard of review and relevant legal principles. "In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Because the exhaustion [of administrative remedies] doctrine implicates subject matter jurisdiction, [the court] must decide as a threshold matter whether that doctrine requires dismissal of the [plaintiff's] claim. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Gerardi* v. *Bridgeport*, 99 Conn. App. 315, 317, 913 A.2d 1076 (2007).

"Under our exhaustion of administrative remedies doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and

until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed." (Internal quotation marks omitted.) Id., 317. "The exhaustion doctrine is rooted in both prudential and constitutional considerations. As our Supreme Court has explained, separation of powers principles [underlie] the exhaustion doctrine, namely, to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review. . . . Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to [the legislature's] delegation of authority to coordinate branches of [g]overnment, that *agencies, not the courts, ought to have primary responsibility for the programs that* [*the legislature*] *has charged them to administer*. . . . Therefore, exhaustion of remedies serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities." (Emphasis in original; internal quotation marks omitted.) *Metropolitan District* v. *Commission on Human Rights & Opportunities*, 180 Conn. App. 478, 486–87, 184 A.3d 287, cert. denied, 328 Conn. 937, 184 A.3d 267 (2018); see also *Gerardi* v. *Bridgeport*, supra, 99 Conn. App. 318 ("[t]he exhaustion doctrine reflects the legislative intent that such issues be handled in the first instance by local administrative officials in order to provide aggrieved persons with full and adequate administrative relief" [internal quotation marks omitted]).

Section 206 (a) of the charter provides in relevant part: "The members of the civil service commission

shall hold regular meetings at least once each month and may hold additional meetings as may be required in the proper discharge of their duties. Said commission shall . . . (4) hear and determine complaints or appeals respecting the administrative work of the personnel department, appeals upon the allocations of positions or concerning promotions, the rejection of an applicant for admission to an examination and such other matters as may be referred to the commission by the personnel director." See also *Gerardi* v. *Bridgeport*, supra, 99 Conn. App. 318 ("[t]he plain language of § 206 (a) (4) empowers the civil service commission to hear appeals, in which employees seek redress for alleged violations of the charter relating to the promotion of civil service employees").

We conclude that Cotto's claim of error in the commission's selection of the date on which the vacancy in the rank of captain occurred was subject to the exhaustion requirement.[10] On May 4, 2015, the commission issued a revised announcement regarding its intention to conduct a promotional examination for police captain. As of that date, Cotto was on notice that the commission had identified Baraja's promotion to deputy chief on December 22, 2011, as the date of the first vacancy in the captain rank. The announcement specified that April 22, 2012, was the date by which candidates for the captain examination were required

[10] We note that our Supreme Court has "carved out several exceptions from the exhaustion doctrine . . . although only infrequently and only for narrowly defined purposes. . . . Such narrowly defined purposes include when recourse to the . . . remedy would be futile or inadequate. . . . A remedy is futile or inadequate if the decision maker is without authority to grant the requested relief. . . . It is futile to seek a remedy only when such action could not result in a favorable decision and invariably would result in further judicial proceedings." (Citations omitted; internal quotation marks omitted.) *Garcia* v. *Hartford*, 292 Conn. 334, 340, 972 A.2d 706 (2009). The defendants, describing exceptions to the exhaustion doctrine as "irrelevant," do not argue that any such exceptions apply.

to have "occup[ied] with tenure, a position of Police Lieutenant for not less than one year." Because of the city's frequent inability to hold promotional tests within 120 days of vacancies, Cotto had not been promoted to lieutenant until February, 2014, but was entitled to be credited with seniority from 120 days of the vacancy in the rank of lieutenant. Dunn did not issue his decision on Cotto's time in grade until September 23, 2015. Thus, from the May 4, 2015 announcement through Dunn's decision on September 23, 2015, Cotto could not have been certain of his eligibility to take the captain examination. Indeed, he does not allege that he had received, prior to the date of the May 4, 2015 announcement, any determination regarding his date of tenure in the rank of lieutenant. Despite this uncertainty, he did not appeal to the commission from the date of vacancy determination pursuant to § 206 (a) (4) of the charter.

Moreover, the defendants have not presented this court with any reason why the date of vacancy was not the proper subject of an appeal before the commission. To the contrary, it is clear that the commission had the authority and expertise necessary to review that issue and afford Cotto the relief he now seeks from the court.[11] The language of the charter provides the commission with broad and wide ranging authority to "hear and determine complaints or appeals respecting the administrative work of the personnel department, appeals . . . concerning promotions . . . and such other matters as may be referred to the commission by the personnel director." Had Cotto appealed to the commission to challenge the date set forth in the May 4, 2015 announcement, the commission would have had the opportunity to decide that question pursuant to its responsibilities under the charter.

[11] See, e.g. *Santora* v. *Miklus*, 199 Conn. 179, 186, 506 A.2d 549 (1986) (noting officers' appeals to Bridgeport Civil Service Commission as to date of eligibility set by commission in examination announcement).

Indeed, had Cotto presented to the commission his claim that the first vacancy in the rank of captain occurred on June 28, 2014, he might have received a satisfactory administrative disposition of that question and avoided the need for judicial review. See, e.g. *Piquet* v. *Chester*, 306 Conn. 173, 187, 49 A.3d 977 (2012) ("[I]f the plaintiff had appealed to the board, and if the board had decided in the plaintiff's favor, she would not have needed to file the present action. If the board had decided the case against the plaintiff, the Superior Court would be presented with the reasons for the board's decision and would have been able to make an informed decision as to whether the board had acted arbitrarily.").

Finally, the policies underlying the exhaustion doctrine would be best served by requiring Cotto to bring his challenge to the date of vacancy before the commission. As our Supreme Court has recognized, "one purpose underlying the exhaustion doctrine is that judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise discretion or apply its expertise." (Internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 568, 821 A.2d 725 (2003). The issue of when the first vacancy occurred is a fact bound inquiry, which the commission is "uniquely qualified to undertake." Id.

Cotto argues, however, that "the appeal language contained in § 206 (a) (4) must be interpreted to mean that an appeal to the commission is required only when an adverse administrative decision has been made, thereby causing an employee to be aggrieved or harmed in some way." He contends that he was not aggrieved by Dunn's decision in his favor. We conclude that the trial court properly dismissed the counterclaim on the basis of Cotto's failure to appeal *the time in grade date established in the May 4, 2015 announcement*. The fact that Cotto did not appeal Dunn's favorable decision as

to his eligibility for the captain examination, rendered on September 23, 2015, well after the May 4, 2015 announcement of the captain examination, is irrelevant.[12]

"The fundamental test for determining aggrievement encompasses a well-settled twofold determination:

[12] Accordingly, we find inapposite the defendants' comparison to authority standing for the proposition that a party who *prevails* in the trial court by obtaining the relief sought cannot appeal the trial court's order to the Appellate Court. See *Seymour* v. *Seymour*, 262 Conn. 107, 110, 809 A.2d 1114 (2002).

We also find *Jones* v. *Redding*, 296 Conn. 352, 363, 995 A.2d 51 (2010), distinguishable. In that case, the Workers' Compensation Commissioner determined that, although the plaintiff's agreement providing benefits under the Heart and Hypertension Act, General Statutes § 7-433c, was void ab initio, the plaintiff was entitled to benefits under the Workers' Compensation Act, General Statutes § 31-275 et seq. Thus, "the plaintiff had prevailed, and was placed in the same or better position than he was previously as a result of the decision." Id., 365. Rejecting the defendant's argument that the plaintiff had been aggrieved by *a portion* of the Commissioner's decision, the court concluded that the plaintiff was not "specially and injuriously affected by the decision" *in its totality*. Id., 366. Relying on the general proposition that "a party who has fully prevailed in the court below is not entitled to appeal from the judgment solely for the purpose of attacking as erroneous the reasons of the court or its conclusions of law," the court concluded that the plaintiff's inability to appeal because he was not aggrieved did not deprive the Compensation Review Board of jurisdiction to review the conclusions of the Workers' Compensation Commissioner (commissioner) that were not challenged in the defendant's appeal. Id.

In *Jones*, the commissioner had issued one decision in which she "reach[ed] four legal conclusions." Id., 359. That decision was rendered, on balance, in the plaintiff's favor, in that the commissioner ordered the parties to proceed with the administration of the plaintiff's benefits, albeit under a different statute, and ordered the defendant to pay the plaintiff benefits owed to him as a result of the defendant's unilateral termination of such benefits. Id., 365.

In the present case, the decision that was favorable to Cotto was rendered on September 23, 2015. We do not suggest that Cotto was required to appeal that decision. Rather, Cotto was aggrieved by the decision rendered more than four months earlier, on May 4, 2015, when the commission announced the captain examination and its attendant eligibility requirements. Thus, *Jones*, involving a single decision containing multiple legal conclusions, does not control our analysis as to whether Cotto was aggrieved by the May 4, 2015 decision of the commission.

[F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Broadnax* v. *New Haven*, 270 Conn. 133, 154, 851 A.2d 1113 (2004).

In the present case, Cotto, a municipal employee candidate for promotion to captain, clearly possessed a specific, personal and legal interest in the date establishing the candidates' eligibility for the captain examination. See id., 155 (plaintiff "employees of a municipal department governed by the city's civil service rules and regulations, certainly are within the zone of interests that the civil service system was designed to protect, and, as such, have a legally protected interest in the subject matter of the challenged action"). As to the second aspect of aggrievement, Cotto's interest was adversely affected by the date selected. Ultimately, as he himself alleges in his counterclaim, the correct date pursuant to *Walker* v. *Jankura*, 162 Conn. 482, 294 A.2d 536 (1972),[13] "was not 120 days after the promotion of

[13] In *Walker*, our Supreme Court affirmed the trial court's judgment declaring a promotion examination illegal and contrary to the charter of the city and the rules of the Civil Service Commission. *Walker* v. *Jankura*, supra, 162 Conn. 491. Pursuant to the charter, the personnel director was required to hold an examination for the position of police inspector within 120 days of the establishment of a vacancy for such position. Id., 485. The applicants for the examination were required to possess three years of experience as a police captain to qualify to take the examination. Id. The personnel director, however, delayed holding the examination until after the required 120 day period had passed to allow two candidates to attain the necessary three years of experience. Id., 486. The court concluded that the civil service

Captain Baraja but 120 days after the June 28, 2014 retirement of Captain [Viadero], by which time the defendant clearly had sufficient time in grade . . . .'' If the commission had selected the date which Cotto now advocates, he would have been eligible to take the captain examination. This consequence alone is sufficient to establish aggrievement, because the decision affected an interest specific to Cotto, namely his eligibility to attain the rank of captain. See *Broadnax* v. *New Haven*, supra, 270 Conn. 158 (plaintiffs established aggrievement by showing that challenged promotional practice affected an interest specific to them, namely, their capacity to attain the rank of captain).

Significantly, the decision Cotto claims that he was not aggrieved by is the same decision he now challenges by way of his counterclaim. Until Dunn issued his decision regarding Cotto's eligibility, Cotto was aware that there was a ''possibility,'' if not a ''certainty,'' of direct injury, specifically, that the date chosen would preclude his eligibility. See id., 154 (''[a]ggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected'' [internal quotation marks omitted]). He, therefore, should have appealed that date. A decision in his favor at that juncture could have averted not only the plaintiffs' appeal to the commission of Dunn's decision on Cotto's eligibility, but also the present action.

We conclude that the trial court properly dismissed Cotto's counterclaim on the basis that he failed to exhaust his administrative remedies. Because Cotto

provision of the charter was mandatory, and, thus, affirmed the trial court's decision that ''the only reasonable remedy is to order that the list established as a result of the examination be vacated, the examination be held again and that the new examination be open only to candidates who possessed the requisite experience and qualifications'' as of the date the examination was required to be held. Id., 487, 491.

could have obtained review of the date of vacancy by way of an appeal to the commission, pursuant to § 206 (a) (4) of the charter, he was required to do so before seeking redress in court.

II

A

The defendants next claim that the trial court improperly concluded that the twenty-second lieutenant position was not established as required pursuant to § 206 (d) of the charter. Specifically, they claim that the trial court improperly determined that the position was not legally established because (1) Dunn did not make or cause to be made an investigation of the need for the position, and (2) the city council never established the twenty-second position. According to the defendants, because the court improperly determined the twenty-second lieutenant position to be illegally created, the court's calculation of Cotto's time in grade on the basis of the subsequent date that the twenty-first lieutenant position became vacant led to the improper conclusion that he was ineligible to sit for the captain examination. The plaintiffs respond that "[p]romoting Cotto to the [twenty-second] position would have been an illegal overfill" because "[t]he twenty-second lieutenant position had never been legally created pursuant to the provisions" of the charter. We agree with the plaintiffs.

We first set forth our standard of review and relevant legal principles. "As with any issue of statutory construction, the interpretation of a charter or municipal ordinance presents a question of law, over which our review is plenary." (Internal quotation marks omitted.) *Shevlin* v. *Civil Service Commission*, 148 Conn. App. 344, 354, 84 A.3d 1207 (2014). "[T]o the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly

erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Broadnax* v. *New Haven*, supra, 270 Conn. 161–62.

"In construing a city charter, the rules of statutory construction generally apply. . . . In arriving at the intention of the framers of the charter the whole and every part of the instrument must be taken and compared together. In other words, effect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws. . . .

"In addition, the present case involves the city's civil service system, and we previously have emphasized the importance of maintaining the integrity of that system. Statutory provisions regulating appointments under civil service acts are mandatory and must be complied with strictly." (Citation omitted; internal quotation marks omitted.) Id., 161; see also *Walker* v. *Jankura*, supra, 162 Conn. 489 ("[s]tatutory provisions regulating appointments under civil service acts . . . may not be waived by a civil service commission").

"The [civil service] law provides for a complete system of procedure designed to secure appointment to public positions of those whose merit and fitness has been determined by examination, and to eliminate as far as practicable the element of partisanship and personal favoritism in making appointments. . . . A civil service statute is mandatory as to every requirement." (Internal quotation marks omitted.) *Broadnax* v. *New Haven*, supra, 270 Conn. 161. "Compliance by a civil service commission that is tantamount to substantial compliance is not sufficient where the civil service provision is mandatory, as substantial performance has no application to the performance of duty by those entrusted

with the administration of the civil service law. It would open the door to abuses which the law was designed to suppress." (Internal quotation marks omitted.) *Jones* v. *Civil Service Commission*, 175 Conn. 504, 510, 400 A.2d 721 (1978). "Good faith of the parties will not validate an illegal appointment and will not be sanctioned by the courts." *Resnick* v. *Civil Service Commission*, 156 Conn. 28, 32, 238 A.2d 391 (1968).[14]

We first address the defendants' argument that the trial court improperly concluded that the city council never established the twenty-second lieutenant position. The defendants contend that the charter requires only that the city council establish a new position, but does not require explicitly that it budget such position. Given that the charter does not prescribe the manner in which the council must establish a new position, the defendants argue that the city council can establish a new position in "any way that manifested such an intent." The plaintiffs respond that "[t]he testimony presented at trial irrefutably proves that the city council never approved the creation of a twenty-second lieutenant position." Without such approval, the plaintiffs argue that the commission was not authorized to create a twenty-second lieutenant position in excess of the city council's budgeted twenty-one positions.

Our case law has long recognized that city commissions have no authority other than that delegated to

[14] See also *Kelly* v. *New Haven*, 275 Conn. 580, 618 and n.42, 881 A.2d 978 (2005) (noting and collecting the "line of appellate cases which underscores that the authority of appointed boards must be exercised in conformity with the policy underlying a city's civil service legislation"); *New Haven Police Local 530* v. *Logue*, 188 Conn. 290, 300, 449 A.2d 990 (1982) (posts created by police chief were "promotions to positions" rather than "appointments," and where charter did not provide chief authority to appoint officers to new positions, department's "long practice of continual deviation from the civil service rules" could not "override the mandates of the charter").

them. Thus, fixing the number of authorized positions,[15] if not expressly delegated to the commission, is not within its authority. "It is well established that a city's charter is the fountainhead of municipal powers. . . . The charter serves as an enabling act, both creating power and prescribing the form in which it must be exercised. . . . It follows that agents of a city, including its commissions, have no source of authority beyond the charter." (Citations omitted; internal quotation marks omitted.) *Lombardi* v. *Bridgeport*, 194 Conn. 601, 604, 483 A.2d 1092 (1984).

Our Supreme Court has stated: "The common council of Bridgeport is the governing body of the city. It can exercise all the powers of the municipality except those expressly granted to other agencies. . . . There is no express authority given to the [the civil service] commission to fix the number of officers in the city police. If such a power were to be accorded to it by implication from the language creating and empowering it to act, the result would be confusion. The commission could then control the entire operation of the police department by prescribing the extent of its service, its internal organization and its budgetary needs. If this were true

[15] We note that the rules of the commission define "position" as "any office or employment, either occupied or vacant, calling for the performance of certain duties and the exercise of certain responsibilities by one individual either on a full-time or part-time basis." Bridgeport Rules of the Civil Service Commission, Rule 1. The rules define "class" as "a group of positions established under these rules sufficiently similar in respect to their duties and responsibilities, (a) that the same title may be used with clarity to designate each position allocated to the class, (b) that the same requirements as to experience, education, capacity, knowledge, ability and other qualifications should be required of the incumbents, (c) that the same tests of fitness may be used to choose qualified employees, and (d) that the same salary range can be applied with equity under the same or substantially the same employment conditions—a single position essentially different from all other positions in characteristics enumerated above may be considered as a class." Id. Cf. General Statutes § 5-196 (21) ("'[p]osition' means a group of duties and responsibilities currently assigned or designated by competent authority to require the services of one employee").

of the police, it could be true of all the other departments and eventually the commission, a purely administrative agency, would take over a large part of the functions of government for the city."[16] (Citations omitted.) *Shanley* v. *Jankura*, 144 Conn. 694, 703–704, 137 A.2d 536 (1957).

"The intention of the legislative body is found in the words employed in the charter provisions, and these words are given their plain and obvious meaning." *Buonanno* v. *Merly*, 4 Conn. App. 148, 149, 493 A.2d 245 (1985). Section 206 (d) governs the procedures to be followed in the event that the chief of police, designated by Chapter 13, § 5 (4) of the charter as the appointing authority for the department, desires to establish a new permanent position in the classified service. Specifically, "[i]f upon consideration of the facts the commission determines that the work of the department cannot be properly and effectively carried on without the position, it shall classify and allocate the new position to the proper class *after the position has been established by the city council*." (Emphasis added.) Indisputably, the plain language of the charter provision requires that the city council establish the new position.

We agree with the trial court's conclusion that the city council never established the position. The trial

[16] We note that there has been robust litigation surrounding the commission and the city's compliance with the charter. See e.g. *Chapman* v. *Bridgeport*, Superior Court, judicial district of Fairfield, Docket No. CV-96-0331064 (August 20, 1997) (explaining that commission was mandated to abolish two lieutenant positions where police chief failed to serve notice on personnel director declaring whether he desired to fill two vacancies and finding that "the commission failed to comply with § 213 (a) [of the charter] in any fashion"); *Reyes* v. *Bridgeport*, Superior Court, judicial district of Fairfield, Docket No. CV-07-4022673 (January 24, 2013) (noting "the city's chronic failure to timely administer promotion tests in accordance with the charter and the union's numerous grievance challenges thereto"), *aff'd*, 152 Conn. App. 528, 100 A.3d 50 (2014).

court expressly found that the commission "never submitted its action authorizing the creation of a twenty-second position to the city council for approval." The defendants do not contest this finding, and Dunn testified that he did not submit any request or notification to the city council that the commission had approved the creation of the twenty-second lieutenant's position. Instead, the defendants direct this court's attention to the police department's 2011 fiscal year budget, which sets forth as an "[a]ccomplishment," that the number of lieutenants had been increased from twenty-one to twenty-two in accordance with PERF's recommendation.[17] This evidence, according to the defendants, was "more than sufficient . . . to show that the city council had established the twenty-second lieutenant position as required by § 206 (d) because it was evidence that the city council recognized the position as permanent in nature rather than temporary." A review of the other listed "accomplishments," including reducing certain crimes, filling vacant positions, reconfiguring meetings to increase productivity, and establishing a greater "web presence,"[18] negates the suggestion that

[17] The defendants also highlight the fact that Azzarito, who had been serving as the twenty-second lieutenant, was being compensated for his work as a lieutenant.

[18] The list provides in full: "(1) Accomplished a 9% reduction in part 1 Crimes, and increased solvability rates for serious crimes. (2) Reduction in worker's compensation claims through Taser implementation and Use of Force Continuum training. (3) Established random drug testing throughout the Department for 10% of the sworn population per month. (4) Filled all ranks in Patrol and Detective Bureau where vacancies existed. (5) Reorganized Table of Organization in accordance with PERF recommended 'Interim Model' (confirmed the position of the 'fourth' Deputy Chief, increased the number of lieutenants to 22). (6) Filled the position of Assistance Chief. (7) Re-configured 'Compstat' meetings to a more productive and meaningful platform. (8) Brought Board of Police Commissioner's Meetings back to the Chief's Office. (9) Re-invigorated the Young Adult Police Commissioner program through Community Outreach. Appointed 12 new Young Adult Police Commissioners. (10) Facilitated the necessary command structure to support the Special Operations Division (placed Captains and additional Sergeant to SET Team). (11) Hired 'Switzer Associates' as Recruitment Consulting Firm. (12) Supported Civil Service with the selection of testing

mere inclusion in a list of accomplishments fulfilled the charter requirement that the city council establish the position. Moreover, the same budget indicates unequivocally that there were twenty-one lieutenant positions budgeted for both fiscal years 2010 and 2011. Because we conclude that the inclusion of an accomplishment in an annual list of the department's highlighted activities does not satisfy the establishment requirement set forth in § 206 (d) of the charter, we need not decide what action is required by the council to establish a position. We note, however, that Chapter 5, § 8 of the charter provides in relevant part that "every act [of the city council] creating, altering or abolishing any agency, office or employment, or assigning or reassigning the same to departments, [or] fixing compensation . . . shall be by ordinance."[19]

We also find guidance in *Broadnax* v. *New Haven*, supra, 270 Conn. 136 n.2, 163 n.34, 168, in which our Supreme Court concluded that the practice of underfilling, whereby funds allocated for a vacant higher rank are used to pay individuals employed at a lower rank, violated the city of New Haven's ordinances and civil service rules and regulations. The New Haven Code required the board of aldermen to approve any action that creates a position not included in the budget as adopted by the board of aldermen, which budget authorized a specific number of salaried positions at each

companies and streamlined the entrance level process (CHIPS card and Police Apps.com). (13) Established a greater 'web presence' through use of social networking sights including Twitter, and Facebook. Development of new Department Website is ongoing."

[19] Chapter 5, § 8 of the charter provides: "In addition to such acts of the council as are required by the general statutes or by other provisions of this charter to be by ordinance, every act creating, altering or abolishing any agency, office or employment, or assigning or reassigning the same to departments, fixing compensation, establishing any rule or regulation for the violation of which a penalty is imposed, or placing any burden upon or limiting the use of private property, shall be by ordinance."

rank. Id., 164. The court concluded that the fire department's employment of "*additional* lieutenants, i.e., positions that were not listed in the budget" violated the New Haven Code by creating positions not included in the budget as adopted without receiving prior approval of the board of aldermen. (Emphasis in original.) Id. The city defendants argued that the board of aldermen was aware that the department was underfilling positions and that the board took no action to prohibit the practice. Id., 169. The court stated: "The defendants, however, have not indicated why the awareness of the board of aldermen somehow validates the practice, nor have the defendants cited any authority to support such a proposition. Even if we were to assume that the board of aldermen was, in fact, aware of the practice, the provisions at issue require *the formal approval*, as opposed to the informal acquiescence, of the board of aldermen, and it is undisputed that the defendants had not obtained such approval in the present case." (Emphasis in original.) Id.

Although distinct from the present case, *Broadnax* reaffirms the principle that where a charter or ordinance requires *a formal* action by the city's legislative body, informal acquiescence is not sufficient. Id. In the present case, the informal recognition of an "accomplish[ed]" increase in the number of lieutenant positions cannot satisfy the charter's mandate that the council establish any such positions.

The defendants' remaining argument is that the trial court improperly concluded that the twenty-second lieutenant position was not established in conformity with the charter because Dunn did not "make or cause to be made an investigation of the need of such position and report his findings to the commission," as provided for in § 206 (d) of the charter. The defendants argue primarily that because the twenty-second lieutenant

position was not a "new" position, but rather an "addition to an already created position," Dunn's reasonable interpretation that the investigation provision was not triggered should have been credited by the court.[20] We reject the defendants' argument that the twenty-second lieutenant position was not a new position such that the provisions of § 206 (d) were not triggered. The defendants have not pointed this court to any provision in the charter granting authority to the commission to increase the number of lieutenants. Following our Supreme Court's decision in *Shanley*, we conclude that the commission lacks authority to increase the number of lieutenants.[21]

B

Lastly, we address the defendants' alternative claim that even if the trial court properly determined that the twenty-second lieutenant position was not established as required, the court's conclusion that he was ineligible to sit for the captain examination constituted an improper sanction of an illegal appointment. They argue that "the trial court cannot, at the same time, reason that Azzarito's appointment was illegal and then legitimize that same appointment by counting it for the purpose of determining when a vacancy in the rank of

[20] We note that "the legal principle that requires courts to accord deference to the construction of a statute by the administrative agency charged with its enforcement . . . does not apply to the construction of a statute on an issue that has not previously been subjected to judicial scrutiny. . . . In such instances, the construction of the statute is a question of law for the court. . . . Moreover, where the judicial interpretation of a rule conflicts with the administrative interpretation, the judicial interpretation prevails." (Citations omitted.) *New Haven Firebird Society* v. *Board of Fire Commissioners*, 32 Conn. App. 585, 589–90, 630 A.2d 131, cert. denied, 228 Conn. 902, 634 A.2d 295 (1993).

[21] Because we conclude that the position had not been established, we need not decide whether the trial court's finding that Dunn had not complied with the investigation provision was clearly erroneous, nor whether the PERF study satisfied the requirements of an investigation of the need for additional lieutenants.

lieutenant occurred." The plaintiffs argue that "the claim that Azzarito's promotion was not legitimate does not justify the overfilling of the lieutenant position that would have been created by making lieutenant Cotto's promotion to lieutenant retroactive to November 16, 2010."[22] The trial court addressed the defendants' argument by concluding that "[e]ven assuming that Azzarito's appointment was improper, one violation cannot justify another violation." We agree.

In *Shanley* v. *Jankura*, supra, 144 Conn. 704, our Supreme Court concluded that the civil service comission lacked authority to promote the plaintiff, a lieutenant at the time, to the position of captain. The city council had established by ordinance that there should be no more than seven police captains. Id., 698. Subsequently, the general assembly enacted a civil service law for the city of Bridgeport, which provided for the creation of a civil service commission to administer the act. Id. Following the adoption of the Civil Service Act in 1935, the position of clerk of the department was allocated to the class of police captain. Id., 699. In 1943, when the then current clerk was appointed to superintendent, the Board of Police Commissioners, without consultation or approval from the commission, appointed James Falvey to the position of clerk. Id., 700. Falvey, however, was ineligible to hold any position within the class of captain. Id. The commission, thereafter, in response to a request from the Board of Police Commissioners, certified and appointed Thomas Cafferty to the position of relief captain. Id., 699. This action increased the number of police captains from seven to eight, in violation of the ordinance. Id.

[22] The plaintiffs also maintain that the defendants failed to raise this claim before the trial court. The city, however, raised this argument clearly in its posttrial briefing, and the plaintiffs responded fully. Further, the trial court addressed it in its memorandum of decision.

The plaintiff claimed that because Falvey was occupying the position of clerk illegally, the position was in effect vacant, and, therefore, he was entitled to promotion to the class of captain. Id., 701. Our Supreme Court stated: "This argument presupposes that the commission can allocate a position in the police department to the class of captain and thereby require the board to fill the position with an appointee of that class even though by so doing the board would exceed by one the number of police captains fixed by ordinance." Id. The court further emphasized that there was no express authority given to the commission to set the number of officers in the department. Id., 702. Thus, "[t]he board was powerless to promote the plaintiff . . . to the position of captain and to assign him to the position of clerk of the department even if Falvey, the incumbent was holding the position unlawfully." The court continued: "Nor can the board's appointment of Cafferty as relief captain in violation of the ordinance help these plaintiffs. One violation cannot justify a second and a third." Id., 704–705.

Turning back to the matter at hand, although there does not appear to be a current ordinance addressing the number of positions in the department; see footnote 20 of this opinion; the commission remains unauthorized to fix the number of positions within the department, and the council remains responsible for establishing new positions under § 206 (d) of the charter. Under *Shanley*, the mere fact that an employee is occupying a position illegally does not permit the personnel director to consider that position vacant for purposes of determining the number of vacant positions within a class. Thus, Azzarito's position in the class of lieutenant remained filled despite the fact that his position initially had been created in violation of the charter, and promoting Cotto to a lieutenant position

upon Burns' termination would have constituted an illegal overfill.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* DAQUAN D. WILLIAMS (AC 39597)

Alvord, Bright and Bear, Js.

*Syllabus*

Convicted of the crimes of manslaughter in the first degree and attempt to commit home invasion, the defendant appealed to this court, claiming that the evidence was insufficient to support his conviction of attempt to commit home invasion. The defendant's conviction stemmed from an incident in which he and two others, P and J, went to an apartment complex where C resided because J was having a dispute with C over a girl. At least two of the men, dressed in black and wearing ski masks, attempted to enter an apartment where C was located with a baseball bat. Thereafter, a fight ensued outside, during which the defendant repeatedly stabbed C's stepfather, causing his death. The defendant claimed that the evidence was insufficient to show that he attempted to enter the apartment in which C was located and that he had the specific intent to seriously injure C. *Held* that the evidence was insufficient to support the defendant's conviction of attempt to commit home invasion, there having been insufficient evidence to prove beyond a reasonable doubt that the defendant had the specific intent to commit a felony assault upon another individual, C, if the defendant and his cohorts successfully entered the apartment in which C was located: although there was sufficient evidence from which the jury could have concluded that the defendant took a substantial step toward unlawfully entering the apartment, the record was devoid of any evidence that the defendant knew or had any issues with C, that he took any action toward C from which an intent to inflict serious injury could have been inferred, that the defendant removed his knife from his pocket during any attempt to enter the dwelling, or to support an inference that the defendant took any action to indicate that he intended to use a metal bat against C, as the prosecutor at trial argued to the jury that defendant was being used as backup because J wanted to fight C, and did not argue, and the evidence did not establish, that the defendant possessed the specific intent to commit the crime of home invasion as charged by the state; moreover, because the state charged the defendant as a principal and not an accessory, proof that either the defendant or one of his codefendants

intended to commit a felony against C would have been legally insufficient to support a judgment of conviction against the defendant, and any suggestion that the jury could have inferred that the defendant had the requisite intent because one of his codefendants was about to assault C was incorrect.

Argued November 14, 2018—officially released January 22, 2019

*Procedural History*

Information charging the defendant with one count of the crime of murder and two counts of the crime of attempt to commit home invasion, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna, J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree and of one count of attempt to commit home invasion, from which the defendant appealed to this court. *Reversed in part; judgment directed in part; further proceedings.*

*Mary A. Beattie*, for the appellant (defendant).

*Linda F. Currie-Zeffiro*, assistant state's attorney, with whom, on the brief, was *Anne F. Mahoney*, state's attorney, for the appellee (state).

*Opinion*

BRIGHT, J. The defendant, DaQuan D. Williams, appeals from the judgment of conviction, rendered after a jury trial, of attempt to commit home invasion in violation of General Statutes §§ 53a-49 and 53a-100aa (a) (1).[1] On appeal, the defendant claims that there was insufficient evidence to support this conviction because the state failed to prove that he attempted to enter the apartment in which Jouleigh Clemente was located, and

[1] The defendant also was convicted of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1), as a lesser included offense of murder in violation of General Statutes § 53a-54a (a). He does not appeal from the judgment of conviction on that count. We also note that the jury found the defendant not guilty of attempt to commit home invasion in violation of §§ 53a-49 and 53a-100aa (a) (2).

the state failed to present evidence that he had the specific intent to seriously injure Clemente. We reverse the judgment of conviction on this count.

On the basis of the evidence presented, the jury reasonably could have found the following facts. On the evening of February 26, 2013, the defendant was wearing gloves, a black sweatshirt, a blue hoodie, two pairs of gray sweatpants, a blue ski mask and black sneakers. He also was in possession of a black pocket knife. On that cold and rainy winter evening, Kristopher Pryce drove the defendant and Isiah Jones to the Summerfield apartment complex in East Hartford,[2] where Clemente lived in unit 109 with his younger brother, Westley, his mother, Jasmin Fuentes, and his stepfather, Jonathan Lopez.

Jones and Clemente were having a dispute about a girl. On that evening, Clemente was not in unit 109, but, rather, he and his brother were visiting their friend Juan Carlos Zavala in unit 69. Zavala lived in unit 69 with his younger brother, Jack, his mother, Vilma Rodriguez, and his mother's boyfriend, Angel Luis Nieves.

While Rodriguez and Nieves were upstairs in unit 69, they heard Zavala, Jack, Westley, and Clemente downstairs making a commotion and yelling that someone was trying to get into the apartment. When Rodriguez and Nieves looked downstairs, they saw the young males trying to force a metal bat back out of the doorway, while simultaneously trying to close the door. Nieves jumped from the top of the staircase and successfully assisted the young males in pushing the bat out of the doorway, and then locked the door. Rodriguez looked outside from her bedroom window, and she saw two teenaged males, dressed in black, wearing winter

[2] The defendant was described as being larger and heavier than Jones or Pryce, weighing approximately 250 pounds.

masks, and carrying bats. The young males in the apartment told Rodriguez that Clemente and Zavala were having problems with Jones and Pryce. Rodriguez then telephoned 911, telling the dispatcher that two teenaged males from her apartment complex,[3] dressed in black and wearing masks, were hitting her door, trying to break into her apartment, and one of them had a bat. Rodriguez recognized Pryce outside. Nieves, who also looked out the upstairs window, saw people wearing masks on the side of the building.

Clemente then ran out the door, heading toward his apartment, unit 109, with Westley and Zavala chasing after him. Rodriguez and Nieves chased after them. Rodriguez soon realized that there were three other teenaged males, not two, involved in the incident. One of those males was standing near the side of her apartment, while another, Jones, was fighting with Clemente.

No one interfered in the fight between Jones and Clemente because the fight was a "fair one," with no weapons. As the two fought, the defendant stood next to a red car, near the street, somewhere between unit 69 and unit 109. At some point, however, Lopez, Clemente's stepfather, came outside. Lopez and the defendant exchanged words, and Lopez knocked a bat out of the defendant's hands and pushed him onto the red car. Jasmin Fuentes, Clemente's mother, who also had come outside, picked up the metal bats that were lying on the ground and put them in her apartment.[4] The defendant and Lopez began fighting, and the defendant took

[3] The evidence showed that Pryce regularly stayed or lived in unit 31 of the Summerfield apartment complex with his girlfriend, but that the defendant and Jones lived in another area of East Hartford, although Rodriguez had seen Jones around the complex previously. Jones was godfather to the child of Pryce and his girlfriend. Rodriguez testified that she had never seen the defendant before.

[4] Fuentes refused to testify during the trial.

out his knife and repeatedly stabbed Lopez, who, thereafter, was able to retreat into his apartment.[5]

The defendant, Jones, and Pryce attempted to flee the scene, but were pulled over by the police before they exited the apartment complex. Pryce was driving, and Jones was in the passenger seat, with the defendant, who was shirtless and covered in blood, in the back seat. The defendant's blue hoodie was on the seat next to him. The three were arrested. The defendant was charged with murder and two counts of attempt to commit home invasion, one under each subdivision of § 53a-100aa (a).[6] The jury found the defendant guilty of the lesser offense of manslaughter in the first degree, as well as attempt to commit home invasion under § 53a-100aa (a) (1). It found him not guilty of attempt to commit home invasion under §53a-100aa (a) (2). The court sentenced the defendant to twenty years to serve on the manslaughter conviction, and to a concurrent mandatory minimum ten-year term on the attempt to commit home invasion conviction, for a total effective sentence of twenty years incarceration. This appeal followed.

On appeal, the defendant claims that there was insufficient evidence to support his conviction of attempt to commit home invasion.[7] He argues that the state

[5] Lopez later died from his injuries.

[6] General Statutes § 53a-100aa (a) provides: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling, or (2) such person is armed with explosives or a deadly weapon or dangerous instrument."

[7] The defendant preserved this issue by moving for a judgment of acquittal at the close of the state's evidence. Furthermore, even if unpreserved, a sufficiency of the evidence claim merits review. See *State* v. *Lewis*, 303 Conn. 760, 767 n.4, 36 A.3d 670 (2012).

failed to prove two elements of this crime: "First, there is insufficient evidence that [the] defendant personally took a substantial step toward unlawfully entering the dwelling at issue. Second, there is insufficient evidence that, at the time of the claimed home invasion attempt, [the] defendant intended to seriously injure Jouleigh Clemente."

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"An appellate court may not second-guess a jury's credibility determinations. . . . In reviewing the evidence, the reviewing court [is] bound by the jury's credibility determinations and all reasonable inferences the jury could have drawn from the evidence." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Gemmell*, 151 Conn. App. 590, 604–605, 94 A.3d 1253, cert. denied, 314 Conn. 915, 100 A.3d 405 (2014).

When determining whether the state introduced evidence sufficient to support the trial court's judgment of conviction, we look not just at the charging document, but also at the state's theory of the case. "When the state advances a specific theory of the case at trial . . . sufficiency of the evidence principles cannot be applied in a vacuum. Rather, they must be considered in conjunction with an equally important doctrine, namely, that the state cannot change the theory of the case on appeal." (Internal quotation marks omitted.) *State* v. *Carter*, 317 Conn. 845, 853–54, 120 A.3d 1229 (2015). Of particular relevance to this case, where the state's theory rests on an intent to injure a specific person, the question for us is whether there is sufficient evidence that the defendant specifically intended to injure that particular person. Id., 855.

Count two of the long form information accused the defendant "of the crime of criminal attempt to commit home invasion in violation of . . . §§ 53a-49 and 53a-100aa (a) (1) and allege[d] that on or about February 26, 2013, in East Hartford . . . [the defendant] intentionally did an act which, under the circumstances he believed them to be, was an act constituting a substantial step in a course of conduct planned to culminate in his commission of the crime of home invasion." The state's theory of the case, as argued before the jury, was that Pryce picked up the defendant and Jones and "drove them to the Summerfield apartments. . . . Jones had been having a beef with . . . Clemente, who lived over at those apartments, over a girl . . . . [Clemente] was trash-talking [Jones] because [Clemente] had basically won [the girl] away from him.

"So, the brains of the operation, Pryce, decided that he would drive them over there. [Jones] decided to bring the heavy, who is this defendant, to come along as a backup. And [Jones] left the house with a metal bat that night. The defendant had his knife on him, and

they were all dressed in dark clothing. They went over to the Summerfield apartments because they were going to get [Clemente].

"When they got there . . . all three of them got out [of the car] . . . . The defendant had on his black ski mask, dark clothing, dark gloves, and [Jones] said to him, they ain't coming out. . . . So, they started banging on the door trying to break in, and they didn't stop banging until [Clemente] came out. While the banging was going on inside the home at [unit] 69 . . . the defendant and his friends decided to break into the house. The boys in the house told the mother upstairs, hey, somebody's trying to break in. She came down, saw the bat, all sorts of craziness going on. She went back upstairs to call 911. . . . [T]hey tried to go into the house, and they [were] breaking in with the bats."

"So, they drove over there. They brought baseball bats. They banged on the door. They damaged the door. They managed to get a bat in. And they were going . . . [to enter] the dwelling . . . . I don't have to actually prove it to you that they did enter it, but that this was their intent. They were intending to go in the dwelling. They wanted to commit a crime inside. There were people inside the dwelling who were not participants in the crime. And that once they got inside there, *either he or his codefendants were about to attempt to commit a felony against a person in the home. In other words . . . Clemente.*

"[Jones] wanted to beat [Clemente] up. He wanted to make sure he was the winner of that fight so he brought the bigger and the heavier defendant with him, an armed defendant with him, and they were trying to break in the house to get to [Clemente]." (Emphasis added.)

In this case, the defendant was charged in relevant part with attempt to commit home invasion. Section

53a-100aa (a) provides in relevant part: "A person is guilty of home invasion when such person enters . . . unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling . . . ."

Section 53a-49 provides in relevant part: "(a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

"(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law . . . (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed . . . ."

"To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose. . . . This standard focuses on what the actor has already done and not what remains to be done. . . . The substantial step must be at least the start of a line of conduct which will lead naturally to the commission

of a crime." (Internal quotation marks omitted.) *State* v. *Washington*, 186 Conn. App. 176, 187–88, A.3d (2018).

Reading the attempt and home invasion statutes together, the essential elements of attempt to commit home invasion under §§ 53a-49 and 53a-100aa (a) (1) in this case are: (1) the defendant intentionally took a substantial step toward entering unit 69 without license or privilege to do so; (2) the defendant had the specific intent to commit a crime in unit 69; (3) at least one other person not participating in the attempt to enter unit 69 without license or privilege to do so was present in unit 69; and (4) the defendant or another participant in the defendant's attempt to enter unit 69 was going to commit a felony against another person in unit 69, who was not a fellow participant in the crime. See id., 187–89.

The state's theory of the case, in satisfaction of prongs one and three, was that the defendant intentionally took a substantial step toward entering unit 69 without license or privilege to do so, while Rodriguez and her family, along with Clemente and his brother, were present in unit 69; in satisfaction of prong two, the state's theory was that the defendant had the specific intent to commit a crime while in unit 69, to wit, a felony assault against Clemente.[8] The state also argued to the jury, however, in satisfaction of prong four, that the defendant *or another participant* in the defendant's endeavor was going to commit a felony assault against Clemente. Although the state could have sought to prove, in satisfaction of prong two, that the defendant,

[8] Consistent with the state's theory of the case, the court charged the jury, in relevant part, that "[i]n this case, the state claims that the defendant intended to commit the crime of assault in the second degree. To prove assault in the second degree, the state must prove beyond a reasonable doubt that (1) the defendant had the specific intent to cause serious physical injury to another person, Jouleigh Clemente . . . ."

himself, had intended to commit some other crime in unit 69, either a felony or a misdemeanor, the state instead sought to prove that the crime the defendant, himself, intended to commit, if successful in his entry into unit 69, was a felony assault against Clemente.

The defendant argues that the evidence presented by the state in this case was insufficient to prove that (1) he, personally, attempted to enter a dwelling, namely unit 69 in the Summerfield apartment complex, in an unlawful manner, and (2) he had the specific intent to commit felony assault against Clemente if successful in his attempt to enter unit 69.

The defendant argues that he "was not charged with conspiracy to enter the dwelling, or as an accessory. He was charged as a principal, and that is how the jury was instructed. Thus, the state needed to prove that [the] defendant, personally, attempted to enter the dwelling." Further, he argues, the state also failed to present any evidence that he had the specific intent to commit felony assault against Clemente if he were successful in entering the apartment. He argues that there was no evidence, direct or circumstantial, that he personally intended to commit felony assault against Clemente and that the state, in fact, even argued during his trial that it was Jones who wanted to fight Clemente and that the defendant merely was there as "backup." (Internal quotation marks omitted.) He contends that the state is relying on nothing more than conjecture.

The state responds that, on the basis of the evidence presented, the jury reasonably could have inferred that Jones, Pryce, and the defendant all had metal bats with them, and that they intended to use them for "unlawful purposes." The state argues that the "jury further could have inferred . . . that the effort to insert a bat into the dwelling was not limited to only one of the three

potential intruders. . . . Thus, under a theory of principal liability . . . the jury reasonably could have found that the defendant acted with the intent to unlawfully enter the dwelling and took a substantial step toward doing so." Furthermore, the state argues, "it was undisputed that the defendant was armed with a knife and was dressed in two sets of clothing, a ski mask, and gloves. Three bats were found at the scene. The defendant was still carrying a bat while [Jones] and [Clemente] were fighting. Moreover, the defendant came armed with a knife and, undisputedly, used his knife to stab . . . Lopez . . . Based on the fact that the defendant inflicted a fatal stab wound to the unarmed victim—a man he did not know—during a fistfight, it is a reasonable inference that he brought the knife with him to Summerfield intending to use it on Clemente—an antagonist of his friend [Jones]."[9]

We agree with the state that there was sufficient evidence from which the jury could conclude that the defendant took a substantial step toward unlawfully entering unit 69. Rodriguez testified that it was approximately 11 p.m., on a cold and rainy night, when Zavala, Jack, Westley, and Clemente, who were in unit 69, started running upstairs, indicating something was going on, so she looked out of her upstairs window and saw "three guys with masks and bats," and she telephoned the police. She thought that one of them may have had a gun.[10] She testified that she told the police that there were three males trying to get into her apartment "because one of them hit [her] door with

[9] Although the state argues that the jury could have concluded that the defendant brought a knife to use on Clemente inside unit 69, the jury found the defendant not guilty of violating § 53a-100 (a) (2). See footnote 6 of this opinion.

[10] Nieves testified that he told Rodriguez to call the police because he saw the "heavy dude" with his hand in his waistband and thought he might have a gun. We note, however, that there was no evidence that the defendant or anyone else had a gun that night.

a bat and then the bat kind of stayed stuck in between the door and that's when [Nieves] came down, pushed the bat out and got the door locked."[11] Rodriguez admitted, however, that when she spoke with the police, via 911, she had told them that there were only two black males trying to get into her apartment. She explained to the jury that she had not realized there was a third male until she went outside and saw him "standing on the side of . . . the building." Rodriguez further acknowledged that she told the police, via her 911 call, that there were two teenaged males, dressed in black, and that she had no doubt in her mind, when she relayed that information to the 911 operator, that was what she was seeing. She also acknowledged at trial that that was what she saw that night when she looked out of her bedroom window. Rodriguez then acknowledged that the young males in her apartment said that they, especially Clemente, were having a problem with Jones and Pryce.

Rodriguez further testified that after Nieves had closed and locked the door, Clemente opened the door and ran toward his apartment; two or three guys, wearing all black, then chased after him. Rodriguez and others followed. Rodriguez stated that Clemente and Jones then began engaging in a fair fight, one with no weapons, and she saw Fuentes gather up the bats and bring them inside her apartment. She also saw the defendant standing next to a car at that time, which was parked approximately halfway between unit 69 and unit 109. Rodriguez stated that Pryce was standing some distance away, closer to her apartment. The defendant was seen by another witness holding a bat at that time, but neither he nor Pryce attempted to interfere in the fight. It also was undisputed that the defendant was in possession of a pocket knife. This, essentially, was the

[11] Rodriguez testified that the assailants damaged her screen door and the wooden door to her apartment.

evidence presented by the state in support of the charge of attempt to commit home invasion under § 53a-100aa (a) (1).

Viewing this evidence in a light most favorable to sustaining the verdict, we conclude that the jury reasonably could have inferred that the defendant took a substantial step toward unlawfully entering unit 69. Rodriguez saw at least two teenaged males attempting to enter the unit, and at least one of them had a bat. The defendant, shortly thereafter, standing near a red car, was seen holding a bat while Jones and Clemente were fighting. It is a reasonable conclusion that the defendant had attempted to gain entry into unit 69 in an unlawful manner.

We further conclude, however, that there simply was no evidence that could have led the jury reasonably to conclude, without resort to conjecture and speculation, that the defendant had the specific intent to commit a felony assault upon Clemente if he and his cohorts successfully entered unit 69. See *State* v. *Josephs*, 328 Conn. 21, 35, 176 A.3d 542 (2018) ("A trier of fact is permitted to make reasonable conclusions by draw[ing] whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . [These inferences, however] cannot be based on possibilities, surmise or conjecture." [Internal quotation marks omitted.]).

In the present case, there was no evidence that the defendant knew or had any issues with Clemente. By contrast, the evidence did demonstrate that Jones and Clemente were having a dispute over a girl. There also was no evidence that the defendant ever took any actions toward Clemente from which an intent to inflict serious injury could have been inferred. To the contrary, when Clemente fled from unit 69 the defendant did not approach him. The uncontroverted evidence at trial was

that the defendant was not involved in any way in the altercation between Clemente and Jones.

Furthermore, the state's argument that the jury reasonably could have inferred, from the facts that the defendant had a knife on his person and used it on Lopez, that the defendant intended to use the knife on Clemente if he was successful in breaking into unit 69 is inconsistent with the evidence the jury heard. There is no evidence that the defendant removed the knife from his pocket during any attempt to enter unit 69. There also is no evidence that the defendant removed the knife from his pocket when Clemente fled from unit 69 or when he was near the car while Clemente and Jones fought. The only evidence regarding the defendant's use of the knife is that he removed it from his pocket and stabbed Lopez with it after he and Lopez already were engaged in a physical fight. Contrary to the state's argument, this evidence does not support a reasonable inference that the defendant intended to use the knife to inflict serious injury on Clemente if he successfully had broken into unit 69.[12]

Similarly, there was no basis for the jury reasonably to infer that the defendant intended to use a metal bat to inflict serious physical injury, a felony assault, on Clemente. The state's reliance on the fact that the defendant later was seen holding a bat while Clemente and Jones fought is misplaced because the record is devoid of evidence that would support an inference that the defendant ever took any action to suggest that he

[12] In its closing argument, the state argued that the defendant was guilty of a violation of § 53a-100aa (a) (2), as charged, because he was armed with a knife when he attempted to enter unit 69 in an illegal manner, with the intent to commit a felony assault upon Clemente. The state did not argue to the jury, however, that the defendant had intended to use that knife on Clemente. The state also argued to the jury that the defendant first formed the intent to use the knife "quickly on the scene" when he was fighting with Lopez.

intended to use the bat to assault Clemente. Rather, the evidence demonstrates that the defendant did not attempt to interfere in the fight between Clemente and Jones.

Furthermore, the prosecutor during her closing argument at trial, summarizing the state's theory of the case, did not argue that the evidence proved that the defendant intended to assault Clemente and inflict serious injury on him during the alleged home invasion. Rather, the state argued to the jury that the defendant was brought as backup because Jones wanted to fight Clemente. The prosecutor then went on to argue that "once they got inside [unit 69], *either* [*the defendant*] *or his codefendants were about to commit a felony against a person in the home. In other words . . . Clemente.*" (Emphasis added.)

Because the state charged the defendant as a principal and not an accessory, however, proof that *either* the defendant *or* one of his codefendants intended to commit a felony against Clemente would be legally insufficient to support a judgment of conviction against the defendant, who was charged only as a principal. Similarly, any suggestion that the jury could infer that the defendant had the requisite intent because one of his codefendants was about to assault Clemente simply is incorrect. The state had not charged the defendant as an accessory, and the court had not been asked to instruct the jury on accessorial liability. See *State* v. *Davis*, 163 Conn. App. 458, 470, 136 A.2d 257 (2016) ("[A] reviewing court may not uphold a conviction premised on accessorial liability if the court foreclosed the jury from basing its guilty verdict on that theory. See *State* v. *Faulkner*, 48 Conn. App. 275, 277, 709 A.2d 36 [1998] [noting in review of sufficiency of evidence to support conviction as accessory that trial court instructed jury as to both principal and accessorial liability]; *State* v. *Channer*, 28 Conn. App. 161, 166, 612

A.2d 95 [noting in review of sufficiency of evidence that reviewing court limited to considering whether evidence supported finding that defendant acted as principal because trial court did not instruct jury as to accessorial liability], cert. denied, 223 Conn. 921, 614 A.2d 826 [1992]." [Internal quotation marks omitted.]). Consequently, without proof beyond a reasonable doubt that it was specifically the defendant who intended to commit felony assault against Clemente, the defendant could not be convicted of attempt to commit home invasion. Finally, contrary to the state's suggestion before this court that the defendant's possession of the knife permitted an inference that he intended to use it to assault Clemente if he gained unlawful entry to unit 69, the state argued to the jury that the defendant's intent to use the knife was formed quickly on the scene when he was fighting with Lopez. Thus, the state did not argue at trial, and the evidence did not establish, that the defendant possessed the required specific intent to commit the crime of attempt to commit home invasion as charged and pursued by the state. Accordingly, we conclude that the evidence is insufficient to sustain the defendant's conviction of attempt to commit home invasion.

The judgment is reversed only with respect to the defendant's conviction of attempt to commit home invasion in violation of § 53a-100aa (a) (1), and the case is remanded with direction to render a judgment of acquittal on that count and for resentencing in accordance with law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

# STATE OF CONNECTICUT *v.* VICTOR SANTIAGO (AC 41228)

Sheldon, Prescott and Bear, Js.

*Syllabus*

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. *Held*:

1. The trial court did not abuse its discretion in admitting a certain written statement by the defendant's wife as a prior consistent statement under the applicable provision (§ 6-11 [b] [1]) of the Connecticut Code of Evidence; the written statement was offered following cross-examination of the defendant's wife, during which her credibility was challenged using multiple prior inconsistent statements, and, thus, it was admissible to rehabilitate her credibility under § 6-11 (b) (1), which requires that the credibility of a witness first be impeached by an inconsistent statement before the consistent statement can be admitted as an exhibit.
2. The trial court did not abuse its discretion in admitting, as relevant evidence, the testimony of the defendant's wife concerning uncharged misconduct involving specific instances of domestic violence by the defendant: that evidence was probative to explain why the defendant's wife feared the defendant and waited twelve years before telling the police about her knowledge of the victim's murder, and was material to corroborating crucial prosecution testimony, as it made it more probable that a jury would credit the wife's testimony explaining her reliance on a fabricated alibi and her delay in reporting her knowledge of the victim's murder to the police; moreover, the probative value of the domestic abuse testimony was not outweighed by unfair prejudice to the defendant because it provided a context and reasonable explanation for the jury to consider the actions of his wife, and the court made efforts to limit the risk of unfair prejudice by admitting her description of incidents that occurred at around the same point in time as the victim's murder, and limiting the testimony about incidents at other points in time by ordering that she not go into detail about them.
3. The defendant's claim that he was deprived of his due process right to a fair trial as a result of prosecutorial improprieties was unavailing: certain challenged questions of the prosecutor were not intended to elicit inadmissible responses from the defendant's wife, as they were broad and open-ended, the defendant's wife appeared to offer her responses spontaneously and without prompting, and the prosecutor did not go into further detail about certain incidents, but instead directly acknowledged to the trial court that the state would limit its inquiries to the specific matters that the court had allowed in its order; moreover, the prosecutor's references during rebuttal closing argument to specific

instances of domestic violence to which the defendant's wife had testified were not improper, as the prosecutor relied exclusively on evidence admitted during the trial in making her argument that the defendant and his wife had an abusive relationship, the defendant's unpreserved claim that the prosecutor improperly failed to redact certain portions of the statement of the defendant's wife to the police was evidentiary in nature and not reviewable, and the defendant having failed to establish any prosecutorial improprieties, it was not necessary to address his claim that this court should exercise its supervisory authority to award him a new trial.

Argued October 16, 2018—officially released January 22, 2019

*Procedural History*

Substitute information charging the defendant with the crimes of murder and felony murder, brought to the Superior Court in the judicial district of Waterbury, and tried to the jury before *K. Murphy, J.*; verdict and judgment of guilty of murder, from which the defendant appealed. *Affirmed.*

*Katherine C. Essington*, assigned counsel, for the appellant (defendant).

*Timothy J. Sugrue*, assistant state's attorney, with whom were *Cynthia S. Serafini*, senior assistant state's attorney, and, on the brief, *Maureen Platt*, state's attorney, and *Donald F. Therkildsen, Jr.*, senior assistant state's attorney, for the appellee (state).

*Opinion*

BEAR, J. The defendant, Victor Santiago, appeals from the judgment of conviction, rendered against him after a jury trial on the charge of murder in violation of General Statutes § 53a-54a. On appeal, the defendant claims that the trial court erred in admitting into evidence (1) his wife's statement to the police as a prior consistent statement and (2) her testimony of uncharged misconduct relating to domestic violence perpetrated by the defendant. Additionally, the defendant claims that the prosecutor's alleged violations of

the court's order limiting the scope of uncharged misconduct evidence constituted prosecutorial impropriety that deprived him of his due process right to a fair trial. Alternatively, the defendant claims that the alleged prosecutorial impropriety warrants the exercise of this court's supervisory authority to award him a new trial, based on similar conduct by the prosecutor in at least one other trial. We affirm the judgment of conviction.

The jury reasonably could have found the following facts from the evidence presented at trial.[1] In the early morning hours of April 11, 1998, Wilfred Morales was shot and killed near his home on Middle Street in Waterbury when he was returning there from a bar he owned on Baldwin Street. Morales' murder remained unsolved for twelve years, until the defendant's estranged wife, Damaris Algarin-Santiago (Algarin), provided the police with a written statement implicating the defendant and his brothers, Thomas Bonilla and Noel Bermudez, in the crime.

Algarin was the state's chief witness in its prosecution of the defendant. She and the defendant had been in a relationship from 1993 until 2008, had married in 2004 so that she would not be able to testify against him concerning Morales' murder, and had four children

[1] The facts in the present case are nearly identical to those underlying the judgment appealed from in *State* v. *Santiago*, 143 Conn. App. 26, 28–31, 66 A.3d 520 (2013). In that case, "[t]he defendant . . . was charged with murder in violation of General Statutes §§ 53a-8 and 53a-54a (a), murder in violation of § 53a-54a (a) and felony murder in violation of § 53a-54c. The jury found the defendant not guilty of murder in violation of §§ 53a-8 and 53a-54a (a). The jury found the defendant guilty of both murder in violation of § 53a-54a (a) and felony murder in violation of § 53a-54c. The court merged the conviction of murder into the conviction of felony murder and sentenced the defendant to a term of sixty years of incarceration." Id., 31.

The defendant appealed that conviction. This court invoked its supervisory authority to overturn the defendant's conviction of felony murder in violation of § 53a-54c, holding that the prosecutor's improper comments in that case, and repeated and deliberate use of improper argument in other cases, warranted reversal and a new trial. Id., 51.

together. During Algarin's relationship with the defendant, he was extremely abusive toward her and, as a result of this abuse, she had come to fear him.

On April 10, 1998, Bonilla was released from prison. The defendant, Bonilla, and Bermudez went out that night to celebrate Bonilla's release, while Algarin stayed home and later went to sleep. At approximately 3 a.m. on April 11, 1998, Algarin was awakened by the defendant and told to go downstairs. Upon entering the downstairs living room, she saw the defendant and Bonilla sorting cash and checks on the coffee table. She also saw a blue leather bank bag. Bermudez was in the kitchen disassembling guns, and Bonilla threatened to kill her if she said anything about what she was seeing or hearing. Bermudez then told her that he had shot Morales because he thought Morales had a gun and because Morales had previously shot the defendant.

The defendant and his brothers proceeded to destroy the evidence. They wiped the guns with baby oil as they broke them down and placed them into bags. They also burned the checks in the kitchen sink and burned the bank bag and their clothes in a container in the back of the house. Bonilla and Bermudez then went to a car wash to clean any gun residue from the vehicle they had used that night and, after they returned from the car wash, the defendant took Algarin to dispose of the guns which were placed in three separate bags. While they were disposing of the guns, Algarin asked the defendant about the murder. He told her that he had been stalking Morales and planning to rob him because he knew that Morales always carried cash on him at the end of the night, that Bermudez and Bonilla had waited in the bushes for Morales while he waited in the car, and that Bermudez had shot Morales.

When they returned to the house, the defendant and his brothers formulated an alibi. This alibi was that they

were all together at their mother's house celebrating Bonilla's release from prison and sharing a Good Friday meal. Algarin stuck to this story for the next twelve years, despite repeated questioning by the Waterbury police. In 2009, however, Algarin began dating Luis Maldonado, whom she told about Morales' murder. In April, 2010, when Maldonado had some legal trouble of his own, he told the police what Algarin had told him about Morales' murder. When confronted by the police, Algarin finally admitted that the defendant and his brothers had killed Morales, and she provided the police with a written statement detailing everything she knew about the murder.

The state thereafter charged the defendant with murder, in violation of § 53a-54a (a), and felony murder, in violation of General Statutes § 53a-54c. The jury found the defendant guilty of murder and not guilty of felony murder, and the court sentenced the defendant to sixty years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the trial court erred in admitting Algarin's 2010 written statement to the police into evidence as a prior consistent statement. We conclude that the court did not abuse its discretion in admitting Algarin's written statement to the police, as redacted, into evidence for that purpose.

The following additional facts are relevant to this claim. On direct examination, Algarin testified that on April 9, 2010, she provided the written statement about the 1998 murder to the Waterbury Police Department. After reviewing the statement to refresh her recollection, Algarin described in detail the events of April 10 and 11, 1998, including statements that the defendant had made to her regarding how the incident occurred, the creation of the alibi, and the depositing of the money

that had been stolen from Morales. Algarin testified that she had been questioned by police about the murder three or four times prior to providing them with her 2010 written statement, and that on each occasion she had made statements supporting the alibi created by the defendant and his brothers. Algarin also testified that, in the years following Morales' murder, she had told only three people about the murder: Ralph Crozier, an attorney whom she told in 2002; her former coworker; and Maldonado, whom she told in 2009. She stated that she had made the written statement to the police in 2010, and not sooner, because the defendant at that time was incarcerated and she felt "free to speak and free to live." Additionally, Algarin testified that she had been aware of a $50,000 reward that had been offered for information as to Morales' murder on the previous occasions when she had been asked by the police about the incident, but that she did not provide the police with any information prior to 2010. She stated, however, that she subsequently received, in 2010, approximately $28,000 of the reward for providing the information to the police.

Defense counsel's cross-examination included questions regarding Algarin's motive for making the statement in 2010. Specifically, defense counsel asked Algarin if, prior to her 2010 statement, she had spoken to the police three or four times about Morales' murder. Algarin admitted that on each occasion she had spoken to police prior to 2010, she had told them a story that was inconsistent with her trial testimony. Defense counsel also asked Algarin if she told the police that she needed to save Maldonado from getting hurt in jail because he had been arrested that day, and she replied in the affirmative. Algarin, however, denied that her goal in making the statement was to get Maldonado out of jail. The court subsequently asked Algarin about when she applied for the reward she received. Algarin

testified that Crozier, her attorney at the time, applied for the reward some time after she gave the statement in 2010. When asked again by defense counsel as to when she received the award, Algarin testified that she did not receive the award until after she made the statement and had been relocated to another state.

The state offered Algarin's statement to the police into evidence as a prior consistent statement. Defense counsel objected on the grounds that Algarin had not been impeached by an inconsistent statement and that a suggestion of bias, interest, or motive to fabricate was present at the time Algarin made the written statement. After oral argument, the court, relying on this court's ruling in *State* v. *Rose*, 132 Conn. App. 563, 33 A.3d 765 (2011), cert. denied, 303 Conn. 934, 36 A.3d 692 (2012), decided to admit Algarin's statement to the police with certain redactions. The court permitted the state to read the redacted statement to the jury. Prior to the reading of the statement, the court provided the jury with a limiting instruction, stating that the purpose of its introduction was to show its consistency with Algarin's in-court testimony and that the jury should consider the statement only as it related to her credibility and not as substantive evidence.

On appeal, the defendant claims that Algarin's statement was not admissible as a prior consistent statement because she did not make the statement prior to when her bias, interest, or motive to fabricate arose. Specifically, the defendant argues that Algarin's motive to give the statement arose (1) when Maldonado was arrested and incarcerated, and she became concerned for his safety in jail, and (2) in the years before the statement was made when she became aware of the $50,000 reward being offered for information about the 1998 murder.

We first set forth the applicable standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Griswold*, 160 Conn. App. 528, 536, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015). As such, "evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . This deferential standard is applicable to evidentiary questions involving hearsay, generally . . . *and to questions relating to prior consistent statements, specifically*." (Emphasis added; internal quotation marks omitted.) *State* v. *Henry D.*, 173 Conn. App. 265, 274, 163 A.3d 642, cert. denied, 326 Conn. 912, 166 A.3d 635 (2017).

"The general rule is that a party cannot strengthen the testimony of his own witness by showing that he has made previous statements to the same effect as his testimony . . . ." (Internal quotation marks omitted.) *State* v. *McCarthy*, 179 Conn. 1, 18, 425 A.2d 924 (1979); *State* v. *Albino*, 130 Conn. App. 745, 773, 24 A.3d 602 (2011) ("[e]vidence that bolsters a witness' credibility before it has come under attack is prohibited" [internal quotation marks omitted]), aff'd, 312 Conn. 763, 97 A.3d 478 (2014). "Although the general rule is that prior consistent statements of a witness are inadmissible, we have recognized exceptions in certain circumstances. . . . Section 6-11 (b) of the Connecticut Code of Evidence sets forth three limited situations in which the prior consistent statement of a witness is admissible:

If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Henry D.*, supra, 173 Conn. App. 275. The commentary to § 6-11 (b) further indicates in relevant part that ''[c]ommon law permits the use of a witness' prior statement consistent with the witness' in-court testimony to rehabilitate the witness' credibility after it has been impeached . . . .'' Conn. Code Evid. § 6-11 (b), commentary.

In the present case, defense counsel questioned Algarin on cross-examination regarding her 2010 statement to the police. Indeed, the defendant stated in his brief to this court that the ''main focus in cross-examination was to suggest that Algarin made up the story about her husband and his brothers' involvement in the murder because she was concerned about Maldonado's safety in jail and wanted to get favorable treatment for him in his criminal case.'' Defense counsel also questioned Algarin regarding the reward for which she applied, and suggested that she may have fabricated her testimony in order to qualify for the reward.

The defendant asserts that the trial court's reliance on *State* v. *Rose*, supra, 132 Conn. App. 563, was misplaced, and distinguishes that decision from the present case by arguing that Algarin's motive to lie about the defendant's involvement in Morales' murder arose at the time of Maldonado's arrest, which was prior to her providing her written statement to the police. Therefore, the defendant claims, because Maldonado was already arrested prior to Algarin providing her statement to police, her alleged motive to fabricate in order to secure Maldonado's safety from the defendant, who

was also incarcerated, existed at the time she made the statement.

Additionally, the defendant asserts that Algarin's purported motive to fabricate arose when she became aware of the $50,000 reward for information regarding Morales' murder, several years before she gave her 2010 statement to the police. Algarin testified that she was aware of the reward prior to 2010, when she was questioned by the police about the night of Morales' murder. Algarin's motive to fabricate for the purposes of obtaining the reward, thus, existed well before she provided her 2010 statement. Although Algarin testified during cross-examination and subsequent questioning by the court that she did not apply for or receive the reward until after she provided the statement in 2010, we find this timing to be immaterial. For purposes of the application of § 6-11 (b) (2) of the Connecticut Code of Evidence, what matters is when she became aware of the reward. Accordingly, we conclude that Algarin's 2010 written statement to police was not properly admitted as an exhibit pursuant to the § 6-11 (b) (2) exception requiring that the credibility of a witness first be impeached by a suggestion of bias, interest, or improper motive that was not present at the time the witness made the prior consistent statement before the consistent statement can be admitted as an exhibit.

Although we conclude that the court did not properly admit Algarin's 2010 statement as a prior consistent statement under § 6-11 (b) (2) of the Connecticut Code of Evidence, we conclude that the statement was admissible under the § 6-11 (b) (1) exception requiring that the credibility of a witness first be impeached by an inconsistent statement of the witness before the consistent statement can be admitted as an exhibit. We may affirm an erroneous evidentiary ruling if the evidence is admissible on other grounds. See *State* v. *Vines*, 71 Conn. App. 359, 366–67, 801 A.2d 918 ("even if the trial

court did not engage in the proper inquiry as to the admissibility of evidence, we are mindful of our authority to affirm a judgment of a trial court on a dispositive alternate ground for which there is support in the trial court record" [internal quotation marks omitted]), cert. denied, 261 Conn. 939, 808 A.2d 1134 (2002). "Under appropriate circumstances, a prior statement, consistent with a witness' testimony, may be admitted after introduction of an inconsistent statement. . . . There is an important qualification appended to this rule: When a prior consistent statement is received . . . under the principle we have applied, it is admitted to affect credibility only, not to establish the truth of the statement." (Citations omitted; internal quotation marks omitted.) *State* v. *McCarthy*, supra, 179 Conn. 18.

In the present case, Algarin's 2010 written statement was admitted after her credibility had been challenged during cross-examination. Defense counsel challenged Algarin's credibility by questioning her regarding how many times she had given the same alibi to police before deciding to come forward with different information in 2010. Defense counsel's reference to the inconsistencies between her testimony and the information she provided to police three or four times prior to her 2010 statement warranted, in the discretion of the court, the introduction of her prior consistent written statement to rehabilitate her credibility. See id., 18–21; *State* v. *Talton*, 63 Conn. App. 851, 855, 859–60, 779 A.2d 166, cert. denied, 258 Conn. 907, 782 A.2d 1250 (2001). The court ruled that the statement was admissible not for the truth of the matters set forth in it, but solely for the jury to assess Algarin's credibility. See *Marsh* v. *Washburn*, 11 Conn. App. 447, 462, 528 A.2d 382 (1987) ("A trial court, in its discretion, may admit a prior consistent statement to rehabilitate a witness impeached on the basis of his own prior inconsistent statements. . . . It is incumbent upon the trial court, however, to

instruct the jury that such statement is to be considered solely on the issue of the witness' credibility." [Citations omitted.]).

Applying the standard that "evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice," and noting that such standard is applicable to "questions relating to prior consistent statements, specifically"; (internal quotation marks omitted) *State* v. *Henry D.*, supra, 173 Conn. App. 274; we conclude that the court did not abuse its discretion in admitting Algarin's 2010 written statement as a prior consistent statement following cross-examination exposing the lies contained in her prior inconsistent statements to the police.

II

The defendant next claims that the trial court erred in admitting Algarin's testimony of uncharged misconduct involving specific instances of domestic violence perpetrated by the defendant against her. Specifically, the defendant argues that evidence of his uncharged misconduct was not relevant to this case and that, even if it was relevant, it should not have been admitted because it was more prejudicial than probative.

The following additional facts are relevant to this claim. Prior to trial, the defendant filed a motion in limine, arguing that his prior uncharged conduct involving domestic violence was not relevant and that its probative value was outweighed by its prejudicial effect. The state filed an opposition to the motion in limine, arguing that the defendant's motion was without merit because it mistakenly claimed that the uncharged conduct evidence was being offered to show guilt by association.[2] During direct examination, Algarin testified that her relationship with the defendant was

[2] The court granted the motion in part, and denied it in part, from the bench after argument on July 14, 2016. See footnote 5 of this opinion.

"extremely abusive . . . [p]hysically, psychologically, emotionally, financially." As to the defendant's physical abuse, Algarin testified that "he pistol-whipped, he stabbed me, broke my nose." After describing the specific instances in which the defendant broke her nose and pistol-whipped her, Algarin testified that the abuse began early in their relationship, and occurred every day. She further testified that when she called the police to report an act of abuse, the defendant "hit [her] over the head with the phone."

Algarin also testified that the defendant always made threats against her and her family and that she did not report her knowledge about Morales' murder to the police prior to 2010 because "[t]here was always someone around from his family," which concerned her "[b]ecause they're dangerous people." Specifically, Algarin stated that the defendant and one of his brothers were in a gang called the Latin Kings and that another brother was in a gang referred to as "NETA."

Immediately following Algarin's direct examination, the court instructed the jury on its use of the prior misconduct evidence. The court stated that such evidence was "not admitted to prove the bad character, propensity, or criminal tendencies of the defendant," but rather, was "admitted solely to show and establish fear on the part of the witness and one of the reasons for not reporting her observations of April 11, 1998." The court further stated that the jury "may consider such evidence if [it] believe[s] it and further find[s] that it logically and rationally and conclusively supports the issue, but only as it may bear on the issue of fear on the part of the witness, as being one of the reasons [for] her not reporting her observations of April 11, 1998." The court later repeated this same instruction in its final charge to the jury.

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue.

. . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, so long as it is not prejudicial or merely cumulative." (Emphasis in original; internal quotation marks omitted.) *State* v. *Small*, 180 Conn. App. 674, 683, 184 A.3d 816, cert. denied, 328 Conn. 938, 184 A.3d 268 (2018).

Section 4-3 of the Connecticut Code of Evidence provides in relevant part that "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . ." "[Our Supreme Court] has previously enumerated situations in which the potential prejudicial effect of relevant evidence would counsel its exclusion. Evidence should be excluded as unduly prejudicial: (1) where it may unnecessarily arouse the jury's emotions, hostility or sympathy; (2) where it may create distracting side issues; (3) where the evidence and counterproof will consume an inordinate amount of time; and (4) where one party is unfairly surprised and unprepared to meet it. . . . Furthermore, with respect to a trial court's ruling on a prejudicial-probative balancing test, [w]e will indulge in every reasonable presumption in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *State* v. *Estrella J.C.*, 169 Conn. App. 56, 99, 148 A.3d 594 (2016).

Evidence of prior misconduct is generally not admissible to prove bad character or a propensity to engage in criminal activities. Conn. Code. Evid. § 4-5 (a). Section 4-5 (c) of the Connecticut Code of Evidence, however, provides that "[e]vidence of other crimes, wrongs or acts of a person is admissible for purposes

other than those specified in subsection (a) [of § 4-5], such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, *or to corroborate crucial prosecution testimony*." (Emphasis added.) In determining the admissibility of prior bad acts to corroborate crucial prosecution testimony, our Supreme Court has "required the proponent of the evidence to demonstrate a close relationship between the proffered evidence and the evidence to be corroborated. Other crimes evidence, therefore, is only admissible for corroborative purposes, if the corroboration is direct and the matter corroborated is significant. . . . Under this test, significant evidence is defined as important, as opposed to trivial, evidence. . . . Direct corroborating evidence is that which is not wholly disconnected, remote, or collateral to the matter corroborated. . . . The requirement that the corroborating evidence be direct is necessary in order to ensure that the link between the corroborative evidence and the facts to be inferred therefrom is not too attenuated or nonprobative; otherwise, the evidence might unfairly reflect upon the defendant's propensity to commit crimes." (Citations omitted; internal quotation marks omitted.) *State* v. *Mooney*, 218 Conn. 85, 129, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991).[3]

The commentary to § 4-5 (c) of the Connecticut Code of Evidence further provides in relevant part that "the purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are

[3] In *State* v. *Mooney*, supra, 218 Conn. 129, our Supreme Court found a witness' testimony of the defendant's prior bad acts significant because it strengthened the testimony of another critical state witness. Additionally, the court found the testimony admissible because it reinforced the testimony of the state's critical witness and linked the defendant to the ultimate facts to be proven. Id., 129–30.

intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors." As such, evidence of prior bad acts has also been admitted to rehabilitate a state's key witness. See *State* v. *Estrella J.C.*, supra, 169 Conn. App. 96–98.[4]

"The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Small*, supra, 180 Conn. App. 683.

In the present case, the evidence of the uncharged misconduct was probative to explain why Algarin feared the defendant and waited twelve years before telling the police about her knowledge of Morales' murder. The state argued that admitting evidence of severe domestic abuse was material to corroborating crucial prosecution testimony. In its ruling admitting such evidence, the court relied on *State* v. *Yusuf*, 70 Conn. App. 594, 800 A.2d 590, cert. denied, 261 Conn. 921, 806 A.2d 1064 (2002), noting "that a delay in disclosing is a significant event that the state must have some type of explanation for. So it's an important—it's extremely

[4] In *State* v. *Estrella J.C.*, supra, 169 Conn. App. 99–100, this court found that the probative value of uncharged misconduct evidence was not outweighed by its prejudicial effect where such evidence "did not tend to arouse the emotions of the jury . . . pertained to the credibility of the state's key witness, which was the essence of the state's case . . . [and] was not consumed by an inordinate amount of time, but rather was resolved quite summarily at the beginning of two days of the trial."

important if the state has any explanation for a delay in reporting."

The defendant argues that the relevance of Algarin's domestic violence testimony was contingent on the state calling Dr. Evan Stark, an expert on battered woman syndrome. The defendant, therefore, asserts that the court's reliance on *Yusuf* in its ruling was misplaced because, unlike in *Yusuf*, there was no testimony in the present case about battered woman syndrome. This court's ruling in *Yusuf*, however, does not require expert testimony about battered woman syndrome as a predicate to admitting evidence concerning domestic violence. Rather, in *Yusuf*, this court found that such testimony was relevant where it served to corroborate crucial prosecution testimony. See id., 608–609. In the present case, by parallel logic, Algarin's domestic violence testimony served to explain her reason for not providing, over an approximately twelve year period, her knowledge about Morales' murder. Because Algarin's testimony about the domestic violence directed against her made it more probable that a jury would credit her testimony explaining her reliance on the fabricated alibi and her delay in reporting her knowledge to the police, we conclude that the court did not abuse its discretion in determining that the testimony was relevant.

We also conclude that the court did not abuse its discretion in finding that the probative value of Algarin's domestic abuse testimony was not outweighed by unfair prejudice to the defendant. In the present case, the probative value of Algarin's testimony regarding the uncharged misconduct was strong because it assisted the jury in understanding why she repeated the fabricated alibi to the police and did not disclose information to the police pertaining to Morales' murder for approximately twelve years. Algarin's testimony that she feared

the defendant and, thus, did not feel safe offering information on Morales' murder to police, provided a context and reasonable explanation for the jury to consider her actions. Moreover, the court made efforts to limit the risk of unfair prejudice to the defendant. The court admitted Algarin's description of the broken nose incident and the pistol-whipping because they occurred at around the same time as Morales' murder. The court also limited Algarin's testimony about a number of other incidents of violence over the years, ordering that she not go into detail about them. We, therefore, are not persuaded that the court abused its discretion in admitting Algarin's testimony, as limited, concerning the incidents of domestic violence, in order to explain to the jury the approximately twelve year delay in her disclosure to the police of her knowledge of the murder of Morales.

III

Finally, the defendant claims that the prosecutor repeatedly violated the court's order concerning evidence of specific instances of domestic violence and, thus, deprived him of his due process right to a fair trial. In particular, the defendant claims that the prosecutor improperly (1) elicited inadmissible responses from Algarin during direct examination, which she later referred to in her rebuttal closing argument, (2) failed to redact Algarin's statement to the police as the court had ordered, and (3) referred to several inadmissible domestic violence incidents in her rebuttal closing argument.

The defendant concedes that he failed to properly preserve these claims at trial. "It is well established law . . . that a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly,

it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Franklin*, 175 Conn. App. 22, 48, 166 A.3d 24, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017). This rule, however, "does not pertain to mere evidentiary claims masquerading as constitutional violations." (Internal quotation marks omitted.) *State* v. *Small*, supra, 180 Conn. App. 687.

"The principles governing our review of the defendant's claims are well established. In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, *if an impropriety exists*, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Emphasis added; internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 541–42, 180 A.3d 882 (2018). Moreover, "[w]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Turner*, 181 Conn. App. 535, 557, 187 A.3d 454, cert. granted, 330 Conn. 909, 193 A.3d 48 (2018).

A

The defendant first claims that "it can reasonably be inferred that the prosecutor, partly based on her particular track record, did not intend to comply with the judge's ruling limiting [Algarin's] testimony about

specific claimed instances of domestic violence"[5] because, even after the court's ruling, the prosecutor asked questions on direct examination that she should have known would elicit inadmissible responses from Algarin. (Footnote omitted.) The defendant identifies two exchanges that allegedly support his position:

"[The Prosecutor]: And when you said that [the relationship] was physically abusive, what do you mean?

"[Algarin]: Well, he pistol-whipped, he stabbed me, broke my nose.

* * *

"[The Prosecutor]: And was there abuse prior to you living with [the defendant]?

"[Algarin]: Yeah. He pulled my hair."

The defendant objected to the first exchange, and the court ruled that it did not violate its previous order on the admissibility of specific instances of domestic violence. In particular, the court stated: "[The response] came out as sort of a full stream. . . . I didn't think it violated my previous order in this regard. . . . I did indicate pistol-whipping was fine, broken nose was fine, I did not write down stabbing as an—an option. . . . It certainly is relevant for reasons I mentioned before. I will provide a limiting instruction, I guess, at this time."

The court then asked the prosecution whether it was going to go into specific details on the stabbing. The

[5] The court ruled in relevant part: "I think that at some point the introduction of this type of evidence becomes cumulative and therefore, perhaps overly prejudicial, but I think that I will allow the state to have the witness describe the broken nose incident in 1998, which was the same time as the murder in this case, and as well as the pistol-whipping in 1998. I will not allow the state to go into detail on the sexual assault in [1999] or struck in the head with a [twenty-five] pound weight. What I will allow the state to do is have the witness indicate that there were a number of other incidents of violence over the years without going into detail."

prosecutor replied that she was only going to ask about details of the broken nose and pistol-whipping incidents, pursuant to the court's order. The defendant did not object to the second exchange.

We cannot conclude on the basis of the record before us that the prosecutor's questions were intended to elicit inadmissible responses from Algarin. The prosecutor's questions were broad and open-ended, and Algarin appeared to the court to offer her responses spontaneously and without prompting. Additionally, the prosecutor did not go into further detail about the stabbing or hair pulling incidents but, instead, directly acknowledged to the court that the state would limit its inquiries to the specific matters that the court had allowed in its order.

B

The defendant next claims that the prosecutor's failure to redact references in the 2010 statement, to the defendant stabbing Algarin and beating her while she was pregnant, rose to the level of impropriety. The record, however, reveals that the defendant had the opportunity to request the court to order additional redactions of the 2010 statement. Specifically, when discussing redactions to the statement with both parties, the court asked whether there was "anything else in the statement that is not consistent with the [c]ourt's ruling that this is admissible under [*Rose*]?" The defendant did not respond that the references to the defendant stabbing Algarin and beating her while she was pregnant should be redacted. The defendant did not subsequently object to the statement as redacted or request further redactions of the portions of the statement that he alleges on appeal should also have been redacted.

The defendant's claim that the prosecutor improperly failed to redact certain portions of Algarin's statement

is purely evidentiary. "[A] defendant may not transform an unpreserved evidentiary claim into one of prosecutorial impropriety to obtain review of that claim . . . ." (Internal quotation marks omitted.) *State* v. *Devito*, 159 Conn. App. 560, 574, 124 A.3d 14, cert. denied, 319 Conn. 947, 125 A.3d 1012 (2015). Accordingly, we decline to review this unpreserved evidentiary claim.

C

Finally, the defendant claims that the prosecutor improperly referred to several inadmissible incidents of alleged domestic violence in her rebuttal closing argument and that such references were intended to arouse the passions and sympathies of the jurors. In particular, the defendant takes issue with the prosecutor's following statement: "How did she describe the relationship? Abuse was breakfast, lunch, and dinner. It was physical, emotional, financial, psychological abuse. Burned her with cigarettes, stabbed her, punched her, kicked her. She learned that if you screamed you'd only get hit more and harder. So she learned how not to scream. He would lie on top of her, she said during this abuse, and say, I own you. Pistol-whipped her, he said that was for—that he needed money for his addiction she wouldn't give it to him so he pistol-whipped her.

* * *

"He didn't recall stabbing her in the leg, not that it didn't happen. If someone stabbed you do you think that that would [be] memorable to you? It was to [Algarin]."

We have previously recognized that "prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something

must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury [has] no right to consider." (Internal quotation marks omitted.) *State* v. *Reddick*, 174 Conn. App. 536, 559, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018). Additionally, "[i]t is well settled that [a] prosecutor may not seek to sway the jury by unfair appeals to emotion and prejudice . . . ." (Internal quotation marks omitted.) *State* v. *Holley*, 144 Conn. App. 558, 569, 72 A.3d 1279, cert. denied, 310 Conn. 946, 80 A.3d 907 (2013).

After a careful review of the record, we cannot conclude that the prosecutor's references, during her rebuttal closing argument, to specific instances of domestic violence to which Algarin had testified, were improper. The prosecutor relied exclusively on evidence admitted during the trial in making her argument that Algarin and the defendant had an abusive relationship. Specifically, the prosecutor referenced Algarin's testimony

that the defendant was "extremely abusive . . . [p]hysically, psychologically, emotionally, financially," that the defendant pistol-whipped her, stabbed her, broke her nose, and pulled her hair, and that various other instances of physical abuse occurred "every day" over the course of their relationship. The prosecutor also referenced the following exchange that occurred during Algarin's direct examination:

"[The Prosecutor]: And you indicated that there was, I think you said the abuse that you suffered was breakfast, lunch and dinner, was that during pretty much the entire relationship or how long in your relationship was that with the defendant?

"[Algarin]: The entire relationship this is, I don't know if I could show it, but I got a cigarette burn right here on the palm of my hand."

Finally, the prosecutor referenced Algarin's testimony regarding how the defendant reacted to her questions on the night of Morales' murder:

"[The Prosecutor]: And you indicated that he put a beating on you, what do you mean by that?

"[Algarin]: He started punching me on the head, until I got to the floor and he started kicking me, repeatedly.

"[The Prosecutor]: Where was he kicking you?

"[Algarin]: In my back."

The court explicitly allowed testimony describing the broken nose incident in its ruling limiting the testimony to specific incidents of domestic violence, as it occurred close to the time of Morales' murder. See footnote 5 of this opinion. Similarly, the court admitted Algarin's testimony as to being punched and kicked because it occurred on the night of Morales' murder. Finally, although Algarin's testimony as to being burned by a cigarette was not explicitly ruled to be admissible by

the court, defense counsel did not object to it at the time it was made or thereafter. The prosecutor's delineation of the defendant's abusive relationship with Algarin during her rebuttal closing argument directly related to the state's position that Algarin delayed providing information to the police for approximately twelve years because she feared the defendant. See part II of this opinion.

Because we conclude that no prosecutorial improprieties were established by the defendant, we need not engage in an analysis of the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)[6] to determine whether the defendant was deprived of his due process right to a fair trial. See *State* v. *Campbell*, supra, 328 Conn. 541–42. Similarly, we need not address the defendant's claim as to whether the court should exercise its supervisory authority.[7]

The judgment is affirmed.

In this opinion the other judges concurred.

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[6] "In determining whether prosecutorial misconduct was so serious as to amount to a denial of due process, this court, in conformity with courts in other jurisdictions, has focused on several factors. Among them are the extent to which the misconduct was invited by defense conduct or argument . . . the severity of the misconduct . . . the frequency of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted.) *State* v. *Williams*, supra, 204 Conn. 540.

[7] "[W]hen prosecutorial [impropriety] is not so egregious as to implicate the defendant's right to a fair trial, an appellate court may invoke its supervisory authority to reverse a criminal conviction *when the prosecutor deliberately engages in conduct that he or she knows, or ought to know, is improper*." (Emphasis added; internal quotation marks omitted.) *State* v. *Santiago*, 143 Conn. App. 26, 48, 66 A.3d 520 (2013). No such conduct was demonstrated by the defendant in the present case.

# CHELSEA CHAPMAN KIRWAN *v.* LAURENCE KIRWAN (AC 40789)

Alvord, Prescott and Norcott, Js.

*Syllabus*

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgments of the trial court ordering him to pay for a portion of his children's private middle school tuition and finding him in contempt for violating that order. The dissolution judgment incorporated by reference a pendente lite arbitration award that had resolved many of the issues raised in the dissolution action. The parties, however, expressly reserved for the trial court resolution of child related financial issues. Thereafter, following a hearing, the trial court issued child support orders, which, by agreement of the parties, were made retroactive to the date of the dissolution judgment, and ordered, inter alia, that the parties were to make determinations regarding their children's private middle school education in accordance with their parenting plan and that they would share the children's educational expenses, with the plaintiff responsible for 25 percent and the defendant responsible for 75 percent. Subsequently, the plaintiff filed a motion for an order requesting that the court order the defendant to pay his share of their children's private middle school tuition for the 2015–2016 and 2016–2017 academic years, and later requested that the defendant also pay his share of the 2017–2018 tuition. The defendant objected to the motion for an order, arguing that the children's enrollment in the school had not been made in compliance with the parties' parenting plan, which provided that the parties must consider, discuss and agree on major decisions concerning their children's education. The children began attending the private middle school in the fall of 2014, and the parties entered into their parenting plan in May, 2015. The trial court granted the plaintiff's motion for an order and ordered the defendant to pay 75 percent of the children's private middle school tuition for the subject academic years, and the defendant appealed to this court. Thereafter, the plaintiff filed a motion for contempt, alleging that the defendant had failed to pay the children's private middle school tuition in violation of the court's order. The trial court granted the motion for contempt, finding that the defendant's failure to comply with its order was wilful. On the defendant's amended appeal to this court, *held*:

1. The defendant could not prevail on his claim that the trial court erred by ordering him to pay 75 percent of his children's private middle school tuition for the 2015–2016, 2016–2017 and 2017–2018 academic years, which was based on his claim that the children's enrollment in the

school was not decided in accordance with the parties' parenting plan; that court did not abuse its discretion in granting the plaintiff's motion for an order because even if the plaintiff did not confer or consult with the defendant regarding the children's continued enrollment in the private middle school pursuant to the parenting plan, the parties' decision to enroll the children in the school had been made by the fall of 2014, and the 2015 parenting plan was forward looking, governing the parties' collaborative behavior as to future child rearing decisions, and, therefore, the trial court reasonably could have found the defendant responsible for his 75 percent share of the children's private middle school tuition for the subject academic years.

2. The defendant could not prevail on his claim that the trial court erred by ordering him to pay the portion of the children's 2015–2016 tuition that was incurred prior to the dissolution of the parties' marriage in October, 2015; the trial court did not abuse its discretion in allocating the marital tuition debt for the 2015–2016 academic year in addition to allocating responsibility for the postdissolution tuition for the 2016–2017 and 2017–2018 academic years in accordance with its child related financial orders, that court having properly exercised its authority pursuant to the applicable statute (§ 46b-81) to allocate between the parties the marital debt related to the children's 2015–2016 private middle school tuition, which was incurred prior to the entry of the dissolution judgment.

3. The trial court did not abuse its discretion in finding the defendant in contempt for his failure to comply with its order regarding the children's private middle school tuition: the trial court's underlying order was sufficiently clear and unambiguous to support its finding of contempt, as the court clearly stated that the defendant was obligated to pay 75 percent of the children's private middle school tuition for the 2015–2016, 2016–2017 and 2017–2018 academic years, and its suggestion to the defendant regarding potential outside avenues to effectuate payment of his tuition obligation did not make unclear his financial responsibility for the arrearage created by his failure to pay his share of the tuition; moreover, the defendant's contention that he was unable to pay for the children's tuition, and, therefore, that his noncompliance with the order was not wilful was unavailing, as the court's findings that the defendant's annual income was approximately $400,000 and that he did not meet his burden of proving that he was unable to pay his court-ordered obligation were supported by the testimony of the defendant's accountant and, thus, were not clearly erroneous.

Argued October 25, 2018—officially released January 22, 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, *Tindill*, *J.*,

approved the agreement of the parties to enter into binding mediation/arbitration as to certain disputed matters; thereafter, the arbitrator issued an award and entered certain orders; subsequently, the arbitrator issued a clarification of the award; thereafter, the court granted the defendant's motion to confirm the arbitrator's award and rendered judgment incorporating the arbitrator's award and clarification, and dissolving the marriage and granting certain other relief; subsequently, the court issued certain orders; thereafter, the court, *Heller*, *J.*, granted the plaintiff's motion for an order regarding certain tuition payments; subsequently, the court, *Heller*, *J.*, denied the defendant's motion to reargue, and the defendant appealed to this court; thereafter, the court, *Heller*, *J.*, issued an articulation of its decision; subsequently, the court, *Heller*, *J.*, granted the plaintiff's motion for contempt, and the defendant filed an amended appeal. *Affirmed*.

*Laurence Kirwan*, self-represented, the appellant (defendant).

*Joseph T. O'Connor*, for the appellee (plaintiff).

*Opinion*

ALVORD, J. The present appeal arises following the trial court's October 23, 2015 judgment dissolving the marriage of the plaintiff, Chelsea Chapman Kirwan, and the self-represented defendant,[1] Laurence Kirwan. The judgment incorporated by reference a pendente lite arbitration award that had resolved many of the issues raised in the dissolution action, including alimony, the distribution of marital assets, and the enforceability of a premarital agreement. Both the parties' arbitration agreement and the arbitrator's award, however, expressly reserved for the Superior Court resolution of

[1] In the trial court, The Pickel Law Firm, LLC, and Meyers Breiner & Kent, LLP, filed limited appearances on behalf of the defendant. The defendant is appearing as a self-represented party in this appeal.

child related financial issues.[2] Following an evidentiary hearing, the court, on December 7, 2016, issued child support orders, which, by agreement of the parties, were made retroactive to the date of the dissolution judgment. On that same date, the court also ordered the parties to make determinations regarding their children's private middle school education in accordance with their parenting plan. In this appeal, the defendant challenges two subsequent judgments of the trial court, ordering him to pay for a portion of his children's private middle school tuition[3] and finding him in contempt when he failed to do so.

On appeal, the defendant raises various repetitive and overlapping claims of error, which this court has distilled into the three inclusive issues addressed in this opinion. The core of the defendant's claims are that the court erred in (1) ordering him to pay 75 percent of his children's private middle school tuition for the 2015–2016, 2016–2017, and 2017–2018 academic years, because their enrollment in the school was not decided pursuant to the parties' parenting plan, (2) ordering him to pay for a portion of the 2015–2016 school year tuition that was incurred before October 23, 2015, the date of the dissolution, and (3) finding him in contempt. We disagree and, accordingly, affirm the judgments of the trial court.

The following facts and procedural history, relevant to our resolution of the defendant's claims in the present appeal, were recently set forth by this court in *Kirwan*

[2] Specifically, the arbitrator's award stated in relevant part: "The issues of custody, access, child support, maintenance and cost of medical insurance for the minor children and unreimbursed medical expenses are reserved to the Connecticut Superior Court."

[3] Although the parties have three minor children together, all references to the children herein shall refer solely to the parties' twin daughters, whose private middle school tuition is the subject of this appeal.

v. *Kirwan*, 185 Conn. App. 713, A.3d (2018).[4] "The parties were married in 2001. The defendant is a plastic surgeon with offices in New York, Norwalk, and London, as well as a consultant and a professor of plastic surgery. The plaintiff is college educated and worked in pharmaceutical sales until shortly after she married the defendant, at which time she worked for the defendant in his medical practice. The parties have three minor children together, one of whom has special needs. Prior to their marriage, the parties entered into a premarital agreement that, in relevant part, limited the plaintiff's alimony in the event of divorce to $50,000 a year for five years and allocated 45 percent of the value of the marital home to the plaintiff as her share of marital property. In September, 2012, the plaintiff initiated an action to dissolve the parties' marriage.

"On May 26, 2015, the court, *Tindill*, *J.*, approved an agreement by the parties to enter into binding mediation/arbitration of the dissolution action. Pursuant to the parties' arbitration agreement, which was made an order of the court, '[t]he parties agree[d] that the following issues in their action for dissolution of marriage shall be the subject of mediation and, if the parties are unable to resolve these issues via mediation, to binding arbitration . . . .' The list of issues to be resolved in arbitration included the validity and enforceability of the premarital agreement; the validity of an alleged rescission of that premarital agreement; a determination of alimony in accordance with General Statutes § 46b-82; an equitable division of marital property, assets, and liabilities pursuant to General Statutes

[4] In *Kirwan* v. *Kirwan*, supra, 185 Conn. App. 718, the defendant challenged the trial court's child support orders and a subsequent remedial order that the court issued in response to a motion for contempt for nonpayment of child support that required the defendant to make a $91,000 lump sum payment to the plaintiff to satisfy a child support arrearage. This court rejected the defendant's claims. See id., 752 (affirming trial court's judgments).

§ 46b-81; division of attorney's fees and guardian ad litem fees; and any other relief deemed appropriate by the arbitrator 'except as it pertains to child custody and issues of child support.'

"On August 4, 2015, the arbitrator, former Superior Court Judge Elaine Gordon, issued her arbitration award. As a preliminary matter, the arbitrator determined that the parties' premarital agreement was unconscionable, and thus unenforceable, due to 'the present, uncontemplated circumstances' of the parties.[5] The arbitrator issued a number of orders regarding alimony and the distribution of marital assets, including an order directing the sale of the marital home. In support of her orders, the arbitrator made several factual findings, including that '[t]he defendant's annual [gross] income is found to be approximately $400,000 per year based on his income tax returns, business financial statements and the information he has provided to lending institutions on his applications.' As previously noted, the arbitration award indicated that '[t]he issues of custody, access, child support, maintenance and cost of medical insurance for minor children and unreimbursed medical expenses are reserved to the Connecticut Superior Court.'

"On September 1, 2015, the defendant filed a motion asking the court to confirm the arbitration award and to render judgment dissolving the parties' marriage in accordance with the arbitration award. On that same date, the plaintiff filed a motion asking the court to issue orders on the unresolved matters of child support and postsecondary educational expenses. Neither party

[5] The arbitrator stated in relevant part: "To leave the plaintiff, who has no experience in a competitive workplace after thirteen years, with no assets, an alimony award of five years, which is unrelated to either the plaintiff's needs or the defendant's income, and responsibility for three children, one of whom has special needs, is more than unfair or onerous, it is unconscionable."

filed an objection to the other party's motion, and the matters were set down for a hearing on October 23, 2015. At that time, the court rendered a judgment of dissolution of marriage that incorporated by reference the arbitration award and subsequent clarification. The parties agreed that the court would determine the defendant's child support obligations, including the issue of unreimbursed medical expenses and child care, after an evidentiary hearing, and that child support obligations would be made retroactive to the date of dissolution." (Footnotes altered.)

The following additional facts, as found by the trial court, and procedural history are relevant to our resolution of this current appeal by the defendant. On December 7, 2016, following a five day hearing on child related financial orders as well as several postjudgment motions, the court issued a memorandum of decision ordering, inter alia, that the parties were to make determinations regarding their children's private middle school education in accordance with their parenting plan.[6] The court also ordered that the parties would share the children's educational expenses, with the plaintiff responsible for 25 percent and the defendant responsible for 75 percent.

During the course of the marriage and after the divorce proceeding was filed, the parties' children had attended private school at the French-American School of New York from kindergarten through the fourth

[6] The parties' parenting plan, executed on May 26, 2015, provides that they must consider, discuss and agree on major decisions concerning, inter alia, their children's education. Specifically, the parenting plan provides in relevant part: "Major decisions, which shall be defined as those key issues [affecting] the minor children's health [and] course of study . . . shall be considered, discussed, and agreed to by both parties. . . . The parties recognize that the joint custody provision herein imposes an affirmative obligation to confer and consult with each other and arrive at a consensus regarding major decisions concerning the health, education and welfare of the minor children."

grade, as the parents agreed that their children should have a more European focused education. The French-American School of New York, upon the plaintiff's inquiry, recommended Saints John and Paul School for the children because it had a similar program but cost less money. The children were accepted into middle school at Saints John and Paul School beginning in the fall of 2014 for their fifth grade year. The middle school at Saints John and Paul School ran from fifth grade through eighth grade.

In January, 2015, the defendant visited Saints John and Paul School, where his daughters were enrolled in fifth grade. The defendant met with the school's assistant principal. During the visit, he asked questions about the school and his children's French language studies. At that time, he expressed no objection to his children being educated at Saints John and Paul School.

On January 19, 2017, the plaintiff filed a motion for an order regarding the defendant's payment of his share of the private middle school tuition. In this motion, the plaintiff requested that the court order the defendant to pay $36,000, representing his share of the tuition costs for the 2015–2016 and 2016–2017 academic years. The plaintiff later requested that the defendant also pay his share of the 2017–2018 tuition costs. In objecting to the plaintiff's motion for an order, the defendant argued that the children's enrollment in private middle school had not been made in compliance with the May, 2015 parenting plan and that he was therefore not obligated to pay his share of the tuition costs. On June 22, 2017, the plaintiff filed a motion seeking an immediate hearing on her motion for order, wherein she also replied to arguments raised in the defendant's objection to her motion for an order.

On July 17, 2017, the trial court, *Heller*, *J.*, on the record, granted the plaintiff's January 19, 2017 motion

for order and overruled the defendant's objection thereto. Specifically, the court found that "under the orders that were entered by Judge Tindill in December, 2016 retroactive to October, [2015], the defendant is obligated to pay 75 percent of the tuition that is past due from 2015 to 2016 and 2016 to 2017, and for the coming year of 2017 to 2018." On July 31, 2017, the defendant filed a motion to reargue. On August 25, 2017, the court issued a written order summarily denying that motion. The defendant then filed this timely appeal.

On September 11, 2017, the defendant filed a motion for articulation of the trial court's July 17, 2017 decision. The plaintiff filed an objection thereto. The trial court summarily denied the motion for articulation and sustained the objection thereto. The defendant then filed a motion for review with this court.

On January 18, 2018, this court ordered the trial court to articulate the factual and legal basis of its July 17, 2017 decision to the extent that the defendant argued that he was not required to pay tuition costs incurred prior to October 23, 2015. On January 26, 2018, the trial court articulated its decision. It explained that the plaintiff incurred the debt to Saints John and Paul School for the parties' children during the 2015–2016 school year prior to the entry of the October, 2015 dissolution judgment, and that, under § 46b-81, the court had the authority to allocate some or all of this liability to the defendant.

On August 9, 2017, the plaintiff filed a motion for contempt. The plaintiff claimed that the defendant had failed to pay, or make arrangements to pay, the amount that he owed to Saints John and Paul School, in violation of the court's July 17, 2017 decision. The court held a hearing on the plaintiff's motion on October 2 and 23,

and December 8, 2017.[7] As of the October 2 hearing date, the defendant had failed to make any payments to Saints John and Paul School on his court-ordered share of the children's tuition. By the December 8 hearing date, the defendant had paid only $3500 to Saints John and Paul School toward his $54,894.40 tuition obligation.

On February 5, 2018, the court found the defendant in contempt for failing to comply with the court's July 17, 2017 order to pay 75 percent of his children's tuition for the 2015–2016, 2016–2017, and 2017–2018 academic years. In finding the defendant in contempt, the court determined that the defendant's failure to comply with the court's order was wilful. The defendant's annual income from his medical practice was approximately $400,000. Rather than paying for his children's tuition, the defendant chose to satisfy over $100,000 in other debt. In addition, although he was entitled to $53,519 from his 2016 federal income tax return, the defendant chose to apply the entire amount to his 2017 estimated taxes. In finding the defendant in contempt, the court ordered him incarcerated but stayed the order of incarceration to provide him with an opportunity to purge the contempt by making a payment of $10,278.88 to the plaintiff, which represented 20 percent of the total due by the defendant to Saints John and Paul School. Lastly, the court awarded, pursuant to General Statutes § 46b-87, the plaintiff attorney's fees for the preparation and prosecution of the motion for contempt. The defendant thereafter filed an amended appeal. Additional facts will be set forth as necessary.

[7] At the same time, the court also considered a motion for an order that the defendant had filed on August 10, 2017. In his motion, the defendant sought a court order that his children attend the public school in the Rye, New York, school district. The court denied the defendant's motion in its February 5, 2018 memorandum of decision. The defendant did not appeal the court's denial of this motion.

I

The defendant claims that the trial court erred by ordering him to pay 75 percent of his children's private middle school tuition for the 2015–2016, 2016–2017, and 2017–2018 academic years, because their enrollment in the school was not decided pursuant to the parenting plan he entered into on May 26, 2015.[8] Specifically, he argues that, under the parenting plan, the plaintiff was obligated to confer and consult with him regarding their children's education. He claims that the plaintiff failed to do so, and, therefore, he is not obligated to pay his 75 percent share of the children's tuition. We disagree.

We begin by setting forth the relevant standard of review. "An appellate court will not disturb a trial

[8] In addition to the defendant's claims challenging the substance of the court's decision, he sets forth several claims challenging the court's authority to rule on the issue of the children's private middle school tuition. He argues that (1) the court was bound by the findings of the arbitration award, (2) the court erred when it considered the issue of private middle school tuition because child support, maintenance, and unreimbursed medical expenses were the only issues reserved by the court, (3) the court erred in disturbing orders of the parenting plan, (4) the tuition was the subject of a motion for modification, and (5) the tuition was the subject of an automatic stay. These claims have no merit.

The crux of the defendant's first and second claims are that the children's tuition was not included within the child related financial issues that were reserved to the trial court. We disagree. The arbitration award indicated that "[t]he issues of custody, access, child support, maintenance and cost of medical insurance for minor children and unreimbursed medical expenses are reserved to the Connecticut Superior Court." Although the children's tuition was not explicitly listed as one of the issues reserved, the parties consistently treated the tuition as part of the child related financial issues to be addressed by the court. Next, the court did not disturb the orders of the parenting plan. Rather, the court found that the parenting plan did not apply. Moreover, in the defendant's motion for modification, which he filed on December 19, 2016, the defendant sought to modify his weekly child support obligation. The motion did not address the issue of the children's tuition. Lastly, nothing in the record indicates that there was an automatic stay in place regarding child support or the children's tuition. See *Schull* v. *Schull*, 163 Conn. App. 83, 99, 134 A.3d 686, cert. denied, 320 Conn. 930, 133 A.3d 461 (2016) (orders related to child support are not automatically stayed under Practice Book § 61-11 (c) pending the period of an appeal).

court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Thus, unless the trial court applied the wrong standard of law, its decision is accorded great deference because the trial court is in an advantageous position to assess the personal factors so significant in domestic relations cases . . . ." (Internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 156 Conn. App. 628, 637, 115 A.3d 39, cert. denied, 317 Conn. 921, 118 A.3d 63 (2015).

We conclude that the court did not abuse its discretion when it granted the plaintiff's motion for an order on July 17, 2017,[9] even if the plaintiff did not confer or consult with the defendant regarding their children's continued enrollment at Saints John and Paul School.

The parties' children began attending middle school at Saints John and Paul School in the fall of 2014. In January, 2015, the defendant visited Saints John and Paul School and expressed no objection to his children being enrolled at its middle school.[10] At the time the

[9] The defendant also claims that the court erred by denying his July 31, 2017 motion to reargue and his September 11, 2017 motion for articulation regarding the court's July 17, 2017 ruling. We consider these claims to be inadequately briefed and therefore decline to address them. "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

[10] On appeal, the defendant also claims that he was improperly precluded from presenting evidence of (1) a letter sent by his attorney to the plaintiff's attorney during settlement negotiations for the parenting plan, and (2) e-mail correspondence between himself and his attorney. He claims that this evidence exhibited his objection to the children's enrollment at Saints John and Paul School. With respect to the settlement negotiations, the defendant

parties entered into their parenting plan, in May, 2015, the children were finishing their first year of middle school at Saints John and Paul School. The parenting plan provides that the parties must consider, discuss and agree on major decisions concerning, inter alia, their children's education. Specifically, the parenting plan provides in relevant part: "Major decisions, which shall be defined as those key issues [affecting] the minor children's health [and] course of study . . . shall be

offered a letter from his attorney sent during negotiations for the parenting plan. The letter stated that it was for settlement purposes only. The general rule is that evidence of settlement negotiations is not admissible at trial. See *Jutkowitz* v. *Dept. of Health Services*, 220 Conn. 86, 97, 596 A.2d 374 (1991). Thus, the court properly excluded this evidence.

Moreover, with respect to the e-mails, the plaintiff objected to their admission on the basis of hearsay and pointed out that they were sent from the defendant to the defendant's attorney. The following colloquy took place between the court and the defendant:

"The Court: . . . I don't want you to inadvertently waive the attorney-client privilege.

"[The Defendant]: I understand.

"The Court: So, perhaps you can get in the gist of that through your own testimony too.

"[The Defendant]: Absolutely. So, just initially starting with the e-mail of 6/22/14. There's some question about whether or not I had objected prior to the children starting school in St. John and Paul. And it says, I have no idea where the children are currently living, etc. With regard to schooling next year, I have no idea which schools the children are going to."

From the record, it is not clear that the court precluded the defendant from presenting evidence of the e-mails. Rather, upon learning that he risked waiving his attorney-client privilege, the defendant did not offer the e-mails into evidence. However, even assuming that the court improperly excluded the defendant's evidence, the defendant has failed to demonstrate harm. See *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 158, 971 A.2d 676 (2009) ("[e]ven if a court has acted improperly in connection with the introduction of evidence, reversal of a judgment is not necessarily mandated because there must not only be an evidentiary [impropriety], there also must be harm" [internal quotation marks omitted]); see also *Lovetere* v. *Cole*, 118 Conn. App. 680, 682, 984 A.2d 1171 (2009) ("[i]n the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless" [internal quotation marks omitted]). The defendant testified about the content of the e-mails. Thus, he has failed to show that admission of the e-mail correspondence would have affected the court's judgment.

considered, discussed, and agreed to by both parties. . . . The parties recognize that the joint custody provision herein imposes an affirmative obligation to confer and consult with each other and arrive at a consensus regarding major decisions concerning the health, education and welfare of the minor children." The parenting plan does not mention the children's ongoing enrollment in Saints John and Paul School.

In its July 17, 2017 order, the court explained that the children's continued enrollment in middle school at Saints John and Paul School was not a decision governed by the parenting plan because "[t]hat was the status quo. This was not a future plan or a major decision because they were already attending that school when the parties entered into the parenting plan."

The decision to enroll the children in Saints John and Paul School had been made by the fall of 2014, when the children first entered the middle school program. The parenting plan was forward looking and governed the parties' collaborative behavior as to future child rearing decisions. Thus, the court reasonably could have found the defendant responsible for his 75 percent share of the children's private middle school tuition for the 2015–2016, 2016–2017, and 2017–2018 academic years.

II

The defendant also claims that the trial court erred by ordering him to pay the children's tuition that was incurred prior to the October 23, 2015 date of the dissolution. He argues that the court, in its December 7, 2016 memorandum of decision, ordered that he pay 75 percent of the children's private middle school tuition retroactive to October 23, 2015, the date of the dissolution, and, therefore, that order did not cover tuition fees incurred prior to that date. We disagree.

As stated in part I of this opinion, this court "will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Thus, unless the trial court applied the wrong standard of law, its decision is accorded great deference because the trial court is in an advantageous position to assess the personal factors so significant in domestic relations cases . . . ." (Internal quotation marks omitted.) *Budrawich* v. *Budrawich*, supra, 156 Conn. App. 637.

Under § 46b-81, a court may assign to either party all or any part of the estate of the other party at the time of entering a decree dissolving a marriage. Section 46b-81 "confers broad powers upon the court in the assignment of property, and the allocation of liabilities and debts is a part of the court's broad authority in the assignment of property."[11] (Internal quotation marks omitted.) *Roos* v. *Roos*, 84 Conn. App. 415, 420, 853 A.2d 642, cert. denied, 271 Conn. 936, 936, 861 A.2d 510 (2004).

The plaintiff incurred the debt at issue, to Saints John and Paul School for the 2015–2016 academic year, prior to the entry of the October 23, 2015 dissolution judgment. This children's private middle school tuition bill remained unpaid as of the date of the parties' dissolution. The court had the authority pursuant to § 46b-81 to consider the division of this marital liability in the October, 2015 dissolution judgment if the parties had

[11] General Statutes § 46b–81 (c) provides in relevant part: "In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the . . . liabilities and needs of each of the parties . . . ."

requested it to do so at that time.[12] However, at the time of the dissolution, the parties agreed to reserve judicial consideration of all child related financial issues. Thereafter, on December 7, 2016, the court addressed those child related financial issues and determined, inter alia, each parent's share of the children's private middle school tuition. Subsequently, on July 17, 2017, the court ruled on the plaintiff's motion for an order on the defendant's payment of his share of the private middle school tuition. On this date, the court exercised its authority, under § 46b-81, to allocate between the parties the marital debt related to the children's 2015–2016 private middle school tuition. It was not an abuse of the court's discretion to allocate the marital tuition debt for the 2015–2016 academic year in addition to allocating responsibility for the postdissolution tuition for the 2016–2017 and 2017–2018 academic years in accordance with its December 7, 2016 child related financial orders.

[12] Typically, division of marital assets and liabilities occur at the time the court renders the dissolution judgment. Recent appellate case law, however, illustrates some degree of flexibility in deviating from this historical practice. See *Reinke* v. *Sing*, 328 Conn. 376, 393, 179 A.3d 769 (2018) (concluding that trial court had statutory authority to entertain and determine plaintiff's claim seeking modification of dissolution judgment where parties submitted issue to court, postdissolution, by agreement). Before *Reinke*, in *Smith* v. *Smith*, 249 Conn. 265, 274–76, 752 A.2d 1023 (1999), our Supreme Court, citing its "policy favoring finality of lump sum alimony and property awards," concluded that a trial court no longer retained jurisdiction, after a dissolution judgment, to divide a party's interest in a family trust if the party was found, in the future, to hold such an interest. We recognize that *Smith*, in addition to being factually distinguishable from the present case, is no longer good law to the extent that it is inconsistent with the court's recent decision in *Reinke*.

We view the present case, where the parties agreed, at the time of their dissolution, to defer resolution of their child related financial issues, as a logical extension of *Reinke*, where the parties agreed, postdissolution, to modify the division of their property. The present case, however, unlike *Reinke*, does not involve the redistribution of assets and did not require the court to open the judgment of dissolution. Thus, the court here did not need to be presented with a postdissolution agreement of the parties in order to effectuate the division of their marital liability because the parties specifi-

## III

Finally, the defendant claims that the court erred by finding him in contempt. Specifically, he argues that (1) the court's July 17, 2017 order was not sufficiently clear and unambiguous, (2) the court's factual findings regarding his ability to comply with the order, based on his income, were not supported by the evidence, (3) the court considered the use of his funds prior to the July 17, 2017 order even though there were no automatic orders in place limiting the use of those funds, and (4) he did not have the funds to comply with the order, and, therefore, his noncompliance was not wilful.[13] We conclude that this claim has no merit.

cally agreed, at the time of the dissolution, to reserve adjudication of child related financial issues. We therefore see no legal impediment to the court's authority to allocate the marital tuition debt for the 2015–2016 academic year.

[13] The defendant also argues that the court improperly granted the plaintiff's motion for contempt because it failed to comply with the requirements of Practice Book § 25-27. This argument was not made before the trial court, and, therefore, we decline to review it for the first time on appeal. See *Histen* v. *Histen*, 98 Conn. App. 729, 737, 911 A.2d 348 (2006) ("[W]e will not decide an appeal on an issue that was not raised before the trial court. . . . To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." [Internal quotation marks omitted.]).

In addition, with respect to the court's award of attorney's fees, the defendant argues that "[b]ecause of the errors of the court . . . [he] is not in contempt and . . . should not be liable for plaintiff's fees." His argument that the court improperly awarded attorney's fees necessarily depends on a determination that the court abused its discretion when it found him in contempt. Because we conclude that the court did not abuse its discretion in finding the defendant in contempt, we also conclude that the court did not abuse its discretion when it awarded attorney's fees under § 46b-87. See *Allen* v. *Allen*, 134 Conn. App. 486, 502–503, 39 A.3d 1190 (2012) ("Our law for awarding attorney's fees in contempt proceedings is clear. [Section] 46b-87 provides that the court may award attorney's fees to the prevailing party in a contempt proceeding. The award of attorney's fees in contempt proceedings is within the discretion of the court." [Internal quotation marks omitted.]).

Lastly, the defendant argues that the court's order improperly prohibits him from hiring counsel on appeal. The defendant's argument, in its entirety, states: "Not only does the defendant lack the financial ability to satisfy the orders of the court . . . and to engage counsel but in addition, should the

We begin by setting forth our standard of review and relevant legal principles. "First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Footnote omitted; internal quotation marks omitted.) *Keller* v. *Keller*, 158 Conn. App. 538, 545, 119 A.3d 1213 (2015). "[T]he credibility of witnesses, the findings of fact and the drawing of inferences are all within the province of the trier of fact. . . . We review the findings to determine whether they could legally and reasonably be found, thereby establishing that the trial court could reasonably have concluded as it did." (Internal quotation marks omitted.) *O'Connell* v. *O'Connell*, 101 Conn. App. 516, 521, 922 A.2d 293 (2007).

The defendant first argues that the court's July 17, 2017 order was not sufficiently clear and unambiguous. To support his contention, the defendant directs our attention to the court's suggestion that the defendant consider, "if this is an economic hardship to make a substantial lump sum payment for tuition, that he consult with the school and ask whether a payment plan

defendant have funds, is prohibited from using them to [engage] counsel for his defense, as he would then be deemed in willful contempt of the current orders." This argument finds no support in the record. Neither the court's July 17, 2017 ruling on the plaintiff's motion for an order nor the court's February 5, 2018 finding of contempt provides a basis for the defendant's assertion that he would have been held in contempt if he had hired counsel to represent him on appeal. Accordingly, the defendant's argument fails.

would be possible for him to continue to pay that." The defendant, in essence, argues that the court's suggestion rendered the tuition payment order ambiguous. We disagree. The court clearly stated that "the defendant is obligated to pay 75 percent of the tuition that is past due from 2015 to 2016 and 2016 to 2017 and for the coming year of 2017 to 2018." The court's suggestion to the defendant regarding potential outside avenues to effectuate payment of his tuition obligation did not make unclear his financial responsibility for the arrearage created by his failure to pay his share of the children's private middle school tuition. Thus, we conclude that the court's July 17, 2017 order was sufficiently clear and unambiguous to support its February 5, 2018 finding of contempt.

The defendant's next three arguments are based on his contention that he was unable to pay for his children's tuition. He argues that, due to his inability to pay, his failure to comply with the court's order was not wilful, and, therefore, he could not be held in contempt. To constitute contempt, "a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . [I]nability to pay is a defense to a contempt motion. However, the burden of proving inability to pay rests upon the obligor." (Internal quotation marks omitted.) *Marshall* v. *Marshall*, 151 Conn. App. 638, 650–51, 97 A.3d 1 (2014). The court found that the defendant's annual income was approximately $400,000 and that he did not meet his burden of proving that he was unable to pay his court-ordered obligation.

We review the court's factual findings in the context of a motion for contempt to determine whether they are clearly erroneous. "A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm

conviction that a mistake has been made." (Internal quotation marks omitted.) *Dionne* v. *Dionne*, 115 Conn. App. 488, 494, 972 A.2d 791 (2009). During the October 23, 2017 hearing on the plaintiff's motion for contempt, the defendant called his accountant, Philip Ayoub, to testify as to his "actual disposable income" from his professional service corporation for the first six months of 2017. Ayoub explained that the defendant, as the sole shareholder of Dr. K Services, P.C., his medical practice, has two sources of income from that corporation, as he is paid a salary and also is entitled to the income from the profits of his medical practice. Ayoub testified that, from January to June, 2017, the defendant received W-2 wages of $105,573.06 and was entitled to receive approximately $95,000 from the profits of his medical practice. The testimony of the defendant's accountant provided a basis for the court's findings, and, thus, they were not clearly erroneous. Therefore, we conclude that the court did not abuse its discretion in finding the defendant in contempt.

The judgments are affirmed.

In this opinion the other judges concurred.

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## SOJOURNAL HODGES *v.* COMMISSIONER OF CORRECTION
## (AC 40652)

Lavine, Alvord and Moll, Js.

*Syllabus*

The petitioner, who had been convicted of attempt to commit robbery in the first degree with a firearm as an accessory and conspiracy to commit robbery in the first degree with a firearm in connection with the attempted robbery of a store, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner's trial counsel did not render ineffective assistance:

   a. The habeas court did not err in determining that the petitioner failed to establish that his trial counsel was ineffective in pursuing a defense theory of mere presence and not contesting the petitioner's presence at the store at the time of the robbery; trial counsel's decision to pursue a mere presence defense was a reasonable strategic decision, as the petitioner had admitted to trial counsel, the police, and the court that he was present at the scene of the attempted robbery, which rendered an alibi defense not viable, and it would have been inconsistent with the defense theory that the petitioner was merely present at the scene and was not a participant in the robbery for trial counsel to have challenged an eyewitness' identification of the petitioner or the presence of a firearm during the robbery.

   b. The petitioner failed to establish that his trial counsel rendered ineffective assistance by failing to consult with and retain an expert witness in video forensics, as any such testimony challenging the quality of a surveillance video from the store and whether it depicted a firearm would not have been helpful to the petitioner in establishing trial counsel's defense that the petitioner did not participate in the attempted robbery; trial counsel's trial strategy was not to contest the commission of an attempted robbery with a firearm by an unidentified man in the video, as trial counsel believed that the surveillance video would aid the petitioner's mere presence defense because it did not show the petitioner doing anything that would constitute a conspiracy, and, therefore, the habeas court properly concluded that trial counsel's decision not to call an expert witness in video forensics was based on a reasonable investigation and with adequate explanation.

2. The habeas court did not abuse its discretion by precluding the testimony of the petitioner's firearm identification expert as to whether the surveillance video depicted the presence of a firearm: because the presence of a firearm was an essential element of the charged crimes of attempt and conspiracy to commit robbery with a firearm, it was an ultimate issue to be decided by the jury, which had viewed the surveillance video and heard eyewitness testimony regarding the presence of a firearm, and, thus, the presence of a firearm was not the type of issue that required expert assistance for the jury to decide; moreover, even if trial counsel had attempted to introduce such evidence at the petitioner's criminal trial, the trial court likely would not have permitted expert testimony as to that ultimate issue.

Argued October 16, 2018–officially released January 22, 2019

*Procedural History*

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

and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Daniel Fernandes Lage*, assigned counsel, for the appellant (petitioner).

*Mitchell S. Brody*, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc C. Ramia*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

LAVINE, J. The petitioner, Sojournal Hodges, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) improperly rejected his claim that his trial counsel, Donald J. Cretella, Jr., rendered ineffective assistance and (2) abused its discretion by precluding the petitioner's expert from testifying at the habeas trial. We affirm the judgment of the habeas court.

The petitioner was charged with attempt to commit robbery in the first degree with a firearm as an accessory in violation of General Statutes §§ 53a-8, 53a-49, and 53a-134 (a) (4), and conspiracy to commit robbery in the first degree with a firearm in violation of General Statutes §§ 53a-48 and 53a-134 (a) (4). The petitioner informed Cretella that he was present at the scene. Cretella pursued a mere presence defense during the petitioner's criminal trial and attacked allegations of the petitioner's involvement in the events forming the basis for the charges. Following a jury trial, the petitioner was convicted of both charges, and the trial court, *Prescott*, *J.*, sentenced the petitioner to seven years incarceration, followed by five years special parole.

The following facts, which the jury reasonably could have found concerning the petitioner's underlying

offenses, are relevant to this appeal. On June 28, 2012, at approximately 8:15 a.m., the petitioner and an unidentified man walked into Hernandez Grocery in Waterbury (store). The petitioner wore one grey glove and covered his face with a red hoodie that had a white patch. The unidentified man wore a black hoodie and asked Josean Campos, a store employee, for a single cigarette. Upon discovering that the store did not sell loose cigarettes, the two men left the store and stopped on the sidewalk. The petitioner followed the unidentified man back into the store. The unidentified man placed his right hand on the store counter, while holding a pistol on its side, and demanded that Campos give him "all the money." Campos noticed that the pistol lacked an ammunition clip and stated that he would not do so. The unidentified man stated that he was "just joking" and left the store with the petitioner following him. Campos contacted the police, who, on the basis of Campos' physical description of the petitioner and his clothes, detained the petitioner. A crime scene technician collected a surveillance video from the store, which was admitted as a full exhibit in the petitioner's underlying criminal trial.

Following his conviction, the petitioner brought a petition for a writ of habeas corpus, in which he alleged that Cretella was ineffective, inter alia, for failing to investigate and pursue a valid defense and failing to consult with experts. The habeas court, *Oliver*, *J.*, denied the petition for a writ of habeas corpus on all counts. The petitioner then filed a petition for certification to appeal from the court's judgment, which the court granted. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner claims that the court improperly determined that Cretella did not render ineffective assistance

by (a) allegedly failing to present a competent defense and (b) declining to consult with and retain an expert witness in video forensics. We disagree.

We begin by setting forth the applicable standard of review. "The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland* [v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], however, is a mixed question of law and fact subject to our plenary review." (Citation omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 717, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

"As enunciated in *Strickland* v. *Washington*, [supra, 466 U.S. 687,] this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . The claim will succeed only if both prongs are satisfied." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 510, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner]

must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Goodrum* v. *Commissioner of Correction*, 63 Conn. App. 297, 300–301, 776 A.2d 461, cert. denied, 258 Conn. 902, 782 A.2d 136 (2001).

A

The petitioner argues that Cretella rendered ineffective assistance by pursuing a flawed defense theory of mere presence. He contends, with twenty-twenty hindsight, that Cretella failed to contest his presence at the store despite the claim that it was difficult to identify him from the video. He argues that Cretella failed to move to suppress Campos' out-of-court and in-court identifications of the petitioner and that he posed questions to Campos in the underlying criminal trial in such a manner as to concede that an attempted robbery had occurred. We are not persuaded.

The petitioner has failed to overcome the presumption that Cretella's decision to pursue a mere presence defense, and not to contest the petitioner's presence at the scene or the unidentified man's involvement in an attempted robbery, represented sound trial strategy.[1] The court credited Cretella's testimony that there was never a question that the petitioner was present at the scene and that the petitioner told Cretella that he was there. Cretella testified that he thought the petitioner's

[1] The petitioner also argues that Cretella was ineffective because he developed his defense theory prior to watching a surveillance video provided to him by the state. The petitioner cannot prevail on his argument. The court found that Cretella testified credibly that he reviewed the discovery provided by the state, which included the surveillance videotape, when he received it. We conclude that the habeas court properly determined that trial counsel's investigation was reasonable under the circumstances.

best chance for acquittal was a mere presence defense and explained that he did not believe an alibi defense was viable in light of the fact that the petitioner had admitted his presence at the scene to him, and more significantly, to the police, and to the court, *Fasano*, *J.*, via a letter. "The reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions. " *Strickland* v. *Washington*, supra, 466 U.S. 691. Cretella's use of a mere presence defense was reasonable particularly in light of the fact that the petitioner had admitted he was present at the scene.

Cretella's theory of the defense was based on the premise that the petitioner was present at the scene but was not a participant in the attempted robbery. Cretella testified that his theory of the defense was to concede the underlying crime and argue that, even if Campos and the police were to be believed, the petitioner did not participate in the attempted robbery. Cretella further testified that he did not move to suppress Campos' out-of-court identification of the petitioner because "we weren't disputing that he was there."[2] It would not be consistent with the defense

[2] The petitioner also challenges Cretella's cross-examination of Campos on the ground that it was "poor" and "misfired on exposing Campos' inconsistencies." We conclude, after a review of the relevant criminal trial transcripts, that the court properly concluded that Cretella's cross-examination of Campos "effectively exposed inconsistencies in [Campos'] testimony and supported counsel's mere presence defense," and that the petitioner failed to overcome the strong presumption that trial counsel's cross-examination tactics were reasonable trial strategy. "An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy." (Internal quotation marks omitted.) *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 172, 987 A.2d 1031, cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010).

As recited in the habeas court's memorandum of decision, Cretella's cross-examination of Campos included the following exchange:

"Q. What does [the petitioner] say during that time?

"A. Nothin.

"Q. Did he ever say anything the entire time?

"A. No. . . .

of mere presence for Cretella to have contested the petitioner's presence at the scene by challenging Campos' identifications of the petitioner. Additionally, Cretella's decision not to challenge the presence of a gun was not inconsistent with the theory of the defense, which was premised on the notion that the petitioner was not a participant in the robbery. "There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." (Internal quotation marks omitted.) *Harrington* v. *Richter*, 562 U.S. 86, 109, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). We conclude that the court properly determined that, in light of the surrounding circumstances, Cretella's decision to pursue a mere presence defense was sound trial strategy and did not amount to ineffective assistance of counsel.

B

The petitioner argues that the court improperly concluded that Cretella did not perform deficiently by declining to consult with and retain an expert to provide testimony on video forensics. Specifically, the petitioner argues that the quality of the surveillance video

"Q. Not at all?
"A. No.
"Q. You've never heard him speak ever?
"A. No.
"Q. All right. Did he ever point a gun at you?
"A. No.
"Q. Did he ever try to steal anything?
"A. No.
"Q. Did he ever tell the guy, yeah, get him?
"A. No.
"Q. Did he ever—you know, did he pat him on the butt—
"A. I didn't—
"Q.—say, nice job, go get him?
"A.—I don't know.
"Q. No, you didn't see that?
"A. I was behind the counter, I—
"Q. Did he dap him?
"A. No."

was poor and that an expert could explain how anomalies within the video footage could make it falsely appear as if an item, such as a firearm, were present. We are not persuaded.

The following additional facts are relevant. Lindsay Hawk, a recorded evidence analyst, testified at the habeas trial that she examined the video and determined that limitations in quality existed. She testified that the video contained an anomaly called "banding," which occurred on the edge of the unidentified man's right sleeve when he placed his right hand on the store counter. Hawk further testified that there were too few frames per second causing the video to become jumpy, and opined that "you can't magically have a gun in one frame and not have it in another frame" and that "[y]ou can't just see a gun in one frame" in order for the viewer to believe that the unidentified man had a gun.

"[T]here is no requirement that counsel call an expert when he has developed a different trial strategy. . . . [T]here is no per se rule that requires a trial attorney to seek out an expert witness." (Citation omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 186 Conn. App. 366, 379, A.3d (2018). "[T]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 77–78, 174 A.3d 206 (2017).

The petitioner has not shown that Hawk's testimony challenging the quality of the video would have been helpful in establishing Cretella's defense that the petitioner did not participate in the attempted robbery. Cretella testified that he thought the video supported the defense of mere presence because it showed the

petitioner doing "nothing that would constitute a conspiracy." There was no allegation that the petitioner possessed a gun, and Campos provided a detailed account to the jury of the unidentified man's use of a gun. Hawk's testimony would not have been helpful to the petitioner because Cretella's strategy was not to contest the unidentified man's commission of an attempted robbery with a firearm and Cretella thought the video aided in the petitioner's defense. We conclude that the court properly concluded that Cretella's decision not to call an expert witness in video forensics was based on a reasonable investigation and with adequate explanation and, therefore, did not constitute deficient performance.

II

The petitioner also claims that the court abused its discretion by precluding the testimony of the petitioner's firearm identification expert as to whether the video footage depicted the presence of a firearm. Specifically, the petitioner argues that his expert was to provide information based on his years of experience regarding whether a firearm was depicted in the video and that the trier of fact needed assistance in determining that issue. We are not persuaded.

The following additional facts are relevant. At the habeas trial, the petitioner sought to have Gary Barwikowski testify as an expert in firearms identification. As a foundation for his testimony, Barwikowski testified that, on the basis of his years of experience as a law enforcement officer, an officer in the United States Army, and as a firearm instructor for S.W.A.T. units, he could opine as to whether an individual's physical movements are consistent with the handling, carrying, demonstrating, displaying, sheathing, and/or brandishing of a firearm. The respondent objected. The petitioner's habeas counsel stated that Barwikowski would

testify that he can determine conclusively that the unidentified man was not in possession of a firearm in the video. The court concluded that Barwikowski could not testify on the ultimate issue of whether a firearm was depicted in the video.

"The applicable standard of review for evidentiary challenges is well established. We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 396–97, 963 A.2d 956 (2009).

Section 7-3 (a) of the Connecticut Code of Evidence provides: "Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue." "An expert witness ordinarily may not express an opinion on an ultimate issue of fact, which must be decided by the trier of fact. . . . Experts can [however] sometimes give an opinion on an ultimate issue where the trier, in order to make intelligent findings, needs expert assistance on the precise question on which it must pass. . . . Thus, expert opinion as to the ultimate issue in a case is admissible only when necessary for the trier of fact to make sense of the proffered evidence, rendering the situation . . . of such a nature as to require an expert to express an opinion on the precise question

upon which the court ultimately had to pass." (Citation omitted; internal quotation marks omitted.) *State* v. *Beavers*, supra, 290 Conn. 414–15.

The presence of a firearm was an ultimate issue in the petitioner's underlying criminal trial. It is an essential element of the charged crimes of attempt and conspiracy to commit robbery with a firearm.[3] The presence of a firearm is not the type of issue that requires expert assistance in order for the jury to make sense of the evidence. The jury viewed the video and heard Campos' detailed testimony regarding the presence of a firearm. We are unwilling to conclude that the habeas court abused its discretion in not permitting Barwikowski to testify to this ultimate issue. Even if Cretella had attempted to introduce such evidence at the petitioner's criminal trial, it is likely that the court would not have permitted an expert to testify as to an ultimate issue. Accordingly, the habeas court properly concluded that the petitioner failed to demonstrate that Cretella rendered deficient performance when he declined to retain such an expert.

The judgment is affirmed.

In this judgment the other judges concurred.

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## FRANCIS ANDERSON *v.* CHARLES DIKE ET AL.
## (AC 40799)

Alvord, Prescott and Norcott, Js.

*Syllabus*

The plaintiff, a patient in a state hospital, sought to recover damages from the defendant hospital employees, claiming that he suffered injuries

[3] Both offenses relate to the underlying substantive offense of robbery in the first degree with a firearm. General Statutes § 53a-134 (a) (4) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ."

when one of the employees, M, allegedly closed a door on the plaintiff's hand and intentionally kicked his hand into the door. The plaintiff brought the action against the defendants in their individual capacities and claimed that their conduct violated the patients' bill of rights (§ 17a-540 et seq.). The trial court granted the defendants' motion to dismiss as to all of the defendants except M. The court ruled that only M could be sued in her individual capacity because the plaintiff had alleged reckless, wanton or malicious conduct on her part. The court thereafter denied the plaintiff's motions for a jury trial and the appointment of counsel, and granted the defendants' motion for summary judgment and rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held* that the trial court properly granted the defendants' motion for summary judgment, as the plaintiff did not meet his burden to demonstrate the existence of a genuine issue of material fact and failed to offer any evidence in opposition to the defendants' motion that properly could be considered at summary judgment: the plaintiff's affidavit in opposition to the defendants' motion could not be considered, as it neither was subscribed nor sworn to before a notary, the police reports attached to his opposition were not proper summary judgment evidence, as they were unauthenticated, and because the court properly granted the motion for summary judgment, it was not necessary to consider the plaintiff's claim that the court improperly denied his motion for a jury trial; moreover, there was no merit to the plaintiff's claim that the court improperly denied his motion for the appointment of counsel, as the legislature has not provided a statutory exception to the general rule that court-appointed counsel is not available in civil proceedings.

Argued October 25, 2018—officially released January 22, 2019

*Procedural History*

Action to recover damages for the defendants' alleged violation of the patients' bill of rights, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Domnarski*, *J.*, granted in part the defendants' motion to dismiss; thereafter, the court denied the plaintiff's motions for a jury trial and for the appointment of counsel; subsequently, the court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

*Francis Anderson*, self-represented, the appellant (plaintiff).

*Darren P. Cunningham*, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Jacqueline S. Hoell*, assistant attorney general, for the appellees (defendants).

*Opinion*

NORCOTT, J. The plaintiff, Francis Anderson, appeals from the summary judgment rendered by the trial court in favor of the defendants, Charles Dike, Thomas Ward-McKinley, Steve Lazrove and Heather Madison. The plaintiff claims that the court improperly (1) granted the defendants' motion for summary judgment, (2) denied his motion for a jury trial and (3) denied his motions for the appointment of counsel. We affirm the judgment of the court.

The record reveals the following facts and procedural history. The plaintiff commenced this action in September, 2014, pursuant to the patients' bill of rights, General Statutes § 17a-540 et seq. The plaintiff alleged the following facts in his complaint. On May 4, 2014, while the plaintiff was a patient in the Whiting Forensic Division of Connecticut Valley Hospital, Madison closed the door to the video room, located on unit 2, on his hand and then intentionally and forcibly kicked his hand into the door. The plaintiff went to the nursing station to request medical treatment for his hand, as it was swollen. The plaintiff initially was refused treatment by the nurse. Madison was threatening as well as verbally abusive to the point that Police Lieutenant Margaret G. Miner became involved. As a result of this incident, the plaintiff alleged that Madison was temporarily ordered off the unit. Finally, Lazrove witnessed and was complicit in covering up the incident, and Dike, Ward-McKinley, and Lazrove allowed Madison to pose a threat to the plaintiff's well-being.

In January, 2015, the defendants filed a motion to dismiss for lack of subject matter jurisdiction, asserting

that a claim under General Statutes § 17a-550 for violation of the patients' bill of rights can be brought only against the state and not against individual state employees; therefore, the defendants in their individual capacities cannot be held liable for violations of General Statutes § 17a-542. The court granted the defendants' motion as to Dike, Ward-McKinley, and Lazrove. That court, however, denied the motion as to Madison. The court noted that "[General Statutes] §§ 17a-550 and 4-165 mean that a person can sue a state employee in his individual capacity for violations of the patients' bill of rights, but only for actions that are wanton, reckless or malicious."[1] (Internal quotation marks omitted.)

The court went on to note that as to Dike, Ward-McKinley and Lazrove, the plaintiff had alleged only that those defendants witnessed the incident, were complicit in allowing the incident to happen, and allowed Madison to again pose a threat to the plaintiff's well-being and safety, and that these allegations were not "sufficient to support a cause of action sounding in recklessness." The court denied the motion as to Madison, because when read in the light most favorable to the plaintiff, the plaintiff in his complaint had alleged reckless, wanton or malicious conduct on the part of Madison.[2] As a result of this order, Madison is the only defendant who this action continues against in an individual capacity.

[1] General Statutes § 4-165 (a) provides: "No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter."

[2] The court held that the plaintiff's allegation that Madison "closed [a] door on [the plaintiff's] hand and then kicked [the plaintiff's] hand directly into the door on purpose" sufficiently pleaded a reckless disregard of the just rights or safety of others or of the consequences of the action. (Internal quotation marks omitted.)

Throughout the pendency of the action, the plaintiff made a request for a jury trial as well as several requests to have counsel appointed for him. The court denied these requests. The defendants filed a motion for summary judgment, claiming that they had sustained their burden of establishing that there is no genuine issue of material fact pertaining to the plaintiff's claim that Madison intentionally or recklessly caused injury to the plaintiff. The court granted the defendants' summary judgment motion, concluding that the plaintiff did not provide evidence to raise a genuine issue of material fact.[3] This appeal followed.

On appeal, the plaintiff claims that the court erred by (1) concluding that the defendants sustained their burden of establishing that there is no genuine issue of material fact pertaining to his claim, (2) denying his claim for a jury trial and (3) denying his motions for the appointment of counsel.

First, we address the plaintiff's claim that the court improperly granted the defendants' motion for summary judgment because there existed a genuine issue of material fact. We are not persuaded.

"We begin our analysis with the standard of review applicable to a trial court's decision to grant a motion for summary judgment. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt

[3] Because the plaintiff's claims against Dike, Ward-McKinley and Lazrove were dependent on the plaintiff's claims against Madison, the court rendered judgment in favor of all the defendants.

as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citation omitted; internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

In their motion for summary judgment, the defendants proffered evidence demonstrating that the sequence of events the plaintiff described in his complaint did not take place. Such evidence included (1) a sequence of still photographs taken from a recording of the incident through a video camera that was in place on the unit; (2) an affidavit from a detective of the Department of Mental Health and Addiction Services who conducted an investigation, and reviewed the video footage of the alleged incident and found that the door never closed on the plaintiff's hand, nor did Madison kick the plaintiff's hand into the door; (3) an affidavit of an attending nurse who observed no indication of any injury to the plaintiff's hand or his fingernails; and (4) an affidavit of Dr. Katherine Sundstrom, a psychiatrist who, upon examining the plaintiff, observed no sign of distress

or physical injury. On the basis of this evidence the defendants met their burden of demonstrating that there was no genuine issue of material fact to warrant a trial.

Faced with this evidence, the plaintiff had the obligation to proffer evidence that shows the existence of a genuine issue of material fact. The plaintiff failed to meet this burden. In support of his opposition to the defendants' motion for summary judgment, the plaintiff, in part, relied on his own affidavit. The court considered the affidavit in ruling on the motion to dismiss. In his affidavit, the plaintiff asserted that "[o]n May 4, 2014, Heather Madison on purpose kicked the door when the plaintiff was closing the door, and injured the plaintiff['s] fingers." Nevertheless, the court stated that "[t]he plaintiff has not sustained his burden of proving the existence of [a] material issue of fact regarding his claim against Madison."

In reviewing a grant of summary judgment, this court's review is plenary, and we are not bound to consider the affidavit simply because the trial court did so. Instead, we decline to consider the plaintiff's affidavit as summary judgment evidence because it neither was subscribed nor sworn to before a notary. Such affidavit is of no evidentiary value. *Viola* v. *O'Dell*, 108 Conn. App. 760, 768, 950 A.2d 539 (2008).

In addition to his defective affidavit, the plaintiff attached to his opposition to the motion for summary judgment unauthenticated police reports from Lieutenant Miner and Sergeant David J. Tuschhoff, the officers who witnessed the alleged incident. These unauthenticated reports are not proper summary judgment evidence. This court has made clear that "[the] rules [of practice] would be meaningless if they could be circumvented by filing [unauthenticated documents] in support of or in opposition to summary judgment. . . .

Therefore, before a document may be considered by the court [in connection with] a motion for summary judgment, there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be." (Internal quotation marks omitted.) *Nash* v. *Stevens*, 144 Conn. App. 1, 15–16, 71 A.3d 635, cert. denied, 310 Conn. 915, 76 A.3d 628 (2013). "Documents in support of or in opposition to a motion for summary judgment may be authenticated in a variety of ways, including, but not limited to, a certified copy of a document or the addition of an affidavit by a person with personal knowledge that the offered evidence is a true and accurate representation of what its proponent claims it to be." (Internal quotation marks omitted.) *Gianetti* v. *Anthem Blue Cross & Blue Shield of Connecticut*, 111 Conn. App. 68, 73, 957 A.3d 541 (2008), cert. denied, 290 Conn. 915, 965 A.2d 553 (2009).

The police reports offered by the plaintiff failed to meet this standard. The reports are neither accompanied by an affidavit of a person with personal knowledge that the reports are a true and accurate representation of what the plaintiff purports them to be, nor are the reports certified documents or authenticated by other means. The plaintiff has not offered any evidence that may properly be considered at summary judgment and, thus, did not meet his burden to demonstrate the existence of a disputed factual issue. Accordingly, the court properly granted the defendants' motion for summary judgment.

The plaintiff next claims that the court improperly denied his motion for a jury trial and his motions for the appointment of counsel. Because we conclude that the court properly granted the defendants' motion for summary judgment, we need not consider the plaintiff's claim regarding the denial of a jury trial. See, e.g., *Kakadelis* v. *DeFabritis*, 191 Conn. 276, 281, 464 A.2d 57

(1983) ("[t]he motion for summary judgment is designed to eliminate the delay and expense incident to a trial when there is no real issue to be tried" [internal quotation marks omitted]).

Finally, there is no merit to the plaintiff's claim that the court improperly declined to appoint him an attorney because he is indigent and confined on account of having been found not guilty by reason of mental disease or defect.[4] As a general rule, court-appointed counsel is not available in civil proceedings. See *Kennedy* v. *Putman*, 97 Conn. App. 815, 816 n.3, 905 A.2d 1280 (2006). "The legislature, however, has created exceptions to the general rule . . . by providing for the appointment of counsel to represent indigent parties in certain civil actions. Among those who have a statutory right to counsel in civil cases are petitioners in habeas corpus proceedings arising from criminal matters, General Statutes § 51-296 (a); litigants in termination of parental rights cases, General Statutes § 45a-717 (b), and proceedings on behalf of neglected, uncared for or dependent children or youths, General Statutes § 46b-135 (b); and persons who might be involuntarily confined due to mental condition or for purposes of quarantine, e.g., General Statutes §§ 17a-498 and 19a-221. . . . In addition to the foregoing, our legislature has statutorily provided that, once a trial court determines that a defendant is indigent the court *must* appoint counsel (1) in any criminal action, (2) in any habeas corpus proceeding arising from a criminal matter, (3) in an extradition proceeding, or (4) in any delinquency matter. General Statutes § 51-296 (a)." (Citation omitted; emphasis in

[4] Following an incident that occurred in 2012, the plaintiff, who had been incarcerated at that time, was found not guilty by reason of mental disease or defect of assault of a correction officer, breach of the peace and failure to submit to fingerprint identification, committed to the custody of the Commissioner of Mental Health and Addiction Services and thereafter transferred to the Whiting Forensic Division of Connecticut Valley Hospital. See *State* v. *Anderson*, 319 Conn. 288, 292, 127 A.3d 100 (2015).

original; internal quotation marks omitted.) *Small* v. *State*, 101 Conn. App. 213, 217–18, 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 present case, the plaintiff's claims are brought pursuant to the patients' bill of rights. The legislature has not provided a statutory exception to the general rule for such cases, and, thus, the court properly denied the plaintiff's motions for the appointment of counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

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## ROBERT BUIE *v.* COMMISSIONER OF CORRECTION (AC 40520)

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

*Syllabus*

The petitioner, who had been convicted of two counts of aiding and abetting aggravated sexual assault in the first degree and one count each of attempt to commit aggravated sexual assault in the first degree, conspiracy to commit aggravated sexual assault in the first degree and burglary in the first degree, sought a writ of habeas corpus, claiming, inter alia, that he received ineffective assistance from the habeas counsel who represented him in a prior habeas matter. The habeas court rendered judgment denying the habeas petition and, thereafter, granted the petition for certification to appeal, and the petitioner appealed to this court. On appeal, he claimed that the habeas court improperly determined that he had received effective assistance from his prior habeas counsel and his criminal trial counsel. *Held* that the habeas court properly determined that, due to the overwhelming evidence of guilt, the petitioner could not establish prejudice as a result of any allegedly deficient performance by his criminal trial counsel or his prior habeas counsel; that court properly concluded that, in light of the evidence presented, which established that the victim had been sexually assaulted by two individuals, the petitioner failed to demonstrate a reasonable probability that, but for the ineffectiveness of his trial counsel and prior habeas counsel, the outcome of his criminal trial would have been different, as DNA evidence matching the victim's DNA profile was found in the petitioner's residence, testing of the victim's vaginal swabs revealed the presence of

DNA consistent with the petitioner's DNA, analysis of duct tape recovered from the victim's apartment and duct tape seized from the petitioner's apartment indicated that the items were similar, the victim, who knew the petitioner and the codefendant, identified them by their voices to the police while at her neighbor's apartment, the petitioner's codefendant made a full confession and implicated the petitioner in the assault, and the victim's neighbor provided information to the police that was consistent with the time frame of the events set forth during the prosecution's case.

Argued October 25, 2018—officially released January 22, 2019

*Procedural History*

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Heather Clark*, assigned counsel, for the appellant (petitioner).

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

*Opinion*

DiPENTIMA, C. J. The petitioner, Robert Buie, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly determined that he had received effective assistance from his prior habeas counsel. We conclude that the court properly determined that the petitioner failed to establish prejudice as a result of the allegedly deficient performance of his prior habeas counsel. Accordingly, we affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our decision. The petitioner was convicted of

two counts of aiding and abetting aggravated sexual assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-70a (a) (1), and one count each of attempt to commit aggravated sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70a (a) (1), conspiracy to commit aggravated sexual assault in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-70a (a) (1), and burglary in the first degree in violation of General Statutes § 53a-101 (a) (1). See *State* v. *Buie*, 129 Conn. App. 777, 779–80, 21 A.3d 550 (2011), aff'd, 312 Conn. 574, 94 A.3d 608 (2014). During the criminal trial, attorney Errol Skyers represented the petitioner. His conviction was upheld on appeal. See id.

During the appeal process, the self-represented petitioner commenced three separate habeas actions. These matters were consolidated for trial, and attorney Paul Kraus was appointed to represent the petitioner. At this habeas proceeding, the petitioner claimed that Skyers had been ineffective by failing (1) to call an alibi witness, (2) to question the victim about contracting a sexually transmitted disease as a result of the assault, (3) to offer expert testimony regarding the state's use of DNA evidence, (4) to challenge the chain of custody of the DNA evidence and (5) to challenge the testimony regarding the residence of his codefendant, Beverly Martin. The habeas court, *Cobb*, *J.*, denied the petition for a writ of habeas corpus, and we dismissed the appeal from that judgment. See *Buie* v. *Commissioner of Correction*, 151 Conn. App. 901, 93 A.3d 182, cert. denied, 314 Conn. 910, 100 A.3d 402 (2014).

On December 5, 2013, the self-represented petitioner commenced the present habeas action designated CV-14-4005884-S. He also commenced another habeas action, designated CV-16-4007998-S. The habeas court subsequently consolidated the two matters. On July 6, 2016, the petitioner, now represented by counsel, filed

an amended petition for a writ of habeas corpus. He alleged numerous instances of ineffective assistance against Kraus, his first habeas counsel.[1] The habeas court, *Oliver*, *J.*, conducted a trial on November 8 and 9, 2016; the only witnesses were the petitioner and Skyers.

On May 11, 2017, Judge Oliver issued a thorough memorandum of decision denying the petition for a writ of habeas corpus. The court noted that the petitioner had "failed to overcome the presumption of competent representation." Additionally, it stated that he had not "demonstrated prejudice from his counsel's alleged failures." Finally, the court observed that because the petitioner had failed to establish that Skyers had been constitutionally ineffective, he failed to demonstrate that he received ineffective assistance from Kraus.

The habeas court subsequently granted the petition for certification to appeal from the denial of his petition for a writ of habeas corpus. This appeal followed. Additional facts will be set forth as needed.

As an initial matter, we set forth the relevant legal principles and our well-settled standard of review. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States

[1] See generally *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 550, 153 A.3d 1233 (2017) (Connecticut law permits second petition for writ of habeas corpus challenging performance of counsel in litigating first petition for writ of habeas corpus); *Johnson* v. *Commissioner of Correction*, 168 Conn. App. 294, 308, 145 A.3d 416 (petitioner has right to effective assistance of habeas counsel), cert. denied, 323 Conn. 937, 151 A.3d 385 (2016).

Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the underlying] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . *Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.*" (Emphasis added; internal quotation marks omitted.) *Stephen J. R.* v. *Commissioner of Correction*, 178 Conn. App. 1, 7–8, 173 A.3d 984 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018); see also *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 795–96, A.3d (2018).

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. *Lozada* v. *Warden*, supra, 223 Conn. 842. As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy

*Strickland* twice . . . .'' (Citation omitted; internal quotation marks omitted.) *Adkins* v. *Commissioner of Correction*, 185 Conn. App. 139, 150–51, A.3d , cert. denied, 330 Conn. 946, 196 A.3d 326 (2018); *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–64, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017). We emphasize that the petitioner faces a ''herculean task . . . .'' (Internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 319, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018). Guided by these principles, we turn to the specifics of the petitioner's appeal.

The petitioner claims that his first habeas counsel, Kraus, was ineffective in failing to challenge the effectiveness of his criminal trial counsel, Skyers, regarding his failure (1) to make efforts to exclude evidence of items related to BB guns and firearms, (2) to make efforts to exclude evidence of date and time stamped photographs of the residences of the petitioner and the victim, (3) to make efforts to exclude the victim's identification of the petitioner in a photographic array, (4) to make efforts to exclude hearsay statements made by the victim to an emergency department nurse, (5) to object to improper jury instructions and (6) to object to the prosecutor's closing argument. The respondent, the Commissioner of Correction, counters, inter alia, that as a result of the overwhelming evidence of the petitioner's guilt, he cannot establish prejudice, and, therefore, his habeas action must fail. We agree with the respondent's argument.

In the petitioner's direct appeal, we set forth the following facts that the jury reasonably could have found. In September, 2005, the victim moved into an apartment adjoining the petitioner's apartment. *State* v. *Buie*, supra, 129 Conn. App. 780. At that time, she met the petitioner and, approximately one month later,

she met Martin. Id. The victim "socialized with the [petitioner] and Martin on several occasions after moving into the [residential] complex." Id., 780 n.4. In November, 2006, the victim returned to her apartment at approximately 1:30 a.m., after socializing with a friend. Soon thereafter, she fell asleep on her living room couch. Approximately three hours later, "with [her] apartment completely dark, [the victim] awoke to what she believed was a gun pressed against her head." Id., 780.

"The person holding the gun to her head ordered [the victim] to put her hands behind her back. [The victim] recognized the voice as that of the [petitioner]. A man later identified as the [petitioner] then forced [the victim] to put her arms behind her back and put a piece of duct tape over her mouth and also bound her hands together with duct tape. With [the victim's] pants removed, the [petitioner] and Martin then took turns inserting a dildo into [the victim's] vagina and rectum while holding the gun to her head. When they were finished, the [petitioner] inserted his penis into [the victim's] vagina." Id., 780–81.

Following the assault, the victim went to the apartment of another neighbor and asked her to call the police. Id., 781. The victim told the responding police officer that the petitioner and Martin had "raped her." Id. After obtaining a search warrant for the petitioner's apartment, the police seized, inter alia, two dildos, two BB guns and a roll of duct tape. Id., 782.

In order to prevail in this habeas proceeding, the petitioner must establish, inter alia, that he suffered prejudice as a result of his counsels' deficient performances. "To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there

remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . The court, however, may decide against a petitioner on either prong, whichever is easier." (Internal quotation marks omitted.) *Francis* v. *Commissioner of Correction*, 182 Conn. App. 647, 651–52, 190 A.3d 985, cert. denied, 330 Conn. 903, 191 A.3d 1002 (2018).

In the present case, the evidence established that the victim had been sexually assaulted by two individuals; the disputed issue was whether the petitioner was one of the assailants.[2] The habeas court, considering the evidence,[3] properly concluded that the petitioner failed to demonstrate a reasonable probability that, but for the ineffectiveness of Kraus and Skyers, the outcome of his criminal trial would have been different. The police discovered a dildo in the petitioner's residence that contained the victim's DNA profile. Testing of the victim's vaginal swabs revealed the presence of DNA consistent with the petitioner's DNA. Additionally, analysis of the duct tape recovered from the victim's apartment and the roll of duct tape that was seized from the petitioner's apartment indicated that the items were "similar." The victim, who knew both the petitioner and Martin, identified these individuals by their voices to the police while at her neighbor's apartment. See *State* v. *Buie*, supra, 129 Conn. App. 781. At the habeas trial, Skyers testified that Martin had made a "full confession

[2] We note that the habeas court specifically found that the petitioner's alibi lacked credibility.

[3] The habeas court characterized the state's case as containing "overwhelming evidence of the petitioner's guilt . . . ."

and [implicated] the petitioner" in the assault of the victim. Additionally, Barbara Ferreira, the victim's neighbor, provided information to the police that was consistent with the time frame of the events set forth during the prosecution's case.

On the basis of this record, we conclude that the habeas court properly determined that, due to the overwhelming evidence of guilt, the petitioner could not establish prejudice as a result of any allegedly deficient performance by Skyers or Kraus. His claim of ineffective assistance of counsel, therefore, must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

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## DARLENE BOUCHER *v.* SAINT FRANCIS GI ENDOSCOPY, LLC
## (AC 40597)

Alvord, Prescott and Bear, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant for, inter alia, employment discrimination in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.), claiming that the defendant, her former employer, retaliated against her and constructively discharged her when she complained about being sexually harassed by a coworker, C. The defendant claimed that it did not take any action against the plaintiff that constituted an adverse employment action. The trial court granted the defendant's motion for summary judgment and rendered judgment in favor of the defendant, concluding, inter alia, that the plaintiff had failed to establish a prima facie case of employment discrimination or retaliation, from which the plaintiff appealed to this court. *Held* that the trial court properly granted the defendant's motion for summary judgment, the plaintiff having failed to allege facts that, if proven, would establish an adverse employment action by the defendant: the plaintiff did not establish a genuine issue of material fact as to whether the defendant intentionally created an intolerable work atmosphere that forced her to quit involuntarily to support her claim of constructive discharge, as there was no evidence that the defendant knew of C's actions prior to the plaintiff's disclosure of them to her supervisor, H,

the plaintiff did not claim that the defendant ordered or encouraged C's actions, nor did she make any other viable claim that would constitute an intolerable work atmosphere, the plaintiff presented no evidence from which it could be inferred that the defendant deliberately sought to force the plaintiff to quit, and, in fact, it was undisputed that H attempted to stop the plaintiff from quitting; moreover, even if the plaintiff's interactions with H transpired as she described in her deposition, the defendant's actions did not rise to the level needed to show constructive discharge, because once H was informed of the complaint, she investigated the plaintiff's concerns, the possibility of the defendant being able to provide the plaintiff with a remedy was eliminated three days after the complaint was received when the plaintiff abruptly quit her job, H never issued the plaintiff a warning, and H's request for the plaintiff to recount her story in the course of her investigation did not constitute a materially adverse employment action.

Argued October 16, 2018—officially released January 22, 2019

*Procedural History*

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

*James V. Sabatini*, for the appellant (plaintiff).

*Christopher A. Klepps*, with whom was *Christopher L. Brigham*, for the appellee (defendant).

*Scott Madeo* filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

*Opinion*

PRESCOTT, J. In this employment discrimination action, the plaintiff, Darlene Boucher, appeals from the summary judgment rendered by the trial court in favor of her employer, the defendant, Saint Francis GI Endoscopy, LLC, on the plaintiff's complaint, which alleged that her employer retaliated against her when she complained about being sexually harassed by a coworker.

See General Statutes § 46a-60 (b) (4).[1] On appeal, the plaintiff claims that the court improperly granted the defendant's motion for summary judgment because there is a genuine issue of material fact as to her retaliation claim.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. The defendant employed the plaintiff, beginning in February, 2012, as a part-time office assistant. She eventually became a full-time insurance verification specialist. The plaintiff's immediate supervisor was Kathleen Hull.

On more than one occasion, Jason Crespo, a coworker of the plaintiff, made comments to the plaintiff regarding her appearance at work, including "you look beautiful" and "you look hot." Crespo also thrusted his hips at the plaintiff while stating that she was hot. On another occasion, Crespo hit the plaintiff's torso with a rubber glove. Crespo also sent the plaintiff a text message regarding the plaintiff's husband on Easter weekend, although the plaintiff cannot recall what the text message said and immediately deleted it. Finally, during August, 2013, Crespo forced the plaintiff into a utility closet, where he pushed his body against the plaintiff's and she could feel his penis through his clothes. At some point, the plaintiff told Crespo to stop

[1] General Statutes § 46a-60 was amended by No. 17-118, § 1, of the 2017 Public Acts, which added a new subsection (a) regarding definitions and redesignated the existing subsections (a) and (b) as subsections (b) and (c). Therefore, although the parties and the trial court cite to the earlier version of the statute, for purposes of clarity, we refer to the current revision of the statute.

[2] In addition to the count alleging retaliation, the trial court also granted the motion for summary judgment in favor of the defendant on the plaintiff's counts alleging gender discrimination and creation of a hostile work environment. The plaintiff, however, only opposed summary judgment on the retaliation count, effectively abandoning the other counts.

this behavior. The plaintiff did not report Crespo's conduct to Hull until approximately six months after the incident in the closet.

On the morning of January 10, 2014, the plaintiff made a complaint about Crespo to Hull. Hull and the plaintiff met for about an hour. The plaintiff told Hull about her interactions with Crespo, including the incident in the utility closet, the text message over Easter weekend, and Crespo's comments about the plaintiff's appearance. January 10, 2014, was a Friday, and Hull was leaving work early for a weekend vacation. Hull told the plaintiff that she would interview all parties and get back to the plaintiff the following Monday, January 13, 2014. The plaintiff did not expect that Hull would be interviewing anyone over the weekend.

Hull sent the plaintiff a text message on Sunday, January 12, 2014, in order to ask her more questions about her complaint and what had transpired. Hull told the plaintiff that she would speak with Dawn DiPinto, a coworker and friend of the plaintiff, about the situation. After exchanging text messages regarding the complaint, the plaintiff requested that they wait until the following day to discuss the complaint in further detail. Hull responded, "Wow."

On the following day, Monday, January 13, 2014, after speaking with DiPinto, Hull sent the plaintiff an e-mail requesting that the plaintiff come to her office.[3] Once in her office, Hull told the plaintiff that she had spoken with DiPinto and that the plaintiff's story "[did not] add up." Hull then requested that the plaintiff recount her complaint from the beginning. Hull also told the plaintiff that she was going to give her a warning. The plaintiff, however, was not aware of the nature of the warning,

[3] The meeting on January 13, 2014, that took place between the plaintiff and Hull was not a surprise to the plaintiff. She had specifically requested it.

or why she would get a warning. A warning was never issued.

The plaintiff then told Hull that she did not know what else to say and stood up. Hull asked the plaintiff what she was doing, asked her to sit down, and asked her if she was quitting. The plaintiff replied that she was quitting. Hull asked the plaintiff to sit down again, grabbed her arms, and said, "Are you sure you want to do this?" The plaintiff told Hull to get off of her, walked out, and filed a police report against Hull for assault. Following an investigation, the police did not arrest Hull. After the plaintiff left the workplace on January 13, 2014, Hull spoke with Crespo, continuing her investigation of the plaintiff's complaint.

The plaintiff commenced this action on April 7, 2016. The plaintiff filed a three count complaint setting forth facts regarding her interactions with Crespo and Hull. The first count alleged that the defendant discriminated against the plaintiff on the basis of gender in violation of § 46a-60 (b) (1). The second count alleged that the defendant violated § 46a-60 (b) (8) by creating a hostile work environment through its failure to stop Crespo's sexual harassment of the plaintiff. The third count alleged that, in violation of § 46a-60 (b) (4), the defendant retaliated against her for complaining about the sexual harassment committed by Crespo.

The defendant filed an answer to the complaint denying, or leaving the plaintiff to her proof, with respect to all allegations of discrimination. The defendant further alleged, as affirmative defenses, that (1) it exercised reasonable care to prevent and correct sexual harassment in the workplace and (2) the plaintiff failed to mitigate any damages that she allegedly sustained.

The defendant filed a motion for summary judgment on March 15, 2017, stating that there was no genuine issue of material facts as to any of the plaintiff's claims

and that the defendant was entitled to summary judgment as a matter of law. The defendant also filed a memorandum of law in support of the motion for summary judgment. The defendant argued in its memorandum that the plaintiff failed to establish a genuine issue of material fact regarding the prima facie elements of each cause of action in her complaint. Specifically, regarding the plaintiff's retaliation claim, the defendant asserted that it took no adverse employment action against the plaintiff after she reported Crespo's conduct and, thus, had not retaliated against her. With its memorandum, the defendant submitted, inter alia, sworn affidavits from Hull and Crespo, and an uncertified copy of a text message exchange between the plaintiff and Hull.[4]

The plaintiff filed an objection to the motion for summary judgment on May 30, 2017. In her objection, the plaintiff argued that she had raised a genuine issue of material fact with respect to each element of a prima facie retaliation claim and that the defendant's response to the sexual harassment complaint constituted an adverse employment action. Specifically, the plaintiff argued that the defendant constructively discharged her in retaliation for complaining about sexual harassment. The plaintiff also asserted that Hull's (1) demeanor in her meeting with the plaintiff, (2) opinion that her story "did not add up," (3) request that she recount what had happened, and (4) statement that the plaintiff could receive a warning, constituted an adverse employment action.

[4] A copy of the text messages was attached to the defendant's memorandum of law in support of the motion for summary judgment, but was not certified as a true and accurate copy. The plaintiff, however, raised no objection to the authenticity of the text messages in her opposition to the motion for summary judgment and, furthermore, has not raised the authenticity of the document as an issue on appeal. See *Teodoro* v. *Bristol*, 184 Conn. App. 363, 378, 195 A.3d 1 (2018) (where no party objects, court not required to, but may, consider unauthenticated documents submitted in support of motion for summary judgment).

The court granted the motion for summary judgment in favor of the defendant as to all three counts of the plaintiff's complaint on June 19, 2017. In its memorandum of decision, the court concluded that, viewing the facts in the light most favorable to the plaintiff, she failed to raise a genuine issue of material fact regarding various prima facie elements of each cause of action. This appeal followed.

We first set forth the relevant standards that govern our review of a court's decision to grant a defendant's motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *Barbee* v. *Sysco Connecticut, LLC*, 156 Conn. App. 813, 817–18, 114 A.3d 944 (2015).

"It is frequently stated in Connecticut's case law that, pursuant to Practice Book §§ 17-45 and 17-46, a party

opposing a summary judgment motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . .

"An important exception exists, however, to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition . . . . On a motion by [the] defendant for summary judgment, the burden is on [the] defendant to negate each claim as framed by the complaint . . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial. . . . Accordingly, [w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Internal quotation marks omitted.) Id., 818–19.

On appeal, the plaintiff claims that the court improperly granted the defendant's motion for summary judgment because a genuine issue of material fact existed as to whether the defendant retaliated against her. Specifically, the plaintiff asserts that she raised a genuine issue of material fact regarding retaliation by proffering facts that tend to demonstrate that she was constructively discharged from her employment. In addition to constructive discharge, the plaintiff claims that Hull's behavior toward her in their January 13, 2014 meeting also raised a genuine issue of material fact regarding retaliation. The defendant argues that the plaintiff's retaliation claim fails because, as a matter of law, the

defendant did not take any action against her that constitutes an adverse employment action. We agree with the defendant that it is entitled to summary judgment because the plaintiff failed to allege facts that, if proven, would establish an adverse employment action.

The plaintiff's claim of discrimination in employment arises under the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq. Our Supreme Court previously has determined that "Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." (Internal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 689, 41 A.3d 1013 (2012). Therefore, "[i]n interpreting our antidiscrimination and antiretaliation statutes, we look to federal law for guidance." (Internal quotation marks omitted.) *Amato* v. *Hearst Corp.*, 149 Conn. App. 774, 779, 89 A.3d 977 (2014).

Section 46a-60 (b) (4)[5] prohibits an employer from discharging, expelling, or otherwise discriminating against, any person because such person has filed a complaint regarding a discriminatory employment practice pursuant to § 46a-82 (a),[6] such as sexual harassment, as defined by § 46a-60 (b) (8).[7] To establish a

[5] General Statutes § 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (4) [f]or any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

[6] General Statutes § 46a-82 (a) provides in relevant part: "Any person claiming to be aggrieved by an alleged discriminatory practice . . . may, by himself or herself or by such person's attorney, file with the commission a complaint in writing under oath . . . ."

[7] General Statutes § 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (8) [f]or an employer, by the employer or the employer's agent, for an employment agency, by itself or its agent . . . to harass any employee, person seeking employment or member on the basis of sex or gender identity or expression. 'Sexual harassment' shall, for the purposes of this subdivision, be defined as any unwelcome sexual advances or requests for sexual favors or any

prima facie case of retaliation, a plaintiff must show four elements: (1) that he or she participated in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action against him or her; and (4) a causal connection between the protected activity and the adverse employment action. *McMenemy* v. *Rochester*, 241 F.3d 279, 282–83 (2d Cir. 2001). For the purposes of a retaliation claim, an adverse action must be "materially adverse" or "harmful to the point that [it] could well dissuade a reasonable [employee] from making or supporting a charge of discrimination." (Internal quotation marks omitted.) *Hicks* v. *Baines*, 593 F.3d 159, 165 (2d Cir. 2010). By considering the perspective of a *reasonable* employee, we apply an objective standard. Id. "[T]he alleged acts of retaliation need to be considered both separately and in the aggregate, as even minor acts of retaliation can be sufficiently 'substantial in gross' as to be actionable." Id. Further, the retaliatory act need not bear on the terms or conditions of employment. Id., 169.

Nevertheless, to be materially adverse, a change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities. . . . Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." (Citations omitted; internal quotation marks omitted.) *Terry* v. *Ashcroft*, 336 F.3d 128, 138 (2d Cir. 2003). We first reject

conduct of a sexual nature when (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (C) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment . . . ."

the plaintiff's claim that she has raised a genuine issue of material fact as to whether she was constructively discharged by the defendant. "Normally, an employee who resigns is not regarded as having been discharged, and thus would have no right of action for [wrongful] discharge. . . . Through the use of constructive discharge, the law recognizes that an employee's voluntary resignation may be, in reality, a dismissal by an employer. . . . Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. . . . Accordingly, a claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 178, 717 A.2d 1254 (1998). Furthermore, "[A] constructive discharge cannot be proven merely by evidence that an employee . . . preferred not to continue working for that employer" or that "the employee's working conditions were difficult or unpleasant." *Spence* v. *Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993). "Unless conditions are beyond ordinary discrimination, a complaining employee is expected to remain on the job while seeking redress." (Citation omitted; internal quotations omitted.) *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 147, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004).

The plaintiff has not established a genuine issue of material fact as to whether the defendant *intentionally* created an intolerable work atmosphere that forced her to quit involuntarily. First, there is no evidence that the

defendant knew of Crespo's actions against her prior to the plaintiff's disclosure of them to Hull on January 10, 2014. The plaintiff does not claim that the defendant ordered or encouraged Crespo's actions against her. She made no other viable claim that would constitute an intolerable work atmosphere. Second, the plaintiff has presented no evidence from which it can be inferred that the defendant deliberately sought to force the plaintiff to quit. According to the plaintiff's own account, when the plaintiff quit, her supervisor tried to prevent her from quitting, asking "are you sure you want to do this?" This evidence directly negates the constructive discharge requirement that the defendant *intentionally* create an intolerable work environment to force the employee to quit; in fact, it is undisputed that Hull attempted to stop the plaintiff from quitting.

Even if the meeting with Hull occurred as the plaintiff described in her deposition, the defendant's actions do not rise to the level needed to demonstrate constructive discharge. See *Noel* v. *AT & T Corp.*, 774 F.3d 920, 921 (8th Cir. 2014) (plaintiff failed to show constructive discharge because he produced no evidence that employer deliberately made working conditions so intolerable that reasonable person would have been compelled to resign); *Miller* v. *Praxair, Inc.*, United States Court of Appeals, Docket No. 09:2962CV (CFD) (2d Cir. November 24, 2010) (routine disagreements with supervisors and mild criticisms insufficient to meet "demanding" standard for constructive discharge); *Hill* v. *Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991) (formal written reprimand and supervisor criticism do not constitute constructive discharge). The working conditions in this case were not so difficult or unpleasant that a reasonable person in the plaintiff's shoes would have resigned.

Additionally, an employee claiming constructive discharge under retaliation must give the employer a reasonable chance to remedy any intolerable working

conditions before quitting. *Howard* v. *Burns Bros., Inc.*, 149 F.3d 835, 842 (8th Cir. 1998). Here, once informed of the complaint, the plaintiff's supervisor took swift action to investigate her concerns, going so far as to communicate with the plaintiff over the weekend, while the supervisor was on vacation. The possibility of providing the plaintiff with a remedy, however, was eliminated, three days after the complaint was received, by the plaintiff abruptly quitting her job. The defendant was not given an opportunity to consider and, if necessary, address the plaintiff's claims.

In support of her contention that she raised a genuine issue of material fact as to constructive discharge, the plaintiff relies heavily on *Chertkova* v. *Connecticut General Life Ins. Co.*, 92 F.3d 81 (2d Cir. 1996), in which the United States Court of Appeals for the Second Circuit reversed the decision of the United States District Court for the District of Connecticut to render summary judgment in favor of the defendant on a constructive discharge claim. *Chertkova*, however, is distinguishable from the present case.

The plaintiff in *Chertkova* had been put on probation for "communication" reasons. Id., 85. "[The] [p]laintiff's evidence [suggested] her supervisor engaged in a pattern of baseless criticisms, said she would not be around, and that she would be fired instantly if she did not meet certain ambiguous behavior objectives." (Internal quotation marks omitted.) Id., 89. Another female worker, and no male workers, had been discharged for the same baseless reasons. Id., 85. "[The plaintiff] presented proof that documenting a pattern to get rid of an unwanted employee was a recognized practice at the company . . . ." Id., 93. The court stated that, "[t]he evidence . . . would . . . allow a factfinder to conclude that [the plaintiff's supervisors] *deliberately* created unbearable working conditions for the purpose of forcing Chertkova out of the company."

(Emphasis in original.) Id., 90. In the present case, the plaintiff has demonstrated no such pattern or intentional behavior by the defendant. Accordingly, we disagree with the plaintiff that she raised a genuine issue of material fact as to whether she had been constructively discharged by the defendant.

We turn next to the plaintiff's assertion that the evidence presented regarding the actions of Hull at the meeting on January 13, 2014, either individually or collectively, were sufficient to raise a genuine issue of material fact that the defendant took an adverse employment action against her. Specifically, the plaintiff contends that "[the] [d]efendant's response to [the] [p]laintiff's sexual harassment complaint was harmful to the point that it could have dissuaded a reasonable worker from making or supporting a charge of discrimination." See *Hicks* v. *Baines*, supra, 593 F.3d 165.

Hull's actions, however, individually or in the aggregate, do not constitute a materially adverse employment action. First, it is undisputed that the warning threatened by Hull was never issued. The plaintiff has failed to cite to a single case in which a court has held that the threat of a warning could, by itself, constitute a materially adverse employment action. In repeated cases, in similar factual contexts, courts have rejected the argument that certain actions by employers, unaccompanied by an adverse change in employment conditions, are enough to constitute an adverse employment action.

For example, in *Amato* v. *Hearst Corp.*, supra, 149 Conn. App. 774, the plaintiff employee alleged that her employer had discriminated against her on account of her age. Id., 776. The plaintiff had worked for the defendant for ten years when the defendant put multiple senior employees, including the plaintiff, on a "[p]erformance [i]mprovement [p]lan" that subjected them to

future termination. Id. In response to the plan, the plaintiff filed a complaint alleging age discrimination with the Connecticut Commission on Human Rights and Opportunities (commission). Id. After the complaint had been filed with the commission, the defendant ended or suspended its actions against the older employees, and neither the plaintiff nor any of the other senior employees were terminated. Id., 776–77. This court held that the employee failed to allege any adverse material changes in the terms or conditions of her employment, such as termination, as a result of being placed on the performance improvement plan, and therefore did not establish a prima facie case of discrimination. Id., 783.

Similarly, in *Tepperwien* v. *Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 560 (2d Cir. 2011), the United States Court of Appeals for the Second Circuit affirmed the decision of the United States District Court for the Southern District of New York to grant a motion for summary judgment in favor of the defendant on a constructive discharge claim. In *Tepperwien*, an employee made a complaint to his union, which in turn informed management, about sexual harassment. Id., 561. After the employee made his complaint, the employee was threatened by a supervisor that he would be walked off site and his employment would be terminated. Id., 571. Neither of these threats, however, were carried out. Id. Therefore, the Second Circuit found that these actions did not cause injury because they were "empty verbal threats" and, therefore, were not materially adverse employment actions. (Internal quotation marks omitted.) Id.

In *Balderrama* v. *Kraft Foods North America, Inc.*, 307 F. Supp. 2d 1012, 1013 (N.D. Ill. 2004), the plaintiff alleged that she complained to her employer about sexual harassment and nothing was done. She then filed a complaint of sex discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC). Id. The plaintiff alleged that the employer

gave her a written warning in retaliation for filing the EEOC charge. Id. The United States District Court for the Northern District of Illinois, Eastern Division rendered summary judgment in favor of the employer on the plaintiff's claim of retaliation, concluding that a written warning did not constitute an adverse employment action under Seventh Circuit case law, as it did not result in a significantly negative alteration in the plaintiff's workplace environment. Id., 1014.

Further, Hull's purportedly angry demeanor during her January 13, 2014 meeting with the plaintiff, if proven, does not create a materially adverse employment action. In *Tepperwien* v. *Entergy Nuclear Operations, Inc.*, supra, 663 F.3d 565, 571, a supervisor's stare at an employee during an employee meeting while commenting that "[t]here are people . . . that don't like each other," "[t]here are people here I don't like," after the employee had made a sexual harassment complaint, was not considered an adverse employment action. (Internal quotation marks omitted.) Hull's actions, viewed in the light most favorable to the plaintiff, are no more harmful or intimidating than those in *Tepperwien* and would not dissuade a reasonable employee from making or supporting a charge of discrimination. See *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) ("personality conflicts at work that generate antipathy and snubbing by supervisors and co-workers are not actionable" [internal quotation marks omitted]).

Finally, Hull's request for the plaintiff to recount her story in the course of her investigation does not constitute a materially adverse employment action. It was appropriate for Hull to request that the plaintiff repeat or clarify her complaint. This is particularly true given that Hull had interviewed DiPinto prior to meeting with the plaintiff and needed to ensure that she understood

the plaintiff's claims in light of the additional information she had received. Requesting an employee to repeat a complaint for the employer's investigation would not dissuade a reasonable worker from making or supporting a charge of discrimination.

In sum, the plaintiff failed to demonstrate that a genuine issue of material fact existed with respect to her retaliation claim because the facts proffered, even if established, would not constitute an adverse employment action. Accordingly, we conclude that the defendant was entitled to summary judgment as a matter of law.

The judgment is affirmed.

In this opinion the other judges concurred.