# DANIEL SHEAR *v.* YUPAPORN SHEAR
## (AC 40830)

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

*Syllabus*

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court affirming in part an order of a family support magistrate with respect to his motion for modification of his child support obligation and remanding the case for further proceedings. *Held* that the plaintiff's appeal from the order of the family support magistrate was not taken from a final judgment, which is a threshold requirement to appeal the order to the Superior Court, and, therefore, the trial court should have dismissed the appeal for lack of subject matter jurisdiction, rather than resolving it on the merits; the family support magistrate did not fully dispose of the plaintiff's motion for modification, as he addressed only the first claim set forth in the motion and remanded the second claim pertaining to a certain stipulation between the parties to the family support magistrate for further proceedings, and, as evinced by certain additional proceedings before another family support magistrate and a resulting appeal to the Superior Court, the magistrate's order neither terminated a separate and distinct proceeding nor concluded the rights of the parties so that further proceedings could not affect them.

Argued May 16—officially released November 19, 2019

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Carbonneau*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the family support magistrate, *Michael L. Ferguson*, approved a certain stipulation of the parties; subsequently, the family support magistrate, *Jed N. Schulman*, issued a certain order related to a motion for modification of child support filed by the plaintiff; thereafter, the plaintiff appealed to the court, *Hon. Gerard I. Adelman*, judge trial referee; judgment affirming in part the order of the family support magistrate and remanding the matter for further proceedings, from which the plaintiff appealed to this court. *Reversed*; *judgment directed.*

*Tad J. Bistor*, for the appellant (plaintiff).

*Julé A. Crawford*, for the appellee (defendant).

*Opinion*

DiPENTIMA, C. J. The plaintiff, Daniel Shear, appeals from the judgment rendered by the Superior Court affirming in part an order of a family support magistrate[1] regarding his postdissolution motion for modification and remanding the case for further proceedings. On appeal, the plaintiff claims that (1) the Superior Court

[1] "The Connecticut Family Support Magistrate's Act . . . General Statutes §§ 46b-231 through 46b-23[6], was first enacted in 1986 in response to federal legislation providing federal funds for states that complied with federal requirements for the expeditious enforcement of child support orders in cases arising under Title IV-D. . . . In compliance with the processes mandated by the federal act, the legislature, by the passage of § 46b-231 (d) created the family support magistrate division of the superior court for the purpose of the impartial administration of child and spousal support." (Citations omitted; internal quotation marks omitted.) *O'Toole* v. *Hernandez*, 163 Conn. App. 565, 572–73, 137 A.3d 52, cert. denied, 320 Conn. 934, 134 A.3d 623 (2016).

applied an improper standard of review in the appeal from the family support magistrate's order and (2) the family support magistrate improperly failed to credit and refund money to the plaintiff for lump sum and monthly social security disability benefits paid to the defendant, Yupaporn Shear,[2] in excess of the postdissolution financial orders. We conclude that the plaintiff's appeal from the order of the family support magistrate was not taken from a final judgment. Accordingly, we reverse the judgment and remand the case to the Superior Court with direction to dismiss the plaintiff's appeal.

A detailed review of the facts and procedural history is necessary for our resolution of this appeal. On October 6, 2011, the plaintiff commenced the present action, seeking a dissolution of the parties' marriage and sole custody of their minor child. On November 29, 2012, the court, *Carbonneau*, *J.*, rendered a judgment dissolving the marriage. The court incorporated the terms of the parties' written separation agreement into the judgment. That agreement provided that the parties would have joint custody of the minor child, with her primary residence with the defendant. The plaintiff agreed to pay $71 per week in child support and $4 per week toward an existing arrearage. The parties also agreed to share the work-related day care costs, with the plaintiff paying 42 percent and the defendant paying 58 percent. Neither party was to receive alimony.

On December 27, 2016, the defendant filed a motion for modification and sought to reduce his child support and day care obligations. He alleged that a disability determination by the Social Security Administration constituted a substantial change in circumstances. He also claimed that the orders pertaining to his child support and day care obligations substantially exceeded

[2] The judgment of dissolution restored the defendant's name to Yupaporn Noipeng.

the "guidelines amount" based on his present income and earning capacity.

On January 5, 2017, the defendant was served with the plaintiff's motion for modification.[3] On January 18, 2017, two days before the scheduled hearing on the plaintiff's motion, the defendant's counsel filed a motion for a continuance until February 3, 2017. The plaintiff's counsel did not consent and filed an objection.

On January 20, 2017, the parties executed a stipulation that provided: (1) the defendant's counsel was unable to appear in court due to a previously scheduled matter; (2) support enforcement services received $307.70 on January 3, 2017, from an income withholding lodged with the Social Security Administration, which resulted in a deduction from the plaintiff's January, 2017 disability payment; (3) the plaintiff had received notice that the Social Security Administration deducted $4982.20 from his benefits to pay his child support and that this "substantially exceeds" the $3054.52 arrearage owed to the plaintiff and the state; (4) the minor child was entitled to a monthly dependent benefit and a retroactive lump sum dependent benefit from the Social Security Administration and the amount of these benefits would not be known until the defendant completed, and the Social Security Administration processed, an application; and (5) the parties wanted to protect their respective positions and to prevent overpayment of child support and the arrearage until a hearing was held on the plaintiff's motion for modification. The parties,

[3] "According to [General Statutes] § 46b-86 (a), '[n]o order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party . . . .' " (Emphasis omitted.) *Lesueur* v. *Lesueur*, 172 Conn. App. 767, 780, 162 A.3d 32 (2017).

therefore, agreed (1) to continue the hearing on the motion for modification until February 3, 2017, and (2) that support enforcement services would suspend the disbursement of any income withholdings received from the Social Security Administration until that date. The family support magistrate, *Michael L. Ferguson*, approved the stipulation, which had been filed in court by the plaintiff's counsel.

On March 9, 2017,[4] the family support magistrate, *Jed N. Schulman*, held a hearing on the plaintiff's motion for modification. At the outset, the parties stipulated that the plaintiff had been determined by the Social Security Administration to be disabled effective June 1, 2014, and that his disability payment was $878 per month or $203 per week. They also agreed that the minor child's benefit was $171 per month or $40.38 per week. After further discussion, Magistrate Schulman accepted the stipulations.

Next, Magistrate Schulman addressed the issue of whether the amount paid to the defendant from the social security lump sum disbursement exceeded the amount owed by the plaintiff. He then stated: "So, I'd have to look at certain things between June 1, 2014, [the date of the plaintiff's disability determination] and January 5, 2017 [the date the defendant was served with the motion for modification]. And I do want to make it clear to counsel that the case law is clear that the retro[active]—if you want to call it retro[active]—that the lump sum payment by [the] Social Security [Administration] for the benefit of the child is a gratuity essentially, and if it's—it's provided for so you don't get credit for that and you don't get reimbursement on that." The

[4] On February 3, 2017, the family support magistrate, *Katherine Y. Hutchinson*, continued the case until March 9, 2017, to provide the parties time "to substantiate their claims and to disclose information." The order also noted that "[t]he stipulation that was approved . . . on [January 20, 2017] remains in effect."

defendant's counsel agreed with Magistrate Schulman; the plaintiff's counsel, however, did not. Specifically, the plaintiff's counsel argued that if the plaintiff had received disability payments starting on June 1, 2014, he would have been entitled to a credit for the entire amount of the lump sum paid on behalf of the minor child by the Social Security Administration. Magistrate Schulman rejected the interpretation of the case law offered by the plaintiff's counsel, stating: "[B]ut I have to say that the lump sum payment from [the] Social Security [Administration] is not refundable to your client, nor should it be."

At the conclusion of the discussion regarding the overpayment issue, the plaintiff's counsel raised the matter of the January 20, 2017 stipulation. The plaintiff's counsel argued that the plaintiff was entitled to a refund of $1188.30 because support enforcement services had paid that sum of money to the defendant, despite the terms of the stipulation to withhold any disbursement until the hearing. In response, Magistrate Schulman remarked: "I—I—first of all, I'd have to see the figures as we outline here and see what happened from January 5. I'm not sure if anything would be returned to [the plaintiff] because if there's something being held. And first of all, I don't think support enforcement [services] was a signatory to this stipulation anyway. So . . . administratively, I can't micromanage, and if this happened and everything happens to be paid off, then wonderful . . . ." Aside from this brief comment, Magistrate Schulman did not conclusively address the stipulation issue.

After further discussion of the issues and argument from the parties, Magistrate Schulman issued his findings. The plaintiff's weekly child support obligation was reduced to zero, after accounting for the minor child's

social security dependency benefit paid to the defendant as representative payee. Magistrate Schulman further determined that any excess from the Social Security Administration disability benefits paid to the defendant constituted a gratuity and was not refundable to the plaintiff.

On March 23, 2017, the plaintiff moved for reconsideration of the March 9, 2017 order. Specifically, the plaintiff requested Magistrate Schulman to "allow him credit for lump sum and monthly social security dependency benefits paid to the [d]efendant for the parties' minor child for the period in which the [p]laintiff was entitled to social security benefits. In addition, the [p]laintiff also respectfully moves the [family support magistrate] to reconsider the arrears in light of the parties' [s]tipulation, dated January 20, 2017, approved and made an order of the [family support magistrate] on that date, such that any . . . overpayment to the [d]efendant as a result . . . be ordered refunded to the [p]laintiff." Magistrate Schulman denied the motion for reconsideration on April 10, 2017.

On April 24, 2017, the plaintiff filed an appeal from Magistrate Schulman's March 9, 2017 order to the Superior Court.[5] Specifically, he claimed that Magistrate

[5] General Statutes § 46b-231 (n) (1) provides that "[a] person who is aggrieved by a final decision of a family support magistrate is entitled to judicial review by way of appeal under this section." See also *Ragin* v. *Lee*, 78 Conn. App. 848, 856, 829 A.2d 93 (2003). Our legislature has defined the role of the Superior Court in hearing an appeal from a family support magistrate: "The Superior Court may affirm the decision of the family support magistrate or remand the case for further proceedings. The Superior Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the decision of the family support magistrate is: (A) In violation of constitutional or statutory provisions; (B) in excess of the statutory authority of the family support magistrate; (C) made upon unlawful procedure; (D) affected by other error of law; (E) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." General Statutes § 46b-231 (n) (7).

Schulman improperly denied him credit for the lump sum and monthly social security dependency benefits paid to the defendant and failed to take into account the parties' January 20, 2017 stipulation in calculating his child support arrearage. As a result, the plaintiff argued that he was entitled to a refund from the defendant. On July 10, 2017, the court, *Hon. Gerard I. Adelman*, judge trial referee, held a hearing on the plaintiff's appeal.

At that proceeding, the plaintiff's counsel presented two issues. First, he argued that during the time period of June 1, 2014 to January 5, 2017, the plaintiff's child support obligation was $71 per week. As a result of the disability determination, retroactively effective on June 1, 2014, $38.16 would be paid by the Social Security Administration and $32.84 by the plaintiff. However, because the plaintiff solely had been responsible for the $71 per week for that time period, he was entitled to a refund from the lump sum social security disability for the $38.16 per week over the approximately thirty-one month time period. The plaintiff's counsel asserted that the plaintiff had overpaid the defendant $6240.95. Second, the plaintiff's counsel contended that, despite the January 20, 2017 stipulation, support enforcement services disbursed the money received from the Social Security Administration before the parties' court appearance, and this resulted in an erroneous payment to the defendant in the amount of $1348.

On July 20, 2017, Judge Adelman issued a memorandum of decision. The court concluded that Magistrate Schulman had not abused his discretion with respect to the first issue raised by the plaintiff. With respect to the stipulation issue, the court initially noted that the parties had not presented any evidence. It then stated: "The orders entered at the end of that heading do not reference the stipulation issue directly. As the stipulation was accepted by the [family support magistrate]

and made [an] order, the unresolved issues involving said order must be addressed properly in a hearing so that all sides might have an opportunity to be heard." The court affirmed Magistrate Schulman's March 9, 2017 order "regarding the plaintiff's motion [for modification] and as to the denial of the plaintiff's claims for a refund of any overpayment of funds paid prior to January 20, 2017 . . . ." As to the second issue, the court ordered that "[t]he case [be] remanded to [Magistrate Schulman] only for a determination of the plaintiff's claim for a reimbursement of funds pursuant to the stipulation of the parties and the order of the court dated January 20, 2017." Following the denial of the plaintiff's motion to reargue, this appeal followed.

On appeal, the plaintiff claims that Judge Adelman applied an improper standard of review in considering the plaintiff's appeal from Magistrate Schulman's order and that Magistrate Shulman erred in not awarding the plaintiff a retroactive credit and a refund of $6420.95. On July 31, 2019, following oral argument, we ordered the parties to file simultaneous supplemental briefs addressing the following questions: "1. Whether the March 9, 2017 decision of the family support magistrate constituted a final judgment for purposes of appeal to the Superior Court where the family support magistrate had failed to consider one of the plaintiff's claims? 2. If the family support magistrate decision appealed to the Superior Court was not a final judgment, should the Superior Court have dismissed the plaintiff's appeal?" The parties filed their supplemental briefs on September 16, 2019.

We begin with the threshold question of whether the appeal to the Superior Court of Magistrate Shulman's order was taken from a final judgment.[6] Our Supreme

[6] We emphasize that this issue implicates the subject matter jurisdiction of the Superior Court, not the subject matter of this court. See *Johnson* v. *Clark*, 113 Conn. App. 611, 616 n.9, 967 A.2d 1222 (2009). This court has jurisdiction to determine whether the Superior Court has jurisdiction. Id.

Court has stated that "[t]he lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary. . . . The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . In some instances, however, it is unclear whether an order is an appealable final judgment. In the gray area between judgments which are undoubtedly final and others that are clearly interlocutory . . . [our Supreme Court] has adopted the following test, applicable to both criminal and civil proceedings: An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them. *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)." (Citations omitted; internal quotation marks omitted.) *Khan* v. *Hillyer*, 306 Conn. 205, 209–10, 49 A.3d 996 (2012); see also *Johnson* v. *Clark*, 113 Conn. App. 611, 616–18, 967 A.2d 1222 (2009).

The final judgment requirement applies to appeals from the decision of a family support magistrate to the Superior Court. For example, in *Johnson* v. *Clark*, supra, 113 Conn. App. 613, the parties were the unmarried parents of two children. A family support magistrate had ordered the defendant father to pay child support. Id. As a result of his noncompliance over a period of several years, the plaintiff mother filed numerous contempt motions. Id. The total arrearage

approached $18,000. Id. On May 9, 2007, the family support magistrate found the father to be in contempt and ordered a purge amount of $900, and that he make weekly payments. Id., 613–14. The family support magistrate further ordered the father to return to court on June 20, 2007, if he satisfied the purge amount, as well as on May 16, 2007. Id., 614. At the May 16, 2007 proceeding, the father requested that he be excused from returning to court on June 20, 2007, because he had paid the purge amount. Id. The family support magistrate denied this request and "ordered the [father] to return on June 20, 2007, to review [his] compliance with his weekly payments, with the proviso that the [father] could be excused by support enforcement services if he was in compliance." Id., 615.

The father appealed from the denial of his request to not be required to appear in court on June 20, 2007. Id. The Superior Court resolved the appeal on its merits. Id., 615–16. This court, applying the *Curcio* test, subsequently determined that the family support magistrate's order was interlocutory in nature. Id., 618–21. We further concluded that the family support magistrate's ruling was not an appealable final judgment, and, therefore, the Superior Court should have dismissed the appeal for lack of subject matter jurisdiction. Id., 621.

In *Harvey* v. *Wilcox*, 67 Conn. App. 1, 2, 786 A.2d 533 (2001), the issue before the Appellate Court was whether the Superior Court properly had dismissed the appeal of the defendant father from an order of a family support magistrate due to the lack of a final judgment. In that case, a Maine court, after rendering a default judgment finding him to be the father of the plaintiff mother's minor child, ordered the father to pay retroactive child support in the amount of $181 per week. Id. The father claimed that he never had received notice of the mother's claim that he was the child's father. Id. The mother registered the Maine court order with the

state of Connecticut pursuant to the Uniform Interstate Family Support Act, General Statutes § 46b-212 et seq. *Harvey* v. *Wilcox*, supra, 67 Conn. App. 2–3.

The family support magistrate ordered the father to pay the child support of $181 per week in accordance with the Maine order, rejecting his attempt to collaterally attack its validity by way of a defense of nonpaternity. Id., 3. The family support magistrate stayed the child support order to afford the father the opportunity to open the Maine paternity judgment. Id., 4. The father, however, declined to do so and, instead, appealed to the Superior Court, which dismissed the appeal. Id. We affirmed the judgment of the Superior Court, noting that the "stay order" of the family support magistrate did not constitute a final judgment. Id., 7.

*Johnson* and *Harvey* clearly establish that a final judgment is a threshold requirement to appeal a family support magistrate's order to the Superior Court. In the present case, Magistrate Schulman did not address one of the two claims set forth in the plaintiff's motion for modification at the March 9, 2017 hearing, or in denying the plaintiff's March 23, 2107 motion for reconsideration. Specifically, Magistrate Shulman did not render a decision with respect to the plaintiff's second claim pertaining to the parties' January 20, 2017 stipulation. This court has concluded, albeit in a different procedural context, that there is a lack of a final judgment when a trial court fails to resolve fully the matter placed before it. See, e.g., *Morera* v. *Thurber*, 162 Conn. App. 261, 131 A.3d 1155 (2016); *McGuinness* v. *McGuinness*, 155 Conn. App. 273, 108 A.3d 1181 (2015); *Bucy* v. *Bucy*, 19 Conn. App. 5, 560 A.2d 483 (1989).

We also conclude that neither prong of the *Curcio* test has been satisfied under facts and circumstances of the present case. Following Judge Adelman's judgment affirming in part Magistrate Schulman's order

and remanding the case for further proceedings as to the stipulation issue, this case traversed two divergent paths. The first led the parties to the present appeal. The second resulted in a November 8, 2017 hearing before the family support magistrate, *Gladys I. Nieves*, regarding the stipulation issue. At that proceeding, Magistrate Nieves noted that "[t]his case is on remand only for the determination of the plaintiff's claim for a reimbursement of funds pursuant to the stipulation of the parties and the order of the court dated January 20, 2017." After summarizing the relevant history of the case, Magistrate Nieves concluded that the plaintiff was entitled to $407.70 for money disbursed to the defendant on or about January 23, 2017. After unsuccessfully moving for reconsideration, the plaintiff appealed Magistrate Nieves' order to the Superior Court.

On June 11, 2018, the court, *Miller*, *J.*, sustained the appeal but did not focus on the stipulation issue, which was the sole matter decided by Magistrate Nieves. Instead, Judge Miller addressed the issue of whether the defendant had been overpaid as a result of the social security disability benefits.[7] In her June 29, 2018 "motion to reargue and/or for reconsideration," the defendant succinctly stated that Judge Miller's remand

[7] Judge Miller's June 11, 2018 decision provides in relevant part: "The appeal is sustained. While there were legitimate concerns about the scope of the [family support magistrate's] responsibilities on remand, the scope of the remand did require addressing the issues which have arisen due to the plaintiff's receipt of social security disability (SSD) benefits.

"When a party who has child support obligations is awarded SSD benefits, this will generally have a significant impact on the support obligations. . . . On this appeal, the plaintiff has established that he has, at a minimum, colorable claims that he can offset his SSD benefits against his child support arrearage and against his current support obligations. The plaintiff has argued that such calculations may result in a finding that he has overpaid the defendant, which claim also needs to be addressed.

"The decision of the family support magistrate is hereby reversed and the case is remanded to her for further proceedings consistent with this decision."

order concerned "the very issue that was denied by Magistrate Schulman, which denial was upheld by Judge Adelman, and is now on appeal to the Appellate Court." The defendant's motion was denied on July 6, 2018.[8]

Unquestionably, the policy objectives of the final judgment rule have not been achieved in this matter. As evidenced by the additional proceedings before Magistrate Nieves and Judge Miller, Magistrate Schulman's order neither terminated a separate and distinct proceeding nor concluded the rights of the parties so that further proceedings could not affect them. Accordingly, we conclude that Magistrate Schulman's order did not constitute a final judgment appealable to the Superior Court.

The judgement is reversed and the case is remanded with direction to dismiss the appeal for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* BENJAMIN CHASE CARPENTER
## (AC 41888)

Lavine, Prescott and Harper, Js.

*Syllabus*

Convicted, after a jury trial, of the crimes of murder and arson in the second degree, the defendant appealed. The defendant's conviction stemmed from an incident in which he entered the home of the victim, A, cut her throat, and set her home on fire. The defendant then met with D, and D led the defendant to a location that he felt was a safe place for the defendant to abandon A's car, which the defendant then set ablaze. On appeal, the defendant claimed that certain evidence entitled him to an instruction on the third-party culpability of D. *Held* that the trial court

[8] Judge Olear, citing Practice Book § 11-12, denied the motion to reargue solely on the basis that Judge Miller had retired from the bench on June 11, 2018.

properly declined to give the requested jury instruction on third-party culpability because the evidence was insufficient to establish a direct connection between D and either the murder of A or the arson of A's home: although the defendant claimed that cell phone site data introduced into evidence through W, an agent with the Federal Bureau of Investigation, showed that D may have been at or near A's home within minutes of when a witness, S, had been awakened by the sound of car doors closing before A's home was consumed by fire, there were no witnesses who placed D at A's home, and the defendant ignored W's testimony that there was no evidence suggesting that either D or his cell phone were ever at A's home; moreover, the mere possibility that D might have been in the area did not warrant an instruction on third-party culpability, as the purported evidence did not show physical presence combined with opportunity, nor did it show physical evidence and a lack of similar physical evidence linking the defendant to the scene, and W's review of the cell phone records actually placed the defendant near A's home multiple times; furthermore, even though D had accurate knowledge about the nature of the victim's fatal wounds, which information had not been released to the public, by the defendant's own admission D's knowledge could have been secondhand knowledge he received from the defendant himself, D's own testimony that he heard the information from the defendant at another date and time supported that conclusion, and even though D originally was charged with an arson related offense with respect to the burning of A's car and avoided prosecution by agreeing to testify against the defendant, the murder of A and the arson of A's home occurred at a time and location different from the arson of A's car, and it did not follow, in the absence of other evidence, that D was involved directly with the other, more heinous crimes in this case, as there was no direct evidence beyond bare suspicion that another person murdered A or set fire to A's home.

(*One judge concurring*)

Argued September 17—officially released November 19, 2019

*Procedural History*

Substitute information charging the defendant with the crimes of murder and arson in the second degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

*Matthew C. Eagan*, assigned counsel, with whom were *James P. Sexton*, assigned counsel, and, on the brief, *Emily Graner Sexton*, assigned counsel, and *Danielle J.B. Edwards*, assigned counsel, for the appellant (defendant).

*Nancy L. Chupak*, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Seth Garbarsky*, senior assistant state's attorney, for the appellee (state).

*Opinion*

HARPER, J. The defendant, Benjamin Chase Carpenter, appeals from the judgment of conviction, rendered after a jury trial, of murder and arson in the second degree. The defendant claims that the trial court erred in failing to instruct the jury, as he requested, on third-party culpability. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. Early on the night of December 25, 2015, the defendant communicated with Jennifer Antonier, the victim in this case, who was seeking to obtain narcotics from the defendant on "credit." Later on that night, the defendant reconnected with Antonier on the streets of his neighborhood. Specifically, Antonier, accompanied by an unidentified male, picked up the defendant in her Subaru Impreza and had him sit in the front passenger seat. At that time, Antonier was in the back seat of her car and the unidentified male was in the driver's seat. Once the defendant entered the car, the unidentified male began to drive, at which point Antonier held a gun to the defendant's head and demanded everything he had. After a brief altercation in the vehicle, during which the defendant admitted to punching Antonier, he was able to escape.

Later that same night, the defendant made his way back to Antonier's home located at 28 Lilac Avenue, Hamden (28 Lilac). Once he arrived, he punched Antonier in the face, took a knife that he regularly carried on his person, cut Antonier's throat two times, and severed her jugular vein. To ensure that Antonier would bleed out, the defendant then slashed her left arm with

the knife, leaving a gaping wound that led to her almost immediate death.

After cutting Antonier, the defendant dragged her body up the stairs to the second floor landing. He then left and eventually returned with gasoline that he poured throughout 28 Lilac, including all over Antonier's body. Shortly thereafter, the defendant set the house ablaze and departed, taking Antonier's cell phone and car with him.[1]

In the early morning of December 26, 2015, the defendant connected with his cousin, Jerome Dixon, at Poor John's Pub (Poor John's). The defendant arrived at Poor John's by driving Antonier's car. Dixon testified that the defendant arrived with blood on his pants. While with Dixon, the defendant asked if he knew the best location to get rid of a car. Dixon confirmed that he did know of a place; however, before showing the defendant the location, Dixon elected to go purchase marijuana at a location away from Poor John's.

After Dixon completed his marijuana transaction, he drove back, heading for Poor John's, when he realized that he was being followed by the defendant. After pulling over and having a brief conversation with the defendant, Dixon led the defendant to Russell Street in New Haven, a location he felt was a safe and dark place to abandon a car. Once they arrived at Russell Street, Dixon remained in his car and waited for the defendant.

[1] At some point during the night, most likely before setting fire to 28 Lilac, the defendant went to visit his cousin, Sharese Harrington, at her home, located at 88 Gorham Avenue, Hamden. He told Harrington that he punched Antonier and the unidentified man before running away. Harrington testified that she saw scrapes and cuts on the defendant's knuckles and, at that moment, he had a knife on his person. The Hamden Police Department enlisted the assistance of Special Agent James Wines with the Federal Bureau of Investigation to locate Antonier's cell phone, by way of historical cell site analysis. Through Wines' assistance, Hamden police located Antonier's cell phone in a storm drain outside 56 and 58 Gorham Avenue, approximately 300 feet from Harrington's home.

Through his rearview mirror, Dixon witnessed the defendant exit the Subaru Impreza and wipe down the steering wheel, door, and handle of Antonier's car.[2] Then, Dixon saw the defendant reach back into the Subaru as it lit up in flames, followed by the defendant jumping into the passenger side of Dixon's car.

Several hours later, in the afternoon of December 26, Dixon gave the defendant a ride to work. Before exiting the vehicle, the defendant asked Dixon to dispose of a bag containing the clothes that he wore the previous night. Dixon subsequently disposed of the bag at a gas station. A few days later, the defendant and Dixon met up again at Poor John's, during which time the defendant confessed to Dixon everything he did to Antonier at 28 Lilac and why.

The defendant became a person of interest for the Hamden Police Department's investigating detectives when they discovered that the last telecommunication Antonier had, either by phone call or through text message, was, in fact, with the defendant. Police suspicion of the defendant's involvement in Antonier's death grew stronger when he would not provide a straight answer as to his whereabouts on the night of the murder. Additionally, Harrington informed the police that the defendant had told her that he stabbed Antonier, and, through historical cell site analysis, Hamden police traced the defendant's cell phone to a location near 28 Lilac, as well as Gorham Avenue and Russell Street, on the night of the murder. Weeks later, on February 10, 2016, pursuant to a warrant, Hamden police arrested the defendant, and he was subsequently tried for the murder of Antonier and for having committed arson.

The defendant's trial began on April 3, 2017, and lasted five days. At the conclusion, the jury found the

[2] During trial, Dixon described the car as a black, four door hatchback with a bike rack on top—a description matching Antonier's Subaru Impreza.

defendant guilty of murder and arson in the second degree.

Prior to the conclusion of trial, the defendant requested that the court provide the jury with a third-party culpability instruction, arguing that there had been direct evidence that a third party, and not the defendant, committed the crimes of which he was accused. The defendant argued the following evidence supported a third-party culpability instruction: (1) Antonier's neighbor, Timothy Snodgrass, heard multiple car doors shutting between midnight and 12:20 a.m. and a beeping noise during that time period; (2) Wines testified that Dixon's cell phone connected to cell towers in the area of 28 Lilac at 12:10 a.m.; (3) Dixon's testimony contained intimate knowledge of nonpublic details of the murder; and (4) Dixon's DNA was found on a lighter.

The court denied the defendant's request for a third-party culpability instruction, citing *State* v. *Baltas*, 311 Conn. 786, 91 A.3d 384 (2014). The court opined that "[e]vidence that would raise only a bare suspicion that a third party rather than the defendant committed the charged offense would not be relevant to the jury's determination. In this particular case there's been no evidence that the third party knew [Antonier], that the third party was [at 28 Lilac] prior to or during the . . . alleged crime. There was no evidence, no physical evidence tying the third party, no fingerprints, no DNA, no weapons, no gasoline. The third party's connection is simply information allegedly received from the defendant, his cousin, who allegedly indicated to him some of the details about his alleged crime." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the trial court erred by denying his request to charge the jury regarding third-party culpability. Specifically, the defendant

argues that the following evidence supported a third-party culpability instruction: (1) "cell phone site data shows that [Dixon] may have been at [28 Lilac] within minutes of the time that her neighbor, [Snodgrass], was awoken by car doors closing and moments before [28 Lilac] was consumed by fire"; (2) "[Dixon had] accurate knowledge about the nature of [Antonier]'s fatal wounds, which were not made public"; and (3) "[Dixon] was initially charged with an arson related offense in this case, and he was only permitted to avoid prosecution for that offense because he pleaded guilty to hindering the prosecution and tampering with evidence, and entered into a cooperation agreement with the state to testify against the defendant." The defendant also points to the fact that Dixon's testimony regarding the events of December 25, 2015, is unreliable because his story changed several times.

We first set forth the standard of review and applicable legal principles that guide our analysis. "In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty *not* to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . .

"It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that *directly connects* a third party to the crime. . . . It is not enough to show

that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated: Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that third party culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt. . . .

"[I]f the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, a trial court has a duty

to submit an appropriate charge to the jury." (Emphasis added; internal quotation marks omitted.) *State* v. *Abdus-Sabur*, 190 Conn. App. 589, 599–601, 211 A.3d 1039, cert. denied, 333 Conn. 911, A.3d (2019).

Recently, our Supreme Court provided further guidance as to what constitutes a sufficient direct connection for purposes of third-party culpability: "[T]his court has found that proof of a third party's *physical presence at a crime scene*, combined with evidence indicating that the third party would have had the *opportunity to commit the crime* with which the defendant has been charged, can be [sufficient]. . . . Similarly, this court has found the direct connection threshold satisfied for purposes of [third-party] culpability when *physical evidence links a third party to a crime scene* and there is a *lack of similar physical evidence linking the charged defendant* to the scene. . . . Finally, this court has found that statements by a victim that implicate the purported third party, combined with a lack of physical evidence linking the defendant to the crime with which he or she has been charged, can sufficiently establish a direct connection for [third-party] culpability purposes." (Emphasis added; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 565, 198 A.3d 52 (2019).

A close examination of the defendant's proffered evidence in support of his request for a third-party culpability instruction leads this court to only one conclusion: it is insufficient to establish a direct connection between Dixon and either the murder of Antonier or the burning of 28 Lilac.

The defendant first argues that Dixon *may* have been at 28 Lilac within minutes of when Snodgrass was awoken by the sound of car doors closing before Antonier's house was set ablaze. There were no witnesses, however, including Snodgrass, who placed Dixon at 28

Lilac. The only evidence the defendant points to in support of this allegation that Dixon was, in fact, at 28 Lilac, is the testimony provided by Wines. Specifically, the defendant identifies portions of Wines' testimony where he interprets the connection of Dixon's cell phone to various cell towers as indicative of movement throughout the night, thus suggesting that Dixon was at or near 28 Lilac. These averments, however, ignore Wines' direct and consistent testimony that, throughout the night, there was no evidence to suggest that either Dixon or his cell phone were ever at 28 Lilac.

Despite Wines' latter testimony, the mere possibility that Dixon might have been in the area does not fall within any of the examples recognized by our Supreme Court in *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 565. The defendant's purported evidence does not show physical presence combined with opportunity, nor does it show physical evidence *and* a lack of similar physical evidence linking the defendant to the scene—on the contrary, Wines' review of the cell phone records places *the defendant* near 28 Lilac multiple times throughout December 25 and December 26, 2015.

With regard to the defendant's second argument, namely, that Dixon had accurate knowledge about the nature of the victim's fatal wounds, which was information that was not released to the public, we are not persuaded that this meets the direct evidence standard described previously. By the defendant's own admission, Dixon's accurate knowledge could have been secondhand knowledge he received from the defendant himself, at any time during December 25 or 26, 2015, or during the many days thereafter that they were together. Dixon's own testimony, that he heard the information from the defendant at another date and time, supports this conclusion.

The defendant's third argument for a third-party culpability instruction is that Dixon originally was charged with an arson related offense, but avoided prosecution on that offense and ultimately agreed to testify against the defendant. Again, we are not convinced that this constitutes direct evidence that would warrant a third-party culpability instruction.

Dixon was charged originally with conspiracy to commit arson in the second degree and conspiracy to tamper with evidence in relation to the burning of Antonier's car, not the burning of 28 Lilac. Although the crimes are related in that they involve the same victim, Antonier, the murder and arson of 28 Lilac occurred at a different time and in a different location from the burning of Antonier's car. Additionally, aside from Dixon's own admission that he was present at the burning of Antonier's car, there was ample evidence via historical cell site analysis and closed circuit television traffic cameras that linked him directly to the burning of the car, if not the location in which the burning occurred. Although the prosecutor elected not to charge Dixon with arson of Antonier's car, despite overwhelming evidence that he contributed to or was involved in that crime, it does not then follow, absent other evidence, that Dixon was involved directly with the other, more heinous crimes in this case.

Additionally, in his argument to the trial court and in his brief to this court, the defendant cites to our Supreme Court's decision in *State* v. *Arroyo*, 284 Conn. 597, 935 A.2d 975 (2007), as a case similar to the present one, urging us to conclude that there was sufficient evidence to warrant a third-party culpability instruction. The present case, however, is distinguishable from *Arroyo*.

In *Arroyo*, the defendant was convicted of, among other things, sexual assault in the first degree, sexual

assault in the fourth degree, and risk of injury to a child involving a five year old girl who lived in a home at which the defendant occasionally slept. Id., 602, 607. The court in *Arroyo* found that there was direct evidence that implicated the child's father and not the defendant. Id., 610–11. Specifically, the court identified the following evidence: (1) there was a "secret" the girl would not talk about between the girl and her father; (2) she said the secret had something to do with her body and pointed on a doll to the region between the doll's "belly and genital area"; (3) she was ashamed and afraid to share the secret; (4) she engaged in secret games with her father; (5) she tested positive for chlamydia around the same time that her father came back home from being away; (6) her father initially refused to be tested for chlamydia; and (7) her "father showered with [the child] and helped her to wash her private area." Id., 611–13. The court opined that, despite being a "close case," the aforementioned evidence "suggest[ed] a direct connection between the father and the sexual assaults of the victim," thus warranting a third-party culpability instruction. Id., 610, 612.

In the present case, unlike in *Arroyo*, there is *no direct evidence* beyond a bare suspicion that another person murdered Antonier or set fire to 28 Lilac. Accordingly, we conclude that the court properly declined to give a jury instruction on third-party culpability.

The judgment is affirmed.

In this opinion LAVINE, J., concurred.

PRESCOTT, J., concurring. Although I agree with the majority's conclusion that the defendant cannot prevail on his claim of instructional error, I reach that conclusion for a different reason. In my view, the defendant's claim fails as a matter of law because he failed to brief

adequately how he was harmed by the court's alleged failure to give the requested third-party culpability instruction. Accordingly, I do not reach the merits of the defendant's claim on appeal and respectfully concur in the result.

"It is well settled that, absent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. An improper ruling must also be harmful to justify such relief. . . . The harmfulness of an improper ruling is material irrespective of whether the ruling is subject to review under an abuse of discretion standard or a plenary review standard. . . . [If] the ruling at issue is not of constitutional dimensions, the party challenging the ruling bears the burden of proving harm." (Internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 816, 162 A.3d 63, cert. denied, 327 Conn. 905, 170 A.3d 2 (2017).

This court has held previously that a claim of instructional error regarding the denial of a third-party culpability instruction is not of constitutional magnitude. See *State* v. *Blaine*, 168 Conn. App. 505, 516, 147 A.3d 1044 (2016), cert. granted and cause remanded on other grounds, 325 Conn. 918, 163 A.3d 618 (2017); *State* v. *Inglis*, 151 Conn. App. 283, 296–97, 94 A.3d 1204, cert. denied, 314 Conn. 920, 100 A.3d 851 (2014), cert. denied, U.S. , 135 S. Ct. 1559, 191 L. Ed. 2d 647 (2015). Accordingly, "the defendant has the appellate burden to establish harm flowing from the [instructional] error, in order to secure a reversal of the judgment." (Internal quotation marks omitted.) *State* v. *Malave*, 250 Conn. 722, 741, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000); see also *State* v. *Arroyo*, 284 Conn. 597, 614–615, 935 A.2d 975 (2007) (engaging in harmful error analysis after determining court improperly refused to give third-party culpability instruction).

In the present case, the defendant's principal brief contains no analysis of whether the court's failure to give the requested third-party culpability instruction was harmful under the circumstances of this case. That brief fails to discuss the appellant's burden in this regard or to analyze any of the factors that courts typically employ to assess whether the defendant has met his burden to demonstrate harm. See, e.g., *State* v. *Arroyo*, supra, 284 Conn. 614–15; *State* v. *Blaine*, supra, 168 Conn. App. 516–17.

Rather, the defendant presents his harmful error analysis for the first time in his reply brief in response to the state's argument that any instructional error was harmless. As we have indicated on numerous occasions, we will not consider arguments raised for the first time in a reply brief. See, e.g., *State* v. *Toro*, supra, 172 Conn. App. 820. Because the defendant failed to address the issue of harm in his principal brief, he cannot meet his burden of establishing harmful error. Thus, even if the defendant were able to demonstrate that he was entitled to a third-party culpability instruction, he would not be entitled to the relief he seeks, namely, a reversal of the judgment and a new trial. Accordingly, I would affirm the judgment of the court without reaching the merits of the defendant's claim of instructional error.

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## KATHLEEN TELMAN *v.* GARY W. HOYT ET AL.
## (AC 41599)

Lavine, Devlin and Harper, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendants for, inter alia, fraud, in connection with false representations made during the defendants' sale of certain real property to the plaintiff. After the defendants were defaulted for failure to plead, a hearing in damages was held, after which the trial court awarded the plaintiff damages that included $4000 in attorney's fees. Thereafter, the plaintiff filed a motion

to set aside the verdict as to damages and for additur, which the court denied. On appeal to this court, the plaintiff claimed that the court abused its discretion when it denied her motion for additur as to her attorney's fees. *Held* that the trial court did not abuse its discretion in denying the plaintiff's motion for additur as to attorney's fees; our rules of practice provide for a motion for additur in connection with a jury trial, not with respect to a hearing in damages to the court, and having construed the requested additur as a motion for reconsideration, this court concluded that the trial court could have reasonably decided as it did and did not abuse its discretion.

Argued September 18—officially released November 19, 2019

*Procedural History*

Action to recover damages for, inter alia, the defendants' alleged fraud, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the action was withdrawn as to the defendant Carol Cangiano et al.; thereafter, the defendant Gary W. Hoyt et al. were defaulted for failure to plead; subsequently, following a hearing in damages, the court, *Hon. Richard E. Burke*, judge trial referee, rendered judgment for the plaintiff; thereafter, the court denied the plaintiff's motion for additur, and the plaintiff appealed to this court; subsequently, the court, *Hon. Richard E. Burke*, judge trial referee, issued an articulation of its decision. *Affirmed.*

*Andrew S. Knott*, with whom, on the brief, was *Robert J. Santoro*, for the appellant (plaintiff).

*Opinion*

PER CURIAM. The plaintiff, Kathleen Telman, appeals from the trial court's judgment denying her motion to set aside the verdict as to damages and for additur. On appeal, the plaintiff claims that the court abused its discretion in denying her motion to "set aside [the] verdict" as to damages and for additur because the court's award of attorney's fees to the plaintiff was so low that it shocks the conscience. We conclude that the trial court did not abuse its discretion in denying

the plaintiff's motion for additur as to attorney's fees and, therefore, affirm the judgment.

The following procedural history and facts are relevant to our resolution of this claim. The plaintiff commenced the present action against the defendants, Gary W. Hoyt and Karen A. Hoyt,[1] by way of summons and complaint. The complaint set out nine causes of action that sounded, inter alia, in fraud. The plaintiff alleged that on November 20, 2015, she purchased real property located at 1958 Hartford Turnpike, North Haven (property) from the defendants. In the defendants' residential property condition disclosure report (disclosure), they stated that "[m]onsoon rains may result in slight water in [the] garage"; (internal quotation marks omitted); and that there were no other water drainage problems associated with the property. The plaintiff alleged that the defendants knew that water intrusion occurred in the garage with normal rainfall and also that there were other drainage problems associated with the landscaping on the property. Therefore, the plaintiff alleged that the defendants committed fraud in their sale of the property by making false representations in the disclosure.

The defendants filed appearances in the present case but failed to plead in response to the plaintiff's amended complaint. Accordingly, the plaintiff filed a motion for default pursuant to the defendants' failure to plead, which was granted by the clerk.

On April 24, 2017, the court held a hearing in damages. The defendants did not appear at the hearing and, therefore, the plaintiff's claims were uncontested. The plaintiff presented evidence with respect to the damages

[1] Carol Cangiano, Coldwell Banker Real Estate, LLC, Coldwell Banker Residential Real Estate, LLC, NRT LLC, NRT New England, LLC, Realogy Franchise Group, LLC, Realogy Operations, LLC, and CBRE, Inc., were also named as defendants but are not parties to this appeal. Our references in this opinion to the defendants are to Gary W. Hoyt and Karen A. Hoyt.

she sustained as a result of the defendants' fraud. Her excavation expert testified that it would cost $19,000 to cure the drainage issues associated with the property. The plaintiff also testified that she spent 197 hours landscaping the property before she realized that there were drainage problems that ruined her landscaping efforts. The plaintiff requested $6,402.05 as compensation for her time spent on her ruined landscaping efforts, which was calculated on the basis of the hourly rate she earned from employment.[2] The plaintiff sought punitive damages, including attorney's fees, on the basis of the defendants' fraud. The plaintiff's counsel presented evidence of $1,462.35 in court costs and $27,480 in attorney's fees.[3]

Soon after the hearing, the court rendered judgment as to damages. The court awarded the plaintiff damages in the total amount of $24,462.35, which included $19,000 in compensatory damages, $1462.35 in taxable costs, and $4000 for attorney's fees. The court also ordered postjudgment interest in the amount of 6 percent per annum. The plaintiff then filed a motion to "set aside [the] verdict" as to damages and for additur pursuant to Practice Book § 16-35.[4] In support of her motion, the plaintiff argued that the court did not properly apply the law to the facts of the case because it failed to consider the plaintiff's lost time and expenses, and the full amount of her attorney's fees. The court denied that motion.

On appeal, the plaintiff claims that the court abused its discretion when it denied her motion for additur

[2] There is no evidence in the record that the plaintiff was employed as a landscaper.

[3] The plaintiff's counsel represented to the court that his legal fee, memorialized in his engagement letter with the plaintiff, was $300 per hour and that he spent 91.6 hours on the plaintiff's case.

[4] Practice Book § 16-35 is in Chapter 16, which is titled "Jury Trials." There was no jury trial in the present case, as the uncontested hearing in damages was tried to the court.

as to her attorney's fees. Following oral argument on appeal, pursuant to Practice Book §§ 60-2, 60-5, and 61-10, this court ordered the trial court to file a written articulation of "the factual and legal basis for the award of $4000 in attorney's fees, rather than the amount requested by counsel." The trial court filed an articulation stating that "in light of the facts as presented at the hearing [in damages] and after determining the damages to be awarded, [the court] used its discretion and awarded a percentage of the requested attorney's fees as punitive damages based upon fraud as requested by counsel." The articulation also highlighted that the plaintiff's counsel said at the hearing in damages that he would "take whatever . . . ."[5]

Our rules provide for a motion for additur in connection with a jury trial, not a hearing in damages to the court. See footnote 4 of this opinion. Construing the requested "additur" as a motion for reconsideration,[6] we conclude that the trial court could have reasonably decided as it did and did not abuse its discretion. See *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 479, 886 A.2d 837 (2005) (standard of review regarding challenges to court's ruling on motion for reconsideration is abuse of discretion), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006).

The judgment is affirmed.

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[5] The following is counsel's complete statement: "So I'll accept whatever the court thinks is—."

[6] "It is the substance of a motion . . . that governs its outcome, rather than how it is characterized in the title given to it by the movant." *State* v. *Taylor*, 91 Conn. App. 788, 792, 882 A.2d 682, cert. denied, 276 Conn. 928, 889 A.2d 819 (2005).

# ROBERT S. *v.* COMMISSIONER OF CORRECTION* (AC 41895)

Keller, Bright and Bear, Js.

*Syllabus*

The petitioner sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance by failing to investigate the viability of an intoxication defense. The petitioner had pleaded guilty, under the *Alford* doctrine, to various charges in connection with the stabbing deaths of two children. The plea agreement allowed the petitioner to avoid the death penalty, and he received a total effective sentence of life in prison with no possibility of release. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the record having supported that court's conclusion that trial counsel's strategy in not presenting an intoxication defense did not constitute ineffective assistance: the habeas court properly determined that the petitioner failed to satisfy his burden of overcoming the presumption that trial counsel's decision not to raise an intoxication defense was a reasonable trial strategy, the petitioner's claim that had trial counsel properly investigated and informed him of a possible intoxication defense, there was a reasonable probability that he would not have pleaded guilty was unavailing, as trial counsel adequately investigated and informed the petitioner of the availability and effectiveness of an intoxication defense, and properly advised him that an intoxication defense would likely have failed and that if he had gone to trial he would have faced a possible death sentence, and although the petitioner claimed that he was under the influence of drugs at the time of the murders in support of his intoxication claim, no evidence of the drug he purportedly ingested was recovered, the petitioner denied being under the influence of drugs to the police immediately following the murders, and the results of psychological tests obtained by the petitioner's trial counsel suggested that any ingestion of drugs immediately prior to the murders may have been voluntary and did not support a potential defense of intoxication; accordingly, the petitioner failed to establish that the issues he raised were debatable among jurists of reason, that a court reasonably could have resolved them differently, or that they raised questions deserving further appellate scrutiny.

Argued September 11—officially released November 19, 2019

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

*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, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

*James E. Mortimer*, assigned counsel, for the appellant (petitioner).

*Lawrence J. Tytla*, supervisory assistant state's attorney, for the appellee (respondent).

*Opinion*

BEAR, J. The petitioner, Robert S., appeals following the denial of his amended petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly concluded that he failed to establish that he had received ineffective assistance from his trial counsel because they failed to conduct a proper investigation and to advise him of the viability of an intoxication defense. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The habeas court's memorandum of decision sets forth the following relevant facts and procedural history: "In the early hours of April 20, 2004, in New London, the petitioner visited the apartment of his former girlfriend [F, who was also the mother of his son]. While there, he stabbed [F] multiple times as well as stabbing a neighbor . . . . While [F] sought refuge in [the neighbor's] apartment, the petitioner barricaded himself, his

fifteen month old son . . . and [F's] ten year old sister . . . in [F's] apartment.

"When the police arrived and pleaded with the petitioner to permit them to enter the apartment, the petitioner falsely warned them that he had a gun and would commence shooting if anyone tried to enter. The police could hear [F's sister] screaming for help but could not break down the metal door to the apartment.

"Eventually, the petitioner unlocked the door, and the police discovered that the petitioner stabbed to death [both children]. The petitioner stabbed [F's sister] eleven times frontally and ten times in her back. She had six wounds to her neck. The petitioner stabbed [his son approximately] fourteen times, the blows distributed to the toddler's neck, scalp, chest, and abdomen. . . .

"[T]he petitioner faced capital felony charges which allowed for imposition of the death penalty or life imprisonment without possibility of parole upon conviction. Murder of two persons in the course of a single transaction was a capital felony in 2004. See General Statutes § 53a-54b (7). The petitioner previously withdrew claims involving retroactive application of *State* v. *Santiago*, 318 Conn. 1, [122 A.3d 1] (2015).[1]

[1] At the habeas trial, the petitioner abandoned the first claim in his amended petition, and pursued the remaining claims: two, three, and four. In this appeal, the petitioner pursues only claims two and three. The petitioner's claims were as follows: "Claim One: *State* v. *Santiago*: The petitioner pleaded guilty to the charges prior to [our] Supreme Court's ruling in *State* v. *Santiago*. Therefore, the petitioner pleaded guilty to the charges not knowing that he would not be subjected to the death penalty if he lost at trial. Had the petitioner known that the death penalty would be repealed and that this repeal would be made retroactive, he would not have pleaded guilty and would have taken his case to trial. . . .

"Claim Two: Ineffective assistance of trial counsel: Counsel misled the petitioner regarding his possible trial strategies and defenses, which effectively confused him and coerced him to plead guilty. Counsel's actions constitute ineffective assistance of counsel. Had the petitioner fully understood the state's offer and had the time to consider it in light of his possible trial strategies and defenses, he would have rejected the plea and taken his case to trial. . . .

"A bifurcation of the criminal trial into proceedings determining guilt and those pertaining to penalty was required in death penalty cases. See General Statutes § 53a-46a. Upon conviction of a capital offense, the fact finder then received evidence and argument concerning the existence or nonexistence of aggravating and mitigating circumstances in weighing whether the death penalty was appropriate. If not, then the accused received a life sentence without possibility of parole.

"After extensive investigation . . . [the petitioner's trial counsel], Attorneys [Bruce] Sturman and [Fred] DeCaprio,[2] were able to negotiate a plea disposition to the charges [against the petitioner] in exchange for the state's abandonment of its quest for the death penalty. On May 11, 2007, the petitioner pleaded guilty pursuant to that agreement [under the *Alford*[3] doctrine]." (Footnotes added.)

"Claim Three: Ineffective assistance of trial counsel: Counsel's failure to investigate the petitioner's involuntary intoxication claim caused the petitioner to misunderstand the strength of his case which coerced him to plead guilty. Counsel's actions constitute ineffective assistance of counsel. Had counsel performed proper investigation, the petitioner would have rejected the plea and taken his case to trial. . . .

"Claim Four: Ineffective assistance of trial counsel: Counsel's failure to discuss the plea offer with the petitioner or disclose its terms caused the petitioner to plead guilty to an unknown plea. Counsel's actions constitute ineffective assistance of counsel. Had counsel discussed the offer with the petitioner and disclosed its full terms, the petitioner would have rejected the plea and taken his case to trial."

[2] The habeas court found in its memorandum of decision that "[b]oth Attorney DeCaprio and Attorney Sturman were highly experienced criminal defense lawyers who had represented many clients charged with murder, including defendants facing capital offenses, before they represented the petitioner. Attorney Sturman was the public defender for the New London Judicial District, and Attorney DeCaprio was and had been a member of the chief public defender's capital murder unit for several years preceding the petitioner's case." Hereafter, any reference to "trial counsel" refers to Attorneys DeCaprio and Sturman.

[3] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea." *Parker* v. *Commissioner of Correction*, 169 Conn. App. 300, 303 n.3, 149 A.3d 174, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016).

On January 22, 2014, the petitioner, then a self-represented litigant, filed a petition for a writ of habeas corpus. The petitioner subsequently requested and was appointed habeas counsel. On May 18, 2016, the petitioner amended his petition for a writ of habeas corpus, which was predicated on the alleged ineffective assistance of trial counsel. Specifically, the petitioner alleged that "[trial counsel] erroneously advised him that he had no viable defenses or evidence to mitigate the charges against him arising from intoxication; that [trial counsel] failed to investigate and research the law properly concerning intoxication as a defense or mitigant; that [trial counsel] afforded him insufficient time to consider the proposed plea disposition; that [trial counsel] misinformed him that a sentence to life imprisonment without possibility of parole was equivalent to a sixty year sentence; and misinformed him that he would become eligible for parole at such time." At the habeas trial on May 24, 2018, the habeas court heard testimony from the petitioner and his trial counsel.

The habeas court, *Sferrazza*, *J.*, in its May 31, 2018 memorandum of decision, denied the petitioner's amended petition for a writ of habeas corpus. On June 8, 2018, the petitioner filed a petition for certification to appeal, which the habeas court denied. This appeal followed. Additional facts will be set forth where necessary.

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal. We disagree.

"We begin by setting forth the applicable standard of review and procedural hurdles that the petitioner must surmount to obtain appellate review of the merits of a habeas court's denial of the habeas petition following denial of certification to appeal. In *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), [our

Supreme Court] concluded that . . . § 52-470 (b) prevents a reviewing court from hearing the merits of a habeas appeal following the denial of certification to appeal unless the petitioner establishes that the denial of certification constituted an abuse of discretion by the habeas court. In *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994), [our Supreme Court] incorporated the factors adopted by the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as the appropriate standard for determining whether the habeas court abused its discretion in denying certification to appeal. This standard requires the petitioner to demonstrate that the [resolution of the underlying claim involves] issues [that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . A petitioner who establishes an abuse of discretion through one of the factors listed above must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Emphasis omitted; internal quotation marks omitted.) *Blake* v. *Commissioner of Correction*, 150 Conn. App. 692, 695, 91 A.3d 535, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014). "In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Johnson* v. *Commissioner*

*of Correction*, 181 Conn. App. 572, 578, 187 A.3d 543, cert. denied, 329 Conn. 909, 186 A.3d 13 (2018). Furthermore, "this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 797, 198 A.3d 630 (2018), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019).

In determining whether there has been an abuse of discretion, every reasonable presumption should be given by this court in favor of the correctness of the habeas court's ruling, and reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. See *Peeler* v. *Commissioner of Correction*, 161 Conn. App. 434, 443, 127 A.3d 1096 (2015). Having set forth the appropriate standard of review, we next consider the petitioner's claims.

The petitioner claims that the habeas court improperly concluded that he received effective assistance of counsel. Specifically, the petitioner argues that trial counsel provided ineffective assistance both by failing to raise the defense of intoxication to mitigate the charges of capital murder and by failing to advise him about the viability of such a defense. We are not persuaded.

The following principles guide our review of a claim of ineffective assistance of counsel. After a guilty plea has been entered by a defendant and accepted by the court, "[i]n order to determine whether the petitioner has demonstrated ineffective assistance of counsel [when the conviction resulted from a guilty plea], we apply the two part test annunciated by the United States

Supreme Court in [*Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] and [*Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. . . . In *Strickland*, which applies to claims of ineffective assistance during criminal proceedings generally, the United States Supreme Court determined that the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . .

"To satisfy the performance prong under *Strickland-Hill*, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that the advice was not within the range of competence demanded of attorneys in criminal cases. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Reasonably competent attorneys may advise their clients to plead guilty even if defenses may exist." *Clinton S.* v. *Commissioner of Correction*, 174 Conn. App. 821, 827–28, 167 A.3d 389, cert. denied, 327 Conn. 927, 171 A.3d 59 (2017).

"It is axiomatic that decisions of trial strategy and tactics rest with the attorney. . . . Furthermore, our review of counsel's performance is highly deferential. . . . Indeed, [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Our cases instruct that [s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Citations omitted; internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 627–28, 212 A.3d 678 (2019). "[Counsel's] decision not to call attention to the petitioner's intoxication falls into the category of trial strategy or judgment calls that we consistently have declined to second guess." (Internal quotation marks omitted.) *Ramey* v. *Commissioner of Correction*, 150 Conn. App. 205, 214, 90 A.3d 344, cert. denied, 314 Conn. 902, 99 A.3d 1168 (2014).

The petitioner argues that trial counsel's performance was deficient for failing to conduct an adequate investigation of the viability of an intoxication defense. Specifically, the petitioner argues that had trial counsel properly investigated and informed him of the availability of an intoxication defense, there is a reasonable probability that he would not have pleaded guilty.

We conclude that the record supports the habeas court's finding that the petitioner's trial counsel adequately investigated and informed the petitioner of the availability and effectiveness of an intoxication defense.

The habeas court found that within a few weeks following the petitioner's arrest and meeting with trial counsel, the petitioner communicated to them that he had smoked a blunt[4] in F's apartment prior to the murders. He claims that the blunt he smoked contained

[4] A "blunt" is a street term used to describe a cigar that has been hollowed out, filled with marijuana, and smoked to ingest the drug. See *State* v. *Sanchez*, 75 Conn. App. 223, 226 n.1, 815 A.2d 242, cert. denied, 263 Conn. 914, 821 A.2d 769 (2003).

phencyclidine, commonly referred to as PCP, which resulted in his abhorrent behavior. One of his arguments regarding his ineffective assistance of counsel claim is that trial counsel failed to act on his representation to them that the blunt he smoked in F's apartment contained PCP. The habeas court found that trial counsel investigated this claim by examining reports and photographs from the scene of the crime compiled by members of the Connecticut State Police Major Crime Squad, after they searched and processed F's apartment. During the crime squad's examination of the crime scene, no blunt was recovered. Shortly after the petitioner had committed the murders, he was admitted to Lawrence + Memorial Hospital for treatment. While there, Sergeant Brian Wright of the New London Police Department asked the petitioner if he was under the influence of any drugs at the time of the murders. The petitioner denied being under the influence of any drugs during the relevant time period.

The petitioner also claims that trial counsel performed deficiently because they failed to have his blood and urine tested specifically for PCP. During the habeas proceeding, the court concluded that while the petitioner was at the hospital, samples of his blood and urine were collected by hospital staff pursuant to a search warrant. The habeas court further concluded that no evidence was adduced "that the material tested negative for PCP or other substances; that such a test was performed; or that such a test for PCP [was] even available."

Evidence presented at the habeas trial demonstrated that trial counsel had the petitioner evaluated by three mental health professionals who opined that the petitioner exhibited psychotic symptoms caused by frequent ingestion of drugs including, but not limited to, marijuana and PCP. The habeas court found that the results of the psychological tests did not support the

potential defense of intoxication. Rather, the results suggest that if the petitioner ingested PCP before committing the murders, the ingestion may have been voluntary.

Furthermore, the habeas court found that in light of the overwhelming evidence supporting trial counsel's decision not to raise the defense of intoxication, "[d]efense counsel correctly informed the petitioner that under General Statutes § 53a-7,[5] intoxication only provided a defense to criminal conduct if that intoxication 'negate[d] an element of the crime.' Murder does require proof of the specific intent to kill. However, the acts incontrovertibly committed by the petitioner displayed specific intent to kill the children, despite the effects of intoxication. He stabbed each child several times including multiple mortal strikes to their throat and torso. He deterred the police from rescuing the children by claiming to have a firearm. This occurred while [F's sister] screamed for help. A reasonable inference would be that the petitioner employed that ruse in order to prevent the police from thwarting his mission to kill them." (Footnote added.) Additionally, the petitioner brought a bag containing knives to F's apartment on the night of the murders with no explanation as to why he had done so. The habeas court determined that this evidence demonstrated that the petitioner had acted with premeditation in committing the murders,

[5] General Statutes § 53a-7 provides: "Intoxication shall not be a defense to a criminal charge, but in any prosecution for an offense evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate an element of the crime charged, provided when recklessness or criminal negligence is an element of the crime charged, if the actor, due to self-induced intoxication, is unaware of or disregards or fails to perceive a risk which he would have been aware of had he not been intoxicated, such unawareness, disregard or failure to perceive shall be immaterial. As used in this section, 'intoxication' means a substantial disturbance of mental or physical capacities resulting from the introduction of substances into the body."

and his intent undermined the viability of an intoxication defense at trial.

In its memorandum of decision, the habeas court concluded that, after considering the evidence in its totality in light of the capital charges, trial counsel, in their reasonable, professional judgment, properly advised the petitioner that an intoxication defense likely would have failed and that if he went to trial he would have faced a possible death sentence. Considering that trial evidence, the habeas court's conclusion was not an abuse of its discretion. "Indeed, we recognize that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [they] did . . . ." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 637.

On the basis of the foregoing, we conclude that the petitioner has not proven that the habeas court abused its discretion when it denied his petition for certification after concluding that trial counsel adequately investigated the viability of an intoxication defense, that the petitioner failed to satisfy his burden of overcoming the presumption that trial counsel's decision not to raise the defense of intoxication was a reasonable trial strategy, and that trial counsel's strategy did not constitute deficient performance.[6] We agree with the

[6] To satisfy the second part of the *Strickland-Hill* test, the prejudice prong, "the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Clinton S.* v. *Commissioner of Correction*, supra, 174 Conn. App. 828; see also *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 705, 184 A.3d 804 (2018). In light of our conclusion that trial counsel did not perform deficiently, we do not need to consider the prejudice prong of the *Strickland-Hill* test. See *Michael T.*

habeas court that the petitioner failed to establish that the issues he raises are debatable among jurists of reason, that they reasonably could be resolved by a court differently, or that they raise questions deserving further appellate scrutiny. See *McClain* v. *Commissioner of Correction*, 188 Conn. App. 70, 92, 204 A.3d 82, cert. denied, 331 Conn. 914, 204 A.3d 702 (2019). Thus, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* ANTHONY PERNELL (AC 42470)

Lavine, Prescott and Bear, Js.

*Syllabus*

Convicted, after a jury trial, of the crime of murder in connection with the shooting death of the victim, the defendant appealed. At trial, the defendant testified, inter alia, that he and the victim were smoking phencyclidine in his bedroom while the victim exchanged a series of phone calls with her mother to arrange for a ride to work. The defendant further testified that a heated conversation ensued between the victim and her mother, that the victim subsequently took a gun from the defendant's closet and put the gun to her head, and that the gun went off when the defendant tried to take it from the victim. On appeal, the defendant claimed that he was deprived of his due process right to a fair trial because of certain prosecutorial improprieties in closing argument. *Held*:

1. The defendant could not prevail on his claim that the prosecutor improperly opined on how someone should act during a police interview because there was no evidence as to how a grieving person typically would respond when questioned by the police hours after witnessing his friend's death, nor about how the defendant's ingestion of phencyclidine

v. *Commissioner of Correction*, 319 Conn. 623, 639, 126 A.3d 558 (2015) (our Supreme Court found that it "need not consider . . . or address the prejudice prong of the *Strickland* test" if petitioner fails to establish counsel provided ineffective assistance).

could have affected his behavior during the police interview; the prosecutor, who merely asked the jurors to consider the defendant's demeanor during the police interview and argued the inference that he was calm during that interview, properly prompted the jurors to employ their common sense in considering the evidence, and he simply observed that the defendant was calm and calculating at the time of the police interview, which the jurors reasonably could have inferred from the video of the police interview that was entered into evidence.

2. The defendant's claim that the prosecutor improperly interjected his own experience by stating what he would have done if he had found himself in the defendant's circumstances was unavailing; the challenged comment of the prosecutor was not an improper personal anecdote and was based squarely on the evidence that was heard by the jury, including the defendant's testimony that he failed to answer the victim's cell phone when her mother called after the shooting, as well as his testimony regarding the victim's heated conversation with her mother that led to her supposedly picking up the gun and holding it to her head to attempt suicide, and the prosecutor's statement about what he would have done did not indicate that the statement was based on the prosecutor's own experience and was the rough equivalent of asking the jurors what they would have done in the defendant's shoes after the shooting.

3. The defendant could not prevail on his claim that the prosecutor improperly appealed to the jurors' emotions when the prosecutor speculated that the defendant went through the victim's purse after her death and found letters regarding child custody issues; the prosecutor's comment was a proper response to an inference raised by defense counsel that a letter from the victim's child custody attorney in the victim's purse corroborated the defendant's story that the victim was suicidal and trying to kill herself because of child custody issues, and there was sufficient evidence in the record to support the inference that the defendant went through the victim's purse, including the defendant's affirmative efforts to portray the victim's death as a suicide, as well as the time and opportunity he had to do so after the shooting and before the police arrived.

4. The defendant could not prevail on his claim that the prosecutor's statement that the defendant's version of the events, namely, that the gun was in both his and the victim's hands at the time of discharge, contradicted the gunshot residue evidence was improper because it was not properly derived from the evidence presented; although the gunshot residue expert did not state with absolute certainty that the victim's hands could not have been on the gun at the time of discharge, it was reasonable for the jury to infer that the victim did not have her hands on the gun at the time of discharge due to the lack of gunshot residue on her hands, and, thus, the prosecutor properly argued a fair inference from the evidence to the jury.

5. The defendant's claim that the prosecutor's use of the words "kill shot" improperly appealed to the jurors' sympathies and emotions because those words implied more than mere murder was unavailing, as the words used were factually accurate and supported by the evidence that the victim was in fact killed by a gunshot to her forehead, and the evidence presented supported the inference that the victim's death was intentionally caused by the defendant.

6. Although the prosecutor improperly appealed to the jurors' sympathies by using the word "executed" and improperly expressed his personal opinion by making the statement that "[i]t's shameful" that the defendant went through the victim's purse after her death, those improprieties did not deprive the defendant of his due process right to a fair trial; the prosecutorial improprieties were not so serious as to amount to a denial of due process, as defense counsel invited the prosecutor's use of the words "[i]t's shameful," the improprieties were not severe because defense counsel did not object and the use of the words "executed" and "[i]t's shameful" was not blatantly egregious in light of the facts before the jury, the improprieties were infrequent because they consisted of a few words following three full days of evidence, the statement "[i]t's shameful" was not central to a critical issue in the case, the curative measures employed by the court, including instructions to the jury on multiple occasions throughout both the trial and closing argument that closing argument was not to be considered as evidence, were adequate, and the state's case was strong enough so that it was not reasonably likely that the jury's verdict would have been different if the prosecutor had not used the word "executed" and the phrase "[i]t's shameful."

Argued September 5—officially released November 19, 2019

*Procedural History*

Substitute information charging the defendant with the crimes of murder, possession of narcotics with intent to sell and criminal possession of a revolver, brought to the Superior Court in the judicial district of Hartford, where the defendant entered a plea of guilty to the charges of possession of narcotics with intent to sell and criminal possession of a revolver; thereafter, the charge of murder was tried to the jury before *D'Addabbo*, *J.*; subsequently, the court denied the defendant's motion for a judgment of acquittal; verdict of guilty; thereafter, the court denied the defendant's

motion for judgment notwithstanding the verdict; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed. *Affirmed.*

*Lisa J. Steele*, assigned counsel, for the appellant (defendant).

*Timothy J. Sugrue*, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

*Opinion*

LAVINE, J. The defendant, Anthony Pernell, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a. On appeal, the defendant claims that the prosecutor committed prosecutorial improprieties in his closing argument, which deprived the defendant of his due process right to a fair trial. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In March, 2015, the defendant; his mother, Gail Grant (mother); and half brother, Christopher Grant (Grant), resided in a three bedroom apartment located at 48 Congress Street in Hartford (apartment). On March 17, 2015, the defendant and Lilliana Restrepo, the victim, were together in the defendant's bedroom smoking phencyclidine (PCP) while the victim got ready for work. When the victim went to leave for work, the defendant shot her with a revolver (gun) at close range in the center of her forehead.

The defendant was taken into custody and interviewed by the police.[1] The defendant told the police that the victim was his friend. He stated that the victim

[1] The video recording of that interview was admitted into evidence, along with a corresponding transcript.

was stressing about her son and that she wanted to kill herself because the Department of Children and Families took her son away. The defendant stated that he took the gun out of a bag to show the victim, and she was playing with it. The defendant said that he tried to stop her, but he accidentally pulled the trigger when he grabbed the gun from her. He claimed that it went off because the victim already had cocked the gun. The defendant stated that he was standing in front of the victim when the gun went off. He also stated: "I wasn't giving her the gun when I shot her in the head. . . . I tried grabbing the gun from her . . . and the shit went off. I told you, it's kind of . . . man, that's why I said it, it was just kind of strange. And then . . . I feel like they probably wouldn't believe . . . me . . . that's why I kind of . . . made it look like she killed herself. . . . Like, actually she had the gun aimed, I grabbed. . . . Do you understand what I'm saying?" The defendant admitted that he put the gun in the victim's hand to make it look like she shot herself. He also admitted that he did not call an ambulance after the victim was shot.

The detectives attempted to take the defendant's written statement. During that discussion of the events, the defendant stated: "I was dirty with drugs . . . basically that's why I came up with this story. . . . I just don't want to get involved in this shit at all. I was trying to keep myself cleared . . . because I had drugs on me," and "I just said that because I had the drugs on me. . . . I don't know really what happened. I came and checked my phone . . . I went outside to make a couple [drug] sales. I came back, and I found her like that." The defendant claimed that he told the police that he had shot the victim to cover up that he had drugs on his person. After that exchange, the detectives left the interview room. In their absence, the defendant knocked on the interview room door and, when the

detectives opened the door, the defendant said: "I just want to tell you guys the truth, man, because I know you won't believe me . . . . I grabbed the gun by accident, man. I know y'all wouldn't believe me, man." The defendant claimed that this was the truth.

The defendant was arrested and charged with murder, possession of narcotics with intent to sell, and criminal possession of a revolver.[2]

Both the defendant and Grant testified at trial. Their respective testimonies are relevant to our evaluation of the defendant's claims on appeal and are, therefore, summarized herein. The defendant testified that when he and the victim were smoking in his bedroom, the victim exchanged a series of phone calls with her mother to arrange for a ride to work. After the victim told her mother that she would find her own ride to work, a heated conversation ensued between the victim and her mother. The defendant further testified that the victim asked him if he would be there for her as a friend, and that she also expressed that she was getting emotionally close to the defendant. The defendant testified that the victim said she felt stupid and ugly, and so the defendant told her that he would be there for her in the best way that he could. The defendant testified that, after that exchange, the victim stated that "she was tired of everybody" and started texting. At that time, the defendant testified that he looked for a CD-ROM to play to calm her down because she was aggravated from the phone call and disappointed that the defendant did not realize how she felt toward him emotionally. The defendant further testified that the victim, who the defendant called Lill, took a gun from the defendant's closet and that: "I said, what you got in your hand? I'm like, Lill, and this is what I said, what

[2] The defendant pleaded guilty to the possession of narcotics with intent to sell and criminal possession of a revolver charges prior to trial.

the fuck are you doing? She like, no, I'm tired. . . . You ain't right. . . . I said, what you talking about? Then, at this time, I'm standing up because she got a gun in her hand and thought . . . maybe she [was] going to shoot me or she might kill herself . . . ." The defendant continued: "I ask her, what the fuck she doing. She just said she was tired of everybody and I'm not right. And I said, Lill, what you doing? She kicked the handle back. I said, Lill, you can't do this. We in my mother's house. I said, we all go to jail if you do this. At this time, she started putting the gun up like this, and I got closer. By the time she had it to her head, I pulled it back, she put it in the other hand and it went off. And then it dropped." The defendant testified that he paced in his room, and that he then picked the gun up and put it on his bed. Then he went into Grant's adjacent bedroom and woke him up.

Grant testified that the defendant and the victim were friends, and that their relationship may have been sexual in exchange for drugs. Grant testified that on the day of the shooting, the defendant came into his room, woke him from sleep, and said that he had done something wrong and shot the victim. Grant further testified that he asked the defendant if he was joking, and the defendant could not clarify, and so the defendant told Grant to go in the next room and look for himself. They went into the defendant's bedroom together, where Grant observed the victim lying with her head back in a basket. Grant testified that he checked the victim's pulse on her left arm. He testified that the defendant then "showed me that he had shot her" and that "[b]ecause her face was facing the other direction to the side, I didn't see the bullet wound at first, and he showed me that it was there." It was at that time that Grant learned that the victim was dead. Grant asked the defendant what happened, but the defendant could

not answer him. They stayed in the defendant's bedroom for about fifteen minutes. Grant testified that, after fifteen minutes, they stepped into the hallway, where they stayed for twenty to forty minutes. After that time, the defendant went back into the bedroom to try and wake the victim up. Grant had to pull the defendant off the victim and close the door to the bedroom. Grant testified that the defendant then received a call to make a drug sale and that he left the apartment.

When the defendant returned from his drug sale, Grant testified that he and the defendant made their way back to the defendant's bedroom. According to Grant, the defendant suggested at that time that "he makes it look like a suicide." Grant told the defendant that that would not be the right thing to do, and he turned away from the defendant's bedroom. The defendant testified that, when Grant left the bedroom, "I sat on the bed, and I started thinking, just started looking at her. I didn't know what to do. I just sit there for a minute and then my mind start racing like, man, when I tell them this, they ain't never going to believe me. So, I just started clicking like, I said, man, my story, they ain't going to believe this, so I put the gun in her hand to make it look like what it was. I tried to grab, but it went off." The defendant further testified that he saw that the victim's mother was calling the victim's cell phone again, but he did not answer the phone. The defendant removed the cell phone from the victim's hand and placed the gun in her hand.

Grant called his girlfriend, mother, and uncle, and his mother called the police. The responding police officer, Dominick Agostino, testified that, upon entering the apartment, he heard Grant on the telephone stating: "He shot her. He shot her. I can't believe this." Agostino observed the defendant frantically scan the area and look for a place to escape but was unable to do so.

On the basis of the evidence presented at trial, the jury found the defendant guilty of murder in violation of § 53a-54a, and the court accepted the jury's verdict. The defendant was sentenced to a term of fifty years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the state violated his due process right to a fair trial when the prosecutor committed six separate improprieties during closing argument. He argues that the prosecutor expressed personal opinions, discussed facts not in evidence, and appealed to the jurors' emotions. The defendant contends that his intent when the victim was shot was "the key issue in this case," and that the claimed improprieties were harmful because the state's case was weak. The state concedes that two of the prosecutor's statements were improper but argues that they did not deprive the defendant of his due process right to a fair trial. We conclude that, notwithstanding the state's concessions, even if two of the prosecutor's remarks were improper, they did not deprive the defendant of his due process right to a fair trial.

We first set forth the relevant legal principles governing our review.[3] It is often said that "[w]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from

[3] Although the defendant did not object to the remarks he challenges on appeal, we still review his claims because "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), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)], and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Turner*, 181 Conn. App. 535, 556, 187 A.3d 454, cert. granted, 330 Conn. 909, 193 A.3d 48 (2018). We note, however, that defense counsel's failure to object is highly significant and indicates lack of severity of the alleged impropriety, as we discuss later in this opinion. See *State* v. *Thompson*, 266 Conn. 440, 479, 832 A.2d 626 (2003).

improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Internal quotation marks omitted.) *State* v. *Rowe*, 279 Conn. 139, 159, 900 A.2d 1276 (2006), quoting *Berger* v. *United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

"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. . . .

"[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include: [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Citations omitted; internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560–61, 34 A.3d 370 (2012). "The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Internal quotation marks omitted.) *State* v. *Ross*, 151 Conn. App.

687, 700, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014). "Under the *Williams* general due process standard, the defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense." *State* v. *A. M.*, 324 Conn. 190, 199, 152 A.3d 49 (2016). "The two steps of [our] analysis are separate and distinct, and we may reject the claim if we conclude [that] the defendant has failed to establish either prong." *State* v. *Danovan T.*, 176 Conn. App. 637, 644, 170 A.3d 722 (2017), cert. denied, 327 Conn. 992, 175 A.3d 1247 (2018).

I

PROSECUTORIAL IMPROPRIETY

The defendant claims that the prosecutor made six improper remarks in closing argument. More specifically, the defendant claims that the prosecutor improperly (1) opined on how someone should act during a police interview; (2) opined on what the prosecutor would have said to the victim's mother when she called; (3) speculated that the defendant might have gone through the victim's purse and shamefully blamed her death on her child custody problem; (4) asserted that the defendant's version of the events conflicted with the gunshot residue evidence; (5) stated that the victim was "dead in the defendant's bedroom with a kill shot to her forehead"; and (6) argued that the victim was "executed." We address each of these remarks in turn to determine whether the prosecutor committed impropriety in his closing argument.

A

On appeal, the defendant claims that the prosecutor improperly opined on how someone should act during a police interview because there was no evidence as to how a grieving person typically would respond when questioned by the police hours after witnessing his

friend's death and also because there was no evidence about how the defendant's ingestion of PCP could have affected his behavior during the police interview.[4] The defendant argues that the remark may have caused the jury to assume that the defendant did not behave appropriately because the prosecutor's question as to whether the defendant seemed upset presupposed that only a guilty person would calmly answer police questions. We disagree.

The defendant's claim is fundamentally flawed because the prosecutor did not offer the opinions that the defendant asserts that he did. The challenged statements are not improper because the prosecutor merely asked the jurors to consider the defendant's demeanor during the police interview and argued the inference that the defendant was calm during that interview. Counsel is not prohibited from asking the jurors questions that prompt them to employ their common sense in considering the evidence. "[J]uries are not required to leave common sense at the courtroom door . . . ." (Internal quotation marks omitted.) *State* v. *Lopez*, 93 Conn. App. 257, 267, 889 A.2d 254 (2006), aff'd, 281 Conn. 797, 917 A.2d 949, aff'd sub nom. *State* v. *Kennedy*, 281 Conn. 801, 917 A.2d 947 (2007). "[J]urors, in deciding cases, are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to a jury's common sense in closing remarks."

[4] The defendant specifically challenges the following statement: " 'Oh, bleep, now I'm in trouble.' That is the response of a person and that's what his response was. Because I ask you to consider, how upset was he? How upset was he that . . . as he testified, his dear friend . . . just got shot in his presence? Seems awful calm when he was interviewed by the police hours later. It also seems that every question presented to him was coolly and with calculation responded to. Ask yourselves if he had any degree of upset when he was talking to the police on March 17, 2015."

(Internal quotation marks omitted.) *State* v. *Elmer G.*, 176 Conn. App. 343, 376, 170 A.3d 749 (2017), aff'd, 333 Conn. 176, 214 A.3d 852 (2019). Furthermore, the declaratory statements contained within this challenged remark—"Seems awful calm when he was interviewed by the police hours later. It also seems that every question presented to him was coolly and with calculation responded to."—are inferences reasonably drawn from the video of the police interview that was entered into evidence. "[I]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . ." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 583, 849 A.2d 626 (2004). The jurors reasonably could have inferred from the video of the police interview that the defendant, as asserted by the prosecutor, was calm, cool, and calculating at the time of the interview. Our review of the evidence supports the prosecutor's argument that the defendant was not agitated or upset during the course of his time in the interview room. To the contrary, he slept and ate macaroni and cheese when he was alone, and offered the detectives multiple, differing stories with respect to how the victim was shot. The defendant even told the police, during his interview, which the jury heard, that he "came up with this story." Because the prosecutor properly prompted the jurors with questions to consider the evidence and simply observed that the defendant was calm and calculating at the time of the police interview, we conclude that this statement was not improper.

B

The defendant next claims that the prosecutor improperly interjected his own experience by stating what he would have done if he had found himself in

the defendant's circumstances.[5] In support of this claim, the defendant cites to *State* v. *McCarthy*, 105 Conn. App. 596, 630–31, 939 A.2d 1195, cert. denied, 286 Conn. 913, 944 A.2d 983 (2008), a case in which this court held that the prosecutor's attempt to attack the defendant's photographic evidence by referring to a personal experience—a failed attempt to accurately photograph a bird—was improper because there was no evidence at trial to establish that the cameras used by investigators for the defense produced disappointing results. In the present case, the prosecutor argued that the defendant did not answer the cell phone call from the victim's mother following the shooting because he murdered the victim and was in "protection mode." In making this argument, he highlighted the defendant's testimony that the victim was suicidal after having a heated conversation with her mother and stating that she was tired of everybody. The prosecutor continued: "Now, ask yourselves . . . can you put yourselves in that position? . . . I . . . would have a few choice words for her mother at that point in time if I just witnessed my friend killing herself or dead after having tried to [kill] herself." We are not persuaded by the

[5] The defendant claims that the entirety of the following remark by the prosecutor was improper: "I want to draw you to another thing the defendant said. He said even after it was all done and he came back, just to look at [the victim], the phone went off and he couldn't . . . get to the point where he could answer the phone when he saw that it was [the victim's] mother calling. Now, ask yourselves, ladies and gentlemen, can you put yourselves in that position? If we believe what the defendant said . . . [the victim] just had a horrible conversation with her mother where she hopes she's going to die, with gun in hand she says, I'm sick of all these people. Something goes down, [the victim] gets shot in the head, and then there is a phone call from her mother. I, ladies and gentlemen, would have a few choice words for her mother at that point in time if I just witnessed my friend killing herself or dead after having tried to [kill] herself. He didn't answer the phone because he killed her. He didn't answer the phone because he's in protection mode. He planted the gun . . . in . . . her right hand because he's in protection mode."

defendant's claim that such a statement constituted an improper personal anecdote, as was the case in *McCarthy*. In the present case, the prosecutor's statement was based squarely on the evidence that was heard by the jury, including the defendant's testimony that he failed to answer the victim's cell phone when her mother called after the shooting, as well as his testimony regarding the victim's heated conversation with her mother that led to her supposedly picking up the gun and holding it to her head to attempt suicide.

The defendant's argument seems to imply, however, that the prosecutor's mere use of the words "I . . . would have" indicates that the statement was based on the prosecutor's own experience. We disagree. "The [prosecutor] should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 583–84. In *State* v. *Bell*, 283 Conn. 748, 773, 931 A.2d 198 (2007), our Supreme Court concluded that it was not improper for the prosecutor to ask the jurors to put themselves in the defendant's shoes to evaluate how a reasonable person would act under the circumstances. In the present case, the prosecutor's statement about what he would have done was the rough equivalent of asking the jurors what they would have done in the defendant's shoes after the shooting. We, therefore, conclude that this statement did not constitute prosecutorial impropriety.

C

The defendant claims that the prosecutor improperly speculated that the defendant "shameful[ly]" went through the victim's purse after her death and found

letters regarding child custody issues. The defendant also claims that this statement improperly appealed to the jurors' emotions. We disagree with the defendant.

The context of closing argument in this case is relevant to the analysis of this claim and is, therefore, summarized herein. The prosecutor argued in closing that the defendant's story—that the victim was suicidal and trying to kill herself—was fabricated. The prosecutor supported that argument with the inconsistencies between the defendant's statements to the police and his testimony at trial.[6] Particularly, the prosecutor questioned the defendant's attribution of the victim's suicidal intentions to child custody issues when the two had not actually discussed those issues on the day she was shot. In rebuttal, defense counsel argued that there was a letter from the victim's child custody attorney in her purse, which corroborated the defendant's story about the victim's child custody issues.[7] In response, the prosecutor suggested to the jury that the defendant pointed to the victim's child custody issue because he went through the victim's purse following the shooting.[8] Considering the sequence of the argument, it is

[6] The prosecutor argued: "[A]ll [the defendant] says through that [police] interview is, [the victim] had child custody issues. Yet, he acknowledges on the stand yesterday that we never discussed and she never stressed about child custody issues during that overnight on March 17, 2015. It's out of whole cloth . . . . She wasn't trying to kill herself."

[7] Defense counsel stated: "[Two and one-half] years ago [the defendant is] talking about [the victim is] stressing about her kid. She's stressing about the custody of her kid. And he kept saying that. He kept saying that. Well, how the hell do we know if she was stressing about her kid? Ladies and gentlemen . . . Lead Detective [Anthony] Rykowski, do you recall his testimony when I asked him about that Coach bag . . . . And what was one of the pieces of correspondence in that bag? . . . [The victim's] bag. A letter from her child custody attorney. Gee, this guy with a ninth grade education put all that together and came up with this horrible story?"

[8] The prosecutor stated: "How you're left with evidence because the thing is . . . you come back to what did [the defendant] say, and once you dismiss his version of events, as it's contradicted by his own statements . . . and it's contradicted by the gunshot residue evidence, [the victim's] hands weren't up. Her hands weren't next to the gun. . . . What's interesting about

unavailing for the defendant to now claim that the prosecutor's statement, to rebut the defendant's argument, was improper. "[T]he state may properly respond to inferences raised by the defendant's closing argument." *State* v. *Robinson*, 227 Conn. 711, 746, 631 A.2d 288 (1993). Additionally, notwithstanding the fact that the prosecutor's comment was a proper response to the inference raised by defense counsel in closing argument, there was sufficient evidence in the record to support the inference that the defendant went through the victim's purse, including the defendant's affirmative efforts to portray the victim's death as a suicide, as well as the time and opportunity he had to do so after the shooting and before the police arrived. Accordingly, we do not conclude that the prosecutor's remark was improper.

The state does, however, concede that the prosecutor's particular statement of "[i]t's shameful" was a gratuitous and improper expression of personal opinion. On the basis of the state's concession, we will assess whether the prosecutor's use of such words deprived the defendant of his due process right to a fair trial in part II of this opinion.

D

The defendant also claims that the prosecutor's statement that the defendant's version of the events contradicted the gunshot residue (residue) evidence was

that letter that may exist, that was testified to, is who was alone with the dead [victim] for about forty minutes, possibly thinking about what he could say to the police as to what stressed her out? Because, again, you got to [juxtapose] all of that with what [the defendant] told you on the stand yesterday; that's the conversation that led [the victim] to her suicidal brink. Yet, he never told any of that to the police, but what he shares with the police is there's custody issues. Custody issues, that subject matter, is actually sitting in her purse while he's alone, and, again, ladies and gentlemen, your minds can run rampant at this point, he already admitted he put a gun in hand . . . would you doubt he went into her purse to see what made her tick? It's shameful. It's shameful, but what you are left with, again, ladies and gentlemen, is the circumstances of her death, an intentional killing at close range to her forehead."

improper because it was not properly derived from the evidence presented. He argues that the prosecutor's remark went beyond what the jury fairly could infer because the residue expert did not state with absolute certainty that the victim's hands could not have been on the gun at the time of discharge. We, however, agree with the state's contention that it was based on the evidence and was appropriate advocacy.

The following additional facts are relevant to the evaluation of this claim. The defendant claimed that the gun was in both his and the victim's hands at the time of discharge. Fung Kwok, a chemist at the Connecticut state forensics laboratory, testified as an expert with respect to the residue evidence. He stated that such residue is "a mixture of gasses and particle from a gun fire" and those major elements are lead, antimony, and barium. Kwok testified that if all three elements are found in the same particle, then that is residue. If two out of the three elements are found, then it is consistent with residue. If only one of the three elements is found, then he cannot identify it as residue. Kwok testified that if he finds residue, then the individual fired a firearm, handled a recently discharged firearm, which caused transfer of residue, or was in close proximity to a firearm when it discharged. Kwok analyzed residue kits taken from the defendant's and the victim's hands, and found all three residue elements on the defendant's left palm, and two out of three elements on the back of his left hand and right palm. He only found lead particles on the victim's hands. The prosecutor questioned Kwok: "Are you able to have an opinion that failure to find all three elements on [the victim's] hands would allow you to conclude that her hands were not in close proximity to the gun?" In response, Kwok stated, "[or] maybe covered up." The prosecutor also asked, in considering the wound and Kwok's opinion on the close range of the shot, "if [the victim's] hands were exposed, you

would've expected to find . . . the three elements?" Kwok responded, "[y]es."

"[I]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 583. In *State* v. *Jones*, 115 Conn. App. 581, 597–600, 974 A.2d 72, cert. denied, 293 Conn. 916, 979 A.2d 492 (2009), this court concluded that it was not necessarily improper for the prosecutor to argue that the DNA evidence found belonged to the defendant, where the evidence presented was that the defendant was included as a contributor to the DNA profile, if it was a reasonable inference to draw in light of the evidence as a whole. See *State* v. *Brett B.*, 186 Conn. App. 563, 583–85, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019).

The present case is similar to *Jones* insofar as it was reasonable for the jury to infer that the victim did not have her hands on the gun at the time of discharge due to the lack of residue on her hands, although the residue expert did not testify to that fact with absolute certainty. "It is the right and duty of the jury to determine . . . what weight, if any, to lend to the testimony of a witness and the evidence presented at trial." (Internal quotation marks omitted.) *State* v. *Osbourne*, 138 Conn. App. 518, 534, 53 A.3d 284, cert. denied, 307 Conn. 937, 56 A.3d 716 (2012). The prosecutor properly argued a fair inference from the evidence to the jury. Accordingly, we do not conclude that this remark was improper.

E

The defendant next claims that the prosecutor's use of the words "kill shot"[9] improperly appealed to the jurors' sympathies and emotions. In support of that claim, the defendant argues that "kill shot" implies "more than mere murder . . . ." We disagree with the defendant.

"A prosecutor is not precluded from using descriptive language that portrays the nature and enormity of the crime when supported by the evidence." *State* v. *Andrews*, 313 Conn. 266, 301, 96 A.3d 1199 (2014) (court held that to extent that prosecutor's language appealed to jurors' emotions, it did so because of nature of crime and not because of terminology used by prosecutor). Although characterizing the victim's gunshot wound as a "kill shot" was crude slang and arguably carried an emotional charge, it was not improper because the words used were factually accurate and supported by the evidence. The evidence supports the state's contention that the defendant, without any known or apparent motive, murdered the victim by shooting her in the center of her forehead from a distance of fewer than eighteen to twenty-four inches. On the basis of our review of the record, we conclude that the prosecutor's use of the words "kill shot" was not improper because the victim was in fact *killed* by a *gunshot* to her forehead, and the evidence presented supports the inference that the victim's death was intentionally caused by the defendant.

F

The defendant's final claim is that the prosecutor's use of the word "executed" improperly appealed to the

[9] The prosecutor argued to the jury that "[defense counsel] will say to you . . . that since no motive evidence has been presented to you, [the victim] was not dead in the defendant's bedroom with a kill shot to her forehead."

jurors' sympathies and emotions. The state concedes that the prosecutor's use of the word "executed" was improper on the basis of *State* v. *Albino*, 312 Conn. 763, 97 A.3d 478 (2014). In *Albino*, our Supreme Court held that the prosecutor's statement that the defendant "execut[ed]" the victim improperly appealed to the jurors' emotions, passions, and prejudices because "the defendant's evidence was deemed sufficient to warrant jury instructions on lesser included offenses inconsistent with a wholly unprovoked act of brutality that has been deemed by courts to justify the use of such terms." Id., 774. In the present case, the trial court instructed the jury as to lesser included offenses.[10] Although the record does not reveal the trial court's reason for its decision to issue those instructions, the jury was nonetheless instructed to consider lesser included offenses, which are naturally "inconsistent with a wholly unprovoked act of brutality . . . ." On the basis of the trial court's instruction, *Albino* requires us to conclude in the present case that the prosecutor's use of the word "executed" was improper.[11]

## II

## DUE PROCESS

We now assess whether the prosecutor's use of the word "executed" and the statement "[i]t's shameful"

[10] The trial court instructed the jury as to the lesser included offenses of intentional manslaughter, reckless manslaughter, and criminally negligent homicide.

[11] We do, however, note that other states tend to focus on the overall strength of the evidence, instead of whether an instruction on lesser included offenses is given, when determining whether a prosecutor's use of the words "executed" or "in cold blood" was improper. Our Supreme Court's decision in *Albino* outlines certain cases that take this alternative approach: "*Commonwealth* v. *Murphy*, 442 Mass. 485, 496, 813 N.E.2d 820 (2004) (statement that victims were murdered in cold blood not improper where evidence permitted inference that murders were unprovoked, senseless, and brutal), *People* v. *Walton*, Docket No. 259584, 2006 WL 2033999, *2 (Mich. App. July 20, 2006) (prosecutor's characterization of offense as execution not improper because clearly supported by evidence that defendant and accomplices made unarmed victims lie down on floor and then shot them), and *State* v. *Harris*,

deprived the defendant of a fair trial. "In determining whether prosecutorial [impropriety] was so serious as to amount to a denial of due process, [our Supreme Court], in conformity with courts in other jurisdictions, has focused on several factors. Among them are [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Citations omitted.) *State* v. *Williams*, supra, 204 Conn. 540.

We first note that defense counsel did not invite the prosecutor's use of the word "executed," but that counsel did invite the prosecutor's statement of "[i]t's shameful." Defense counsel, however, did not object to either the prosecutor's use of the word "executed" or the statement "[i]t's shameful," and "it [is] highly significant that defense counsel failed to object to any of the improper remarks, request curative instructions, or move for a mistrial." *State* v. *Thompson*, 266 Conn. 440, 479, 832 A.2d 626 (2003); see also *State* v. *Payne*, supra, 303 Conn. 568 ("[w]hen no objection is raised at trial, we infer that defense counsel did not regard the remarks as 'seriously prejudicial' at the time the statements were made"). "Beyond defense counsel's failure to object, in determining the severity of prosecutorial impropriety, we look to whether the impropriety was blatantly egregious or inexcusable." *State* v. *Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007). Because defense counsel did not object and the use of the sole words "executed" and "[i]t's shameful" was not blatantly egregious in light of

338 N.C. 211, 229, 449 S.E.2d 462 (1994) (at trial for first degree murder involving calculated armed robbery and unprovoked killing, it was not improper for prosecutor to refer to defendant as cold-blooded murderer)." (Internal quotation marks omitted.) *State* v. *Albino*, supra, 312 Conn. 775.

the facts before the jury, we do not conclude that the impropriety was severe.

The impropriety was infrequent; it consisted of a few words following three full days of evidence and was made during lengthy closing argument. See, e.g., *State* v. *Bermudez*, 274 Conn. 581, 600–601, 876 A.2d 1162 (2005) (court found improper remarks infrequent where remarks consisted of only two instances of brief duration, which was not grossly egregious when viewed in context of entire trial). Although the use of the word "executed" went to the central issue of intent, the statement of "[i]t's shameful" did not because it pertained to the possibility that the defendant might have gone through the victim's purse. Indeed, we conclude that the prosecutor's characterizing the defendant's having gone through the victim's purse as "shameful," under the circumstances of this murder trial, is rather innocuous.

The trial court also instructed the jury on multiple occasions throughout both the trial and closing argument that closing argument is not to be considered as evidence and that "[w]hat [counsel] have said to you is their way of presenting to you what they think the evidence has proven or has not proven, as the case may be, but it is not evidence. If your recollection of the facts differs [from] what the attorneys have presented, it's your recollection that controls." The trial court did not specifically address the use of the word "executed" because there was no objection by the defense. In light of the circumstances, the curative measures employed by the court were adequate.

Finally, the state's case was strong enough so that it is not reasonably likely that the jury's verdict would have been different if the state had not used the word "executed" and the phrase "[i]t's shameful." The defendant's inconsistent story as to what actually occurred

in his bedroom, the residue evidence, and the location of the victim's wound all undermined the defendant's theory that he accidentally killed the victim when he tried to stop her from committing suicide.

On the basis of our analysis of these six factors, we have no difficulty concluding that the defendant failed to prove that the prosecutor's use of the word "executed" and the statement "[i]t's shameful" was a harmful error that deprived him of his due process right to a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

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## COSTELLO AND MCCORMACK, P.C. *v.* CONSTANCE MANERO (AC 41927)

Lavine, Elgo and Moll, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant for, inter alia, breach of contract in connection with its representation of the defendant in a dissolution of marriage proceeding. After the trial court granted the defendant's motion to implead three third-party defendants, F, W and M Co., F filed a cross complaint against the plaintiff, W and M. Co., alleging, inter alia, that they had committed legal malpractice in connection with the defendant's dissolution of marriage proceeding. The trial court thereafter granted motions to preclude expert testimony filed by the plaintiff and W and M Co., and subsequently granted their motions for summary judgment and rendered judgment thereon. Following the trial court's denial of his motion for reconsideration, F appealed to this court. *Held*:

1. The trial court properly concluded that F's cross complaint set forth a claim of legal malpractice against the plaintiff, W and M Co.; the operative complaint was F's answers, defenses and cross claim, not his amended motion to implead response, which was filed before F became a party to the action, and the only claim in the operative complaint, when construed liberally, sounded in legal malpractice.
2. The trial court properly rendered summary judgment in favor of the cross claim defendants on the legal malpractice claim; despite having ample

opportunity to do so, F, the cross claim plaintiff, failed to properly disclose expert witnesses in accordance with the requirements of our rules of practice, and in the absence of such testimony, F could not establish a prima facie case of legal malpractice because he could not prove either a breach of the applicable standard of care or the element of causation.

Argued September 10—officially released November 19, 2019

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of Stamford-Norwalk; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, granted the defendant's motion to implead Arik B. Fetscher et al. as third-party defendants; subsequently, Arik B. Fetscher filed a cross claim against the plaintiff et al.; thereafter, the court granted the motions to preclude expert testimony filed by plaintiff et al.; subsequently, the court, *Genuario*, *J.*, granted the motions for summary judgment filed by the plaintiff et al., denied the motion to reargue filed by Arik B. Fetscher and rendered judgment thereon, from which Arik B. Fetscher appealed to this court. *Affirmed.*

*Arik B. Fetscher*, self-represented, the appellant (cross claim plaintiff).

*Robert C. E. Laney*, with whom was *Karen L. Allison*, for the appellee (cross claim defendant Costello and McCormack, P.C.).

*Nadine Pare*, for the appellees (cross claim defendant William Westcott et al.).

*Opinion*

ELGO, J. The cross claim plaintiff, Arik B. Fetscher,[1] appeals from the summary judgment rendered by the

[1] For purposes of clarity, we refer to the cross claim plaintiff by his surname. In addition, we note that Fetscher has appeared before this court in a self-represented capacity. Although currently licensed to practice law in this state, his license was under suspension at the time of argument before this court. See *Office of Chief Disciplinary Counsel* v. *Fetscher*,

trial court in favor of the cross claim defendants, Costello and McCormack, P.C. (Costello), Attorney William Westcott, and Maya Murphy, P.C. (Maya).[2] On appeal, Fetscher claims that the court improperly (1) construed his cross claim as one sounding in legal malpractice and (2) concluded that no genuine issue of material fact existed with respect to that claim. We disagree and, accordingly, affirm the judgment of the trial court.

In 2012, Fetscher commenced a civil action against his then stepfather, Nicholas Manero, Jr., and a business known as Nick Manero's II, Inc. In response, Nick Manero's II, Inc., brought a countersuit against Fetscher alleging breach of fiduciary duty, unjust enrichment, and conversion.[3] The cases were consolidated and, prior to trial, Fetscher retained the services of the Maya defendants.[4] Following a trial, the court found that Fetscher "breached his fiduciary obligations to defendant Nick Manero's II, Inc. . . . through a long series of misappropriations of corporate funds," that he

Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-19-6040003-S (March 25, 2019).

[2] We refer to Westcott and Maya individually by name and collectively as the Maya defendants.

[3] Because it provides context for the present action, we take judicial notice of the record of those proceedings. See, e.g., *Jewett* v. *Jewett*, 265 Conn. 669, 678 n.7, 830 A.2d 193 (2003) ("[t]here is no question that the [court] may take judicial notice of the file in another case" [internal quotation marks omitted]); *Joe's Pizza, Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 865 n.4, 675 A.2d 441 (1996) (taking judicial notice of outcome of criminal trial); *State* v. *Allen*, 205 Conn. 370, 382, 533 A.2d 559 (1987) ("judicial notice can be taken at any stage of the proceedings including on appeal"). Moreover, a copy of the court's decision in *Fetscher* v. *Manero*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-12-6012822-S (May 21, 2014), was submitted as an exhibit to the Maya defendants' motion for summary judgment.

[4] The Maya defendants filed an appearance on January 28, 2014. Pursuant to the retainer agreement between the parties, the scope of their representation was "unique insofar as [Fetscher] is a licensed attorney in the State of Connecticut, he has filed a pro se appearance in the litigation, and he fully intends to act as co-counsel in the litigation." It is undisputed that Fetscher actively participated in those proceedings, including trial.

"knowingly and wrongfully converted [corporate assets] to his own use," and that he "was unjustly enriched at the corporation's expense . . . ." *Fetscher* v. *Manero*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-12-6012822-S (May 21, 2014). The court thus rendered judgment in favor of Nick Manero's II, Inc. Id. No appeal was taken from that judgment.

In January, 2015, Costello commenced an unrelated action sounding in breach of contract and unjust enrichment against Constance Manero[5] to collect unpaid fees for legal services rendered on her behalf in a dissolution of marriage proceeding. Appearing in a self-represented capacity, Manero filed a handwritten response to that complaint and Costello filed a certificate of closed pleadings on March 25, 2015. On April 8, 2016, a hearing was held before an attorney fact finder pursuant to General Statutes § 52-549n.[6]

On May 16, 2016, Manero filed a motion to implead Fetscher, Westcott, and Maya as third-party defendants.

[5] Constance Manero is Fetscher's mother. Although she is a party to the action underlying this appeal, Manero has not participated in this appeal, which concerns Fetscher's cross claim against Costello and the Maya defendants. In an attempt to bring some clarity to the convoluted procedural history of this case, we refer to Constance Manero by her surname in this opinion.

[6] General Statutes § 52-549n provides: "In accordance with the provisions of section 51-14, the judges of the Superior Court may make such rules as they deem necessary to provide a procedure in accordance with which the court, in its discretion, may refer to a fact-finder for proceedings authorized pursuant to this chapter, any contract action pending in the Superior Court, except claims under insurance contracts for uninsured and underinsured motorist coverage, in which only money damages are claimed and which is based upon an express or implied promise to pay a definite sum, and in which the amount, legal interest or property in controversy is less than fifty thousand dollars exclusive of interest and costs. Such cases may be referred to a fact-finder only after the certificate of closed pleadings has been filed, no claim for a jury trial has been filed at the time of reference, and the time prescribed in section 52-215 for filing a jury trial claim within thirty days of the return day or within ten days after the issue of fact has been joined has expired."

In granting that motion on May 31, 2016, the court noted that Manero had set forth "assertions of harm caused by specific acts and/or omissions committed by the proposed third parties." Manero then filed a "Third Party Plaintiff/Defendant Complaint" on June 29, 2016, which named Fetscher, Westcott, and Maya as third-party defendants.[7]

On August 1, 2016, the attorney fact finder filed a report on Costello's breach of contract action, in which he concluded that Costello had proven its entitlement to $45,438.05 in unpaid legal fees from Manero. When Manero filed no objection thereto, the court rendered judgment in favor of Costello "in accordance with the fact finder's report."

On August 2, 2016, Fetscher filed what he titled an "Answer Defenses and Cross Claim" in response to his mother's third-party complaint. Costello filed an answer and three special defenses to Fetscher's cross claim on November 4, 2016. Those special defenses alleged that (1) Fetscher "lacks standing to make any claims against [Costello] as [Fetscher] has never been represented by [Costello]"; (2) Fetscher's cross claim "fails to state a claim for which relief can be granted"; and (3) Costello "owed no duty" to Fetscher.[8] On February 7, 2017, the

[7] That complaint concerned the alleged failure of the third-party defendants to protect Manero's interests in the litigation among her son, her former husband, and her former husband's business entity. Although she testified as a witness at trial, Manero was not a party to that litigation. The record of those proceedings further indicates that Manero unsuccessfully attempted to intervene therein more than one year after the court had rendered judgment in that case.

[8] Costello subsequently filed a motion to dismiss Fetscher's cross claim for lack of standing, which the court denied. On appeal, Fetscher argues that the doctrine of res judicata bars the entry of summary judgment in light of that ruling. We disagree. Costello's motion to dismiss concerned the issue of Fetscher's standing, which presented a jurisdictional question for the court. See, e.g., *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 552, 133 A.3d 140 (2016) ("a plaintiff's lack of standing is a jurisdictional defect"). That motion did not challenge the sufficiency of the allegations of Fetscher's operative complaint, nor did it raise the question

Maya defendants filed an answer and a special defense, in which they alleged that "it is not possible for Fetscher to prevail on his claims, as he was cocounsel in the [*Fetscher* v. *Manero*, supra, Superior Court, Docket No. CV-12-6012822-S] case that he claims was mishandled and as cocounsel Fetscher was jointly and severally responsible for the decisions that were made in his case, which he fully considered and agreed to at the time."

On January 25, 2017, the court ordered that the pretrial discovery period on Fetscher's cross claim would conclude on February 7, 2017, at which time all expert witnesses were to be disclosed. A certificate of closed pleadings was filed on February 7, 2017. On that date, Fetscher filed an expert witness disclosure, in which he disclosed four experts: Attorney Daniel F. McGuire, Attorney Daniel M. Young, Attorney Salvatore Meli, and Walter McKeever, a certified public accountant.

In response, the Maya defendants filed a motion to preclude that expert testimony due to Fetscher's failure to comply with the strictures of Practice Book § 13-4. They further averred that McGuire, Young, and Meli were unaware of Fetscher's disclosure and had no intention of acting as experts on his behalf. Appended to that pleading were copies of correspondence from McGuire, Young, and Meli, in which all three individuals disclaimed any interest in serving as an expert witness for Fetscher.[9] Costello filed a separate motion to preclude

of precisely which causes of action were contained therein. Moreover, the proper construction of that complaint remains a question of law subject to our plenary review, irrespective of any interpretation applied by the trial court. See *Meyers* v. *Livingston*, *Adler*, *Pulda*, *Meiklejohn & Kelly*, *P.C.*, 311 Conn. 282, 290, 87 A.3d 534 (2014); *Caron* v. *Connecticut Pathology Group*, *P.C.*, 187 Conn. App. 555, 564, 202 A.3d 1024, cert. denied, 331 Conn. 922, 206 A.3d 187 (2019). Fetscher's reliance on the doctrine of res judicata, therefore, is misplaced.

[9] In his February 13, 2017 correspondence, Young stated in relevant part: "I had no knowledge that I would be or had been disclosed as an expert in [this] matter, and I have not been retained by any party to provide expert witness testimony." In his February 10, 2017 correspondence, Meli similarly stated: "I have not been engaged as an expert, nor will I agree to act as an

a day later, in which it alleged that Fetscher had failed to comply with the requirements of § 13-4 and had "knowingly and intentionally made material misrepresentations in his disclosure of expert witnesses, and essentially committed a fraud upon this court." By order dated April 3, 2017, the court ruled that Fetscher's February 7, 2017 disclosure was timely "but fail[ed] to meet the requirements of [§] 13-4. The motion [to preclude expert testimony] is granted . . . unless within [ten] days the disclosures are revised to satisfy [§] 13-4."

Fetscher filed a revised expert witness disclosure on April 5, 2017. After reviewing that pleading, the court issued an order precluding Fetscher from offering expert testimony. The court at that time explained that it had "reviewed [Fetscher's amended expert witness disclosure] and finds it woefully inadequate to satisfy the requirements of [Practice Book] § 13-4. The only reference to opinions is a statement that opinions will be given and that an 'accounting was needed and hired' and that the opinion is necessary. No other reference

expert on behalf of any party in the referenced litigation. I also will not voluntarily appear as a fact witness in this matter."

In a letter dated February 9, 2017, McGuire stated in relevant part: "Simply put, I did not, nor did anyone associated with my firm agree to be an expert in this case. . . . When I discovered (today) that Mr. Fetscher had falsely designated me as his expert, I immediately called him and demanded that he withdraw my name. Mr. Fetscher, begrudgingly, agreed to do so and informed me that he 'had no choice' but to submit my name because of the February 7 . . . disclosure deadline. I told him that submitting my name without my permission (or knowledge) was unprofessional and that he had probably committed a fraud on this [c]ourt by representing that he was in compliance with [the court's] February 7 . . . deadline . . . . Disturbingly, Mr. Fetscher did not seem to care. . . ."

Two days after the court-ordered deadline for disclosure of expert witnesses, Fetscher filed what he titled an "Expert Witness Disclosure Amended," in which he again disclosed Young, Meli, and McKeever as expert witnesses, while also indicating that he was removing McGuire from his list of experts. Fetscher did not request permission from the court to submit that untimely filing, and there is no indication in the record before us that the court authorized or otherwise considered it.

is made to any of the requirements of [§] 13-4 (b) (1) and no effort is made to satisfy them. The court notes further that the final sentence of [§ 13-4 (b) (3)] does not excuse compliance with subsection (b) (1). In conclusion, the court has given ample time and opportunity to comply with the result that the revised disclosure is wholly lacking in even a semblance of compliance. Therefore the only proper and proportional remedy is preclusion." The court nonetheless indicated, in a subsequent order issued on May 22, 2017, that Fetscher "may in a timely manner further revise the disclosure [of expert witnesses] in an attempt to comply with [Practice Book] § 13-4." The record before us indicates that Fetscher did not avail himself of that opportunity, as it is bereft of any compliant disclosure on his part.[10]

On January 9, 2018, the court set a trial date of April 24, 2018. The court further ordered that "[b]y January 23, 2018, any requests to file a motion for summary judgment . . . shall be filed . . . ." In accordance therewith, Costello and the Maya defendants sought permission to file motions for summary judgment on Fetscher's cross claim, which the court granted. They then filed respective motions for summary judgment, predicated primarily on Fetscher's failure to properly disclose expert testimony in accordance with Practice Book § 13-4 to substantiate his legal malpractice claim against them.

Fetscher did not file an opposition to the motions for summary judgment or a memorandum of law.

[10] On appeal, Fetscher argues that the court improperly precluded him from offering expert testimony. We disagree. Appellate review of the trial court's decision to preclude expert testimony is governed by the abuse of discretion standard; *Weaver* v. *McKnight*, 313 Conn. 393, 405, 97 A.3d 920 (2014); a deferential standard under which we indulge every reasonable presumption in favor of the court's ruling. *State* v. *Campbell*, 328 Conn. 444, 522, 180 A.3d 882 (2018). On our review of the record before us, we perceive no abuse of discretion by the trial court.

Instead, he filed a three page objection, in which he insisted that "[t]he requests and motion for summary judgment should be denied as they fail as a matter of law to address any issue or claim besides the negligence claim solely. The claims for breach of contract, breach of fiduciary duty, intentional torts are not addressed by the moving parties . . . in [their] motions for summary judgment." Apart from reciting the general standard that governs motions for summary judgment, Fetscher provided no discussion of legal authority in that objection. He further provided no affidavits or supporting documentation of any kind. The court overruled Fetscher's objection on June 11, 2018.

On that date, the court also granted the motions for summary judgment filed by Costello and the Maya defendants. In rendering judgment in favor of the Maya defendants, the court ruled that Fetscher's failure to disclose an expert in accordance with Practice Book requirements foreclosed, as a matter of law, any recovery on his "legal malpractice" action. With respect to Costello's motion for summary judgment, the court reiterated that noncompliance and also emphasized that Fetscher's complaint "does not allege facts which give rise to an attorney-client relationship [between Fetscher and Costello] which is an essential element of a legal malpractice [action]."[11] Fetscher filed a motion for reargument and reconsideration, which the court denied, and this appeal followed.

I

On appeal, Fetscher claims that the court improperly construed his cross claim as one sounding in legal malpractice. We do not agree.

[11] In support of its motion for summary judgment, Costello submitted, inter alia, a copy of its January 28, 2013 retainer agreement with Manero and the affidavit of Attorney Kiernan J. Costello, in which he averred that neither he nor his law firm had provided legal representation to Fetscher in any matter.

"[I]nterpretation of the pleadings . . . is always a question of law over which our review is plenary." *Meyers* v. *Livingston*, *Adler*, *Pulda*, *Meiklejohn & Kelly*, *P.C.*, 311 Conn. 282, 290, 87 A.3d 534 (2014). It is well established that "[t]he pleadings determine which facts are relevant and frame the issues for summary judgment proceedings or for trial. . . . The principle that a plaintiff may rely only [on] what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations [in the] complaint. . . . A complaint must fairly put the defendant on notice of the claims . . . against him. . . . The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . Only those issues raised by the [plaintiff] in the latest complaint can be tried before the jury." (Citations omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America*, *Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014). In the summary judgment context, our Supreme Court has explained that although "a court's ability to review the evidence, in order to determine whether a genuine issue of fact exists, is not limited to the pleadings," Connecticut law is "clear [that] a plaintiff's theories of liability, and the issues to be tried, are limited to the allegations [in the] complaint." (Internal quotation marks omitted.) Id., 622 n.5; see also id. (allowing "[the] plaintiff [to] rely on a theory of liability that he has not raised in his [operative] complaint . . . ignores our foundational pleading requirements"); *Stevens* v. *Helming*, 163 Conn. App. 241, 247, 135 A.3d 728 (2016) ("[t]he trial court, in ruling on the defendants' motion for summary judgment, was limited to the facts alleged in the complaint standing alone").

We begin, therefore, with Fetscher's operative complaint, his August 2, 2016 "Answer Defenses and Cross Claim." That two paragraph pleading states in full: "This

answer is filed pursuant to [Practice Book §§] 10-6, 10-50, 10-51, 10-53 and 10-54. [Fetscher], an implead [third-party] defendant, as previously stated concurs with [Manero] in her pleadings of fact and asserts his special defenses and asserts both a cross claim and a counterclaim and set off against attorneys Westcott and Costello. [Fetscher] raised the issue several times with both Attorney Westcott and Attorney Costello concerning both [Manero's] interest in the companies as well as the issue of a conflict in having Gilbride, Tusa, Last and Spellane represent both [Manero's husband] as well as the companies of which by their own request (see exhibit A, item 6, page 9) [Manero] had an interest in the results of the case between [Fetscher] and the companies for which she would have to approve any settlement offer. Absent experts or [Manero's] attorneys involvement, despite being given notice by both [Fetscher] as well as being apprised of the interest by [the attorney for Manero's husband], both Attorney Westcott and Attorney Costello were willfully derelict in their representation.

"Exhibit A attached (page 9 of proposed settlement offer), clearly shows in item 5 a conflict between the attorney, accountant, [Manero's husband] and the company and in their representation on behalf of the Manero companies and item 6 clearly states that [Manero] had an interest in the companies and in the outcome of the case for which both Attorney Costello and Attorney Westcott failed to abide by their clients' lawful requests or follow up and/or file any motions concerning the issue. I alone tried to raise the issue before the [c]ourt by filing a verbal objection prior to trial but absent the efforts and assistance of either Attorney Costello or Attorney Westcott was judged unbelievable a fact which the evidence and their support could have clearly corrected."[12]

[12] That pleading does not contain "a plain and concise statement of the material facts . . . to be divided into paragraphs numbered consecutively,

It is axiomatic that "[a] complaint must fairly put the defendant on notice of the claims . . . against him." *Farrell* v. *St. Vincent's Hospital*, 203 Conn. 554, 557, 525 A.2d 954 (1987). We further are mindful that "[t]he burden is on a plaintiff to plead his case clearly and not to expect the court or his opposing counsel to have to wade through a poorly drafted complaint to glean from it the plaintiff's theories of relief." *Fort Trumbull Conservancy, LLC* v. *Alves*, 286 Conn. 264, 277 n.13, 943 A.2d 420 (2008). Liberally construing Fetscher's two paragraph complaint, we conclude that the only claim contained therein is one sounding in legal malpractice. That pleading does not specify any particular cause of action. Rather, it simply alleges that "Attorney Costello" and "Attorney Westcott" were "willfully derelict in their representation" in light of an alleged conflict of interest. The complaint further alleges that "Attorney Costello and Attorney Westcott failed to abide by their clients' lawful requests or follow up and/or file any motions concerning the issue." In our view, those factual allegations can only be construed as ones advancing claims of legal malpractice. For that reason, the trial court properly concluded that Fetscher's operative complaint set forth claims of legal malpractice against Attorneys Westcott and Costello.

Fetscher nonetheless maintains that a document he filed on April 13, 2016, titled "Amended Motion to Implead Response," and not his August 2, 2016 "Answer Defenses and Cross Claim," should be construed as the

each containing as nearly as may be a separate allegation," as required by Practice Book § 10-1, nor does it contain a demand for relief of any kind, in contravention of Practice Book § 10-20. To the extent that Fetscher asserts that his cross claim contains multiple distinct causes of action, his complaint does not comport with Practice Book § 10-26, which provides: "Where separate and distinct causes of action, as distinguished from separate and distinct claims for relief founded on the same cause of action or transaction, are joined, the statement of the second shall be prefaced by the words *Second Count*, and so on for the others; and the several paragraphs of each count shall be numbered separately beginning in each count with the number one."

basis of the "claims and rationale" for his action against Costello and the Maya defendants.[13] That contention is problematic for at least two reasons. First, Fetscher *was not a party* to these proceedings until the court granted Manero's motion to implead on May 31, 2016. He thus could not have properly filed a cross claim of any kind more than one month earlier. Second, the court took no action on his April 13, 2016 filing in light of Fetscher's status as a nonparty. The record indicates that the court issued an order on April 25, 2016, advising all parties that "no action [was] necessary" on Fetscher's filing. Fetscher's reliance on that improper filing is thus unavailing.[14]

On our plenary review of the pleadings before us, we conclude that Fetscher's operative complaint was his

[13] The procedural morass of this case deepened on March 29, 2016, when Fetscher filed an appearance on behalf of Manero and then took steps on her behalf to implead himself as a third-party defendant.

[14] Throughout the course of this litigation, the trial court admonished Fetscher for his failure to comply with the rules governing the practice of law in this state. For example, Fetscher filed a motion for a protective order due to Costello's alleged noncompliance with a discovery request. In denying that motion, the court stated: "[Fetscher's] motion makes no mention of interrogatories or requests for production with which the defendants have failed to comply. Under our rules discovery is not initiated by e-mail correspondence but rather by compliance with [Practice Book §§] 13-6 and 13-9. The procedure employed [by Fetscher] shows either a disregard for or ignorance of our rules of practice with which even self-represented parties are expected to comply." In another instance, Fetscher filed a motion for reconsideration on the basis of "supplemental information," which the court denied. In sustaining Costello's objection to that motion, the court explained that "[t]here is no provision in the Practice Book which permits a supplementation to a motion that has been previously adjudicated. Accordingly, [Fetscher's motion] is stricken from the docket. Pursuant to Practice Book § 1-25, [Fetscher] is cautioned not to assert a claim or file a document unless there is a basis in law and fact for doing so that is not frivolous. Should [Fetscher] continue to file documents or pleadings which are not authorized by the rules the court will consider sanctions including but not limited to fines pursuant to [General Statutes §] 52-84, orders requiring the offending party to pay the costs and expenses including attorney's fees, orders restricting the filing of papers with the court, nonsuit or default, [and] orders mandating continuing education in the art of pleading in civil matters."

August 2, 2016 "Answer Defenses and Cross Claim." We further conclude that this pleading sets forth a claim of legal malpractice against Costello and the Maya defendants.

II

The remaining question is whether the court properly rendered summary judgment in favor of the cross claim defendants on the legal malpractice claim. We answer that query in the affirmative.

The standard governing our review is well established. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and 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. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . 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.) *Northrup* v. *Witkowski*, 332 Conn. 158, 167, 210 A.3d 29 (2019). "[W]hether expert testimony is needed to support a claim of legal malpractice presents a question of law." (Internal quotation marks omitted.) *Moore* v. *Crone*, 114 Conn. App. 443, 446, 970 A.2d 757 (2009).

"A defendant's motion for summary judgment is properly granted if it raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact." *Perille* v. *Raybestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 543, 494 A.2d 555 (1985). When the trial court grants a motion for summary judgment, our review of that determination is plenary. See *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

"Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . . Generally, a plaintiff alleging legal malpractice must prove all of the following elements: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 283, 147 A.3d 1023 (2016). To prevail, a plaintiff generally is obligated to furnish expert testimony to establish both (1) the standard of care "against which the attorney's conduct should be evaluated" and (2) the element of causation.[15] Id., 284–85. Our decisional law is replete with cases in which motions for summary judgment have been granted on legal malpractice claims when the defendant failed to offer such testimony. See, e.g., id., 290; *Grimm* v. *Fox*, 303 Conn. 322, 337, 33 A.3d 205 (2012); *Law Offices of Robert K. Walsh, LLC* v. *Natarajan*, 124 Conn. App. 860, 863–64, 7 A.3d 391 (2010); *Byrne* v. *Grasso*, 118 Conn. App. 444, 448, 985 A.2d 1064 (2009), cert. denied, 294 Conn. 934, 987 A.2d 1028 (2010); *Moore* v. *Crone*, supra, 114 Conn. App. 447; *Dixon* v. *Bromson & Reiner*, 95 Conn. App. 294, 299–300, 898 A.2d 193 (2006); *Vona* v. *Lerner*, 72 Conn. App. 179, 189, 804 A.2d 1018 (2002),

[15] That expert testimony requirement is subject to an exception that "is limited to situations in which [an] attorney essentially has done nothing whatsoever to represent his or her client's interests . . . ." (Internal quotation marks omitted.) *Grimm* v. *Fox*, 303 Conn. 322, 335, 33 A.3d 205 (2012). Fetscher did not invoke this exception before the trial court and has not raised such a claim before this court. On the undisputed facts of this case, in which Fetscher never maintained an attorney-client relationship with Costello and served as cocounsel at all relevant times with the Maya defendants, that limited exception is plainly inapplicable.

cert. denied, 262 Conn. 938, 815 A.2d 138 (2003); *Solomon* v. *Levett*, 30 Conn. App. 125, 128, 618 A.2d 1389 (1993); *Somma* v. *Gracey*, 15 Conn. App. 371, 374–75, 544 A.2d 668 (1988).

Despite having ample opportunity to do so, Fetscher failed to properly disclose expert witnesses in accordance with the requirements of our rules of practice. Absent such testimony, the finder of fact could not properly evaluate Fetscher's claims that Costello and the Maya defendants were "willfully derelict in their representation" and "failed to abide by their clients' lawful requests or follow up and/or file any motions concerning the [conflict of interest] issue." Because Fetscher could not establish a prima facie case of legal malpractice without the introduction of expert testimony to prove either a breach of the applicable standard of care or the element of causation, we conclude that the trial court properly rendered judgment in favor of Costello and the Maya defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

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## BENCHMARK MUNICIPAL TAX SERVICES, LTD. *v.* GREENWOOD MANOR, LLC, ET AL.
## (AC 41924)

Prescott, Bright and Devlin, Js.

*Syllabus*

The plaintiff, B Co., sought to foreclose certain municipal property tax liens on property then owned by the defendant, G Co. The trial court granted G Co.'s motion to cite in the city of Bridgeport as a defendant, and G. Co. filed cross claims against the city and a codefendant, M. G Co. claimed, inter alia, that M tortiously interfered with its intended sale of the property to the city and that the city interfered with a proposed zoning change that would have increased the value of the property. Thereafter, the city was substituted as the plaintiff and M Co. was substituted as the defendant. The trial court rendered judgment in favor

of the city and M against M Co. on the cross claims and denied M Co.'s motion to reargue. On M Co.'s appeal to this court, *held*:

1. The trial court did not err in finding that M Co. failed to establish any tortious action by M; the trial court did not credit any evidence offered by M Co. in support of its allegation that M had acted to interfere with negotiations between the city and G Co., which never reached an agreement with the city for a purchase price for the property, and M Co. failed to allege on appeal any legal error or an erroneous factual basis for the trial court's decision.
2. M Co.'s claim that the trial court erred in finding that the city did not tortiously interfere with the business relationship that existed between G Co. and M failed as a matter of law; M Co.'s claim consisted of nothing more than a request for this court to substitute its own evaluation of the evidence for that of the trier of fact, which this court would not do, and M Co. failed to demonstrate that the trial court either misapplied the law or relied on clearly erroneous factual findings in reaching its decision.
3. The trial court did not err in finding that the city did not act improperly to devalue the property; M Co. presented no evidence that any member of the planning and zoning commission acted improperly in deciding not to change the zoning designation of the property, the trial court was free to reject an inference that members of the commission acted improperly and to conclude that the commission may have decided against a zone change for the subject property, despite initial support for a change, for a reason other than improper interference by the city, and M Co. conceded at oral argument before this court that tortious interference was not the only reasonable inference the trial court could have drawn based on the evidence presented.

Argued September 13—officially released November 19, 2019

*Procedural History*

Action to foreclose certain municipal property tax liens, and for other relief, brought to the Superior Court in the judicial district of Bridgeport, where the court, *Hartmere, J.*, granted the named defendant's motion to cite in the city of Bridgeport as a defendant; thereafter, the named defendant filed cross claims against the city of Bridgeport et al.; subsequently, the court, *Tyma, J.*, granted the motion of the city of Bridgeport to be substituted as the plaintiff; thereafter the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the named defendant's motion to substitute Main Street

Business Management, Inc., as the defendant; subsequently, the cross claims were tried to the court, *Radcliffe, J.*; judgment in favor of the City of Bridgeport et al.; thereafter, the court, *Radcliffe, J.*, denied the substitute defendant's motion to reargue, and the substitute defendant appealed to this court. *Affirmed.*

*Jonathan J. Klein*, for the appellant (substitute defendant-cross claim plaintiff Main Street Business Management, Inc.).

*Thomas W. Moyher*, with whom, on the brief, was *James M. Nugent*, for the appellee (cross claim defendant Manuel Moutinho).

*Juda J. Epstein* filed a brief for the appellee (substitute plaintiff city of Bridgeport).

*Opinion*

PRESCOTT, J. In this action to foreclose certain municipal property tax liens on a 9.9 acre parcel of property in Bridgeport (property),[1] the substitute defendant and cross claim plaintiff, Main Street Business Management, Inc. (Main Street),[2] appeals from the trial court's judgment rendered against it on its cross claim

[1] The original plaintiff, Benchmark Municipal Tax Services, Ltd. (Benchmark), acquired from the city of Bridgeport (city) the tax liens that are the subject matter of the foreclosure action. During the pendency of the foreclosure action, however, Benchmark conveyed those liens back to the city, which later was substituted as the plaintiff.

[2] The original named defendant, Greenwood Manor, LLC (Greenwood), conveyed the property to Main Street on January 8, 2014, after this action was commenced. At the same time, Greenwood assigned to Main Street all of its rights and interests with respect to the foreclosure action, and Main Street was substituted as a defendant.

In addition to Greenwood, the foreclosure complaint named the following additional parties as defendants by virtue of an interest in the property that was subsequent in right to the tax liens: Manuel Moutinho; Greenwood Estates, Inc.; Rio, Inc.; Regensburger Enterprises, Inc.; Millionair Club, Inc.; Cummings Enterprises, Inc.; Albina Pires; Robin Cummings; Joseph Regensburger; Richard Urban; and Dominique Worth. Of these parties, only Moutinho is a participant in the present appeal.

alleging that the cross claim defendant, Manuel Moutinho, tortiously interfered with a business expectancy and violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110 et seq. (CUTPA), and on its counterclaim alleging that the city engaged in tortious interference with a business expectancy and improperly sought to affect the property's value adversely by interfering with a proposed zone change.[3]

On appeal, Main Street, as Greenwood's successor in interest, claims that the court improperly determined that (1) Moutinho did not tortiously interfere with a proposed sale of the property by Greenwood to the city, (2) the city did not tortiously interfere with the business relationship between Greenwood and Moutinho, and (3) the city did not tortiously interfere by causing the city's planning and zoning commission (commission) to reject a zoning reclassification that would have benefited Greenwood by increasing the property's marketability. We disagree and affirm the judgment of the trial court.[4]

[3] Although the court had not rendered a final judgment on the foreclosure complaint at the time this appeal was filed, the judgment disposing of the cross claim and counterclaim was, nonetheless, immediately appealable. See Practice Book § 61-2 ("[w]hen judgment has been rendered on an entire . . . counterclaim or cross complaint . . . such judgment shall constitute a final judgment").

[4] Main Street also claims on appeal that the court improperly ruled against it on its CUTPA count. The court, however, provided three grounds for rejecting the CUTPA claim: (1) Main Street failed to satisfy the so-called "cigarette rule"; (2) Main Street failed to demonstrate an ascertainable loss; and (3) the transaction did not involve consumers. On appeal, Main Street challenges only the second and third grounds. Main Street's failure to raise and brief any challenge to the court's ruling regarding the cigarette rule, a failure that it acknowledged at oral argument before this court, renders moot its other challenges to the court's rejection of the CUTPA count. See *State* v. *Lester*, 324 Conn. 519, 527, 153 A.3d 647 (2017) (if "an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot"). Accordingly, we dismiss as moot that portion of Main Street's appeal challenging the court's ruling on the CUTPA count.

The following facts, which either were found by the court or are not in dispute, and procedural history are relevant to our disposition of the claims on appeal. In January, 2009, after years of negotiations, Moutinho finalized a sale of the property to Greenwood, exchanging a warranty deed for a purchase money mortgage of $2 million. Greenwood intended to develop the property for use as a multiunit residential complex. Such use, however, was not permitted at the time the sale closed because the property was zoned R-A, or single-family residential, and thus required a zone change to R-C, or multifamily residential, in order to be developed in accordance with Greenwood's plan.

Although Greenwood never filed a zone change application, it was aware that, in 2008, the commission had begun the process of revising the city's master plan of development and was engaged in a comprehensive reevaluation of zoning regulations and zoning districts throughout the city. As part of this process, the commission considered whether to adopt a zone change for the property from R-A to R-C.[5] Ultimately, the commission decided to leave the zoning classification for the property unchanged.

Both before and after Moutinho finalized his sale of the property to Greenwood, the city expressed an interest in purchasing the property for use in a flood plain control project and for other purposes. The city engaged in negotiations with Moutinho, both during the time he owned the property and later as the holder of an interest in the property by virtue of the mortgage deed received from Greenwood. The city also negotiated with Greenwood to buy the property. The city

[5] As part of its comprehensive review of the city's zoning map, the commission considered proposed changes to the zoning map with respect to several individual parcels, including the subject property. See *Greenwood Manor, LLC* v. *Planning & Zoning Commission*, 150 Conn. App. 489, 493–94, 90 A.3d 1062, cert. denied, 312 Conn. 927, 95 A.3d 521 (2014).

never entered into a contract for sale with either Moutinho or Greenwood, as there was never a meeting of the minds regarding a sale price.[6]

In August, 2011, Benchmark, which had acquired from the city certain liens for delinquent property taxes assessed against the property in 2008 and 2009, commenced this action to foreclose those liens. At that time, the property was encumbered by a number of other liens and interests that were subsequent in right, including the mortgage held by Moutinho.

Greenwood filed an answer and special defenses to the foreclosure complaint. It subsequently also filed cross claims against the city and Moutinho.[7] The gravamen of the allegations underlying Greenwood's cross claims was that Moutinho and the city had participated in a scheme to prevent a sale of the subject property from Greenwood to the city with the intent that Moutinho would foreclose on his mortgage and, after reacquiring title, sell the property to the city himself at a price lower than that proposed by Greenwood. Greenwood further alleged that the city had somehow interfered with the sale of the property from Moutinho to Greenwood and, hoping to diminish the property's value to Greenwood's detriment, also interfered by meddling in the commission's consideration of a zone change affecting the property.

On May 8, 2018, in accordance with a stipulation by the parties, the trial court, *Radcliffe*, *J.*, rendered a

[6] The evidence admitted at trial demonstrated that the city had sent Greenwood a proposed sale contract that did not contain a purchase price. Greenwood responded, offering to sell the property for $3.5 million, which the city did not accept. Thereafter, negotiations ended.

[7] When the city later reacquired the tax liens from Benchmark and was substituted as the plaintiff, the cross claim technically became a counterclaim. See Practice Book § 10-10 ("any defendant may file counterclaims against any plaintiff and cross claims against any codefendant"). Therefore, we refer to the cross claim against the city as the counterclaim.

partial judgment as to liability on the foreclosure complaint, determining that the amount of debt owed by Main Street to the city was $84,345.52. The trial court did not determine at that time either the fair market value of the property or whether the foreclosure of the property should be a strict foreclosure or a foreclosure by sale.[8]

The court then conducted a two day trial on the cross claim and counterclaim. On May 11, 2018, the trial court rendered a judgment in favor of Moutinho on the cross claim and in favor of the city on the counterclaim. With respect to Moutinho, the court found that he had never interfered with any business relationship that existed between the city and Greenwood. Although the court found that Moutinho and his attorney had met with city officials regarding the property, including with Bill Finch, the city's mayor at the time, the court found that Finch never directed city officials to cease negotiations with Greenwood regarding a sale price or to negotiate exclusively with Moutinho. With respect to the counterclaim against the city, the court found that the city properly was entitled to negotiate with both Moutinho and Greenwood about acquiring the property and that it never engaged in any fraud or other improper action that would support a cause of action for tortious interference. The court further found that there was no improper action taken by the city with respect to the comprehensive rezoning of city property, including the

[8] As the court later explained in its memorandum of decision resolving the cross claim and counterclaim, it "refused to find that the fair market value was $100,000 [as stipulated by the parties] in the absence of an appraisal or any other expert testimony to that effect. That refusal [is supported by] the testimony in this case, which shows that the property was purchased for $900,000 and that there are various encumbrances in the millions of dollars on [the] property. The court refused to accept [the stipulated fair market value] and, in the absence of an appraisal, refused to find that the remedy by way of strict foreclosure was appropriate rather than foreclosure by sale, and that determination was left to another day."

decision not to change the zoning classification for the subject property. This appeal followed.[9] Additional facts will be set forth as necessary.

I

Main Street first claims that the court improperly found that Moutinho did not tortiously interfere with a proposed sale of the property by Greenwood to the city. Moutinho counters that the court correctly determined that Main Street failed to meet its burden of proving that any contract or other business expectancy existed between the city and Greenwood or, in the alternative, that he ever engaged in any tortious conduct intended to interfere with any business expectancy even if one existed. We agree that Main Street failed to establish any tortious action by Moutinho and, accordingly, the court properly ruled in his favor.[10]

"It is well established that the elements of a claim for tortious interference with business expectancies are: (1) a business relationship between the plaintiff and another party; (2) the defendant's intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss. . . . The plaintiff need not prove that the defendant caused the breach of an actual contract; proof of interference with even

[9] On July 24, 2018, the city moved for a judgment of strict foreclosure. On August 17, 2018, Moutinho filed a motion to terminate the automatic appellate stay triggered by the present appeal so that the foreclosure action could proceed. The trial court granted that motion on September 17, 2018. Main Street filed a motion for review of the ruling. On January 9, 2019, this court granted review but denied the relief requested. Because the claims for money damages in tort at issue in the present appeal survive even after title to the property vests in another party, there is no danger that the present appeal would be rendered moot as a result of the lifting of the stay.

[10] Because we agree that Main Street failed to prove that Moutinho's actions were tortious, it is unnecessary to consider Moutinho's arguments that a business expectancy never existed between the city and Greenwood or that Main Street failed to demonstrate any actual loss.

an unenforceable promise is enough. . . . A cause of action for tortious interference with a business expectancy requires proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously. . . . It is also true, however, that *not every act that disturbs a contract or business expectancy is actionable*. . . . A defendant is guilty of tortious interference if he has engaged in improper conduct. . . . [T]he plaintiff [is required] to plead and prove at least some improper motive or improper means." (Citation omitted; emphasis added; internal quotation marks omitted.) *Brown* v. *Otake*, 164 Conn. App. 686, 709–10, 138 A.3d 951 (2016). "Stated simply, to substantiate a claim of tortious interference with a business expectancy, there must be evidence that the interference resulted from the defendant's commission of a tort." (Internal quotation marks omitted.) Id., 710.

Whether a party intended tortiously to interfere with a business expectancy is a question of fact. *Loiselle* v. *Browning & Browning Real Estate, LLC*, 147 Conn. App. 246, 259, 83 A.3d 608 (2013). If a "claim challenges the accuracy of the court's factual findings, our review is limited to the clearly erroneous standard. In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the [judgment] to which it is entitled. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . [A] finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact

reasonably could have found as it did." (Internal quotation marks omitted.) Id. As a reviewing court, "[w]e cannot act as a factfinder or draw conclusions of facts from the primary facts found, but can only review such findings to determine whether they could legally, logically and reasonably be found, thereby establishing that the trial court could reasonably conclude as it did." *Selby* v. *Pelletier*, 1 Conn. App. 320, 327, 472 A.2d 1285 (1984). Moreover, "the fact that there is support in the record for a different conclusion [than the one reached by the court] is irrelevant at this stage in the judicial process. On appeal, we do not review the evidence to determine whether a conclusion different from the one reached could have been reached. . . . [Instead] [w]e review the totality of the evidence, including reasonable inferences therefrom, to determine whether it could support the trier's decision." (Citation omitted.) *American Diamond Exchange, Inc.* v. *Alpert*, 101 Conn. App. 83, 101, 920 A.2d 357, cert. denied, 284 Conn. 901, 931 A.2d 261 (2007).

In the present case, it is reasonable to infer from the court's ruling in favor of Moutinho that the court chose not to credit any of the evidence offered by Main Street in support of its allegation that Moutinho had acted to interfere with negotiations between the city and Greenwood, which never reached any agreement with the city about a sale price for the property. Primarily, Main Street's evidence that Moutinho tortiously interfered consisted of a meeting between Moutinho and the mayor that the court found had occurred in 2008. From its brief, it is not entirely clear how Main Street contends that this meeting in 2008 interfered with the negotiations between the city and Greenwood that took place in 2009, after Greenwood had acquired the property from Moutinho. Nevertheless, rather than directing our attention to any legal error or an erroneous factual

basis that would tend to undermine the court's determination that Main Street failed to meet its burden of demonstrating a tortious interference by Moutinho in the failed negotiations between Greenwood and the city, Main Street, in effect, asks us to reexamine the evidence and to come to a different conclusion than the one reached by the trial court. As we have explained, this is outside the scope of our review.

At trial, Main Street offered testimony from Greenwood's principal, Gus Curcio, regarding Greenwood's efforts to sell the property to the city. Curcio testified on direct examination that he believed that "Moutinho repeatedly went to the city and told them not to buy [the property] from [Greenwood] . . . because he was going to foreclose. He would sell it to them cheaper. Repeatedly. Not once. Not twice. But several times." On cross examination, however, Curcio admitted that he had no documentary evidence to support his assertions that Moutinho had instructed or asked the city not to purchase the property from Greenwood. He further testified that he had no personal knowledge of any conversations between Moutinho and anyone associated with the city.

Finch later testified that at some point Moutinho's attorney had contacted him to explain that Moutinho was going to foreclose on his mortgage to acquire the property and that the city should deal with Moutinho rather than Greenwood. Finch, however, was unable to say why the city ultimately elected to stop negotiating with Greenwood. He explained that he never instructed the city to end negotiations with Greenwood at the request of Moutinho or his attorney. Main Street has not directed our attention to any other evidence that would support an inference that Moutinho acted in a manner amounting to fraud, misrepresentation, intimidation, or extortion. The court was free to disregard Curcio's unsupported and self-serving testimony. We

simply cannot conclude on the basis of the record presented that the court's finding that Main Street failed to demonstrate tortious interference by Moutinho is clearly erroneous.

II

Main Street next claims that the court improperly found that the city did not tortiously interfere with the business relationship that existed between Greenwood and Moutinho. As with the prior claim, Main Street's arguments on appeal consist of nothing more than a request for us to substitute our own evaluation of the evidence for that of the trier of fact, which, as we have explained, we will not do. Because Main Street has failed to demonstrate that the court either misapplied the law or relied on clearly erroneous factual findings in reaching its decision, this claim fails as a matter of law.

III

Finally, Main Street claims that the court improperly concluded that the city had not acted improperly to devalue the property by causing the commission to reject a proposed zoning reclassification that arguably would have increased the property's value. We are not persuaded.

The following facts are relevant to our discussion of this claim, and include, in part, facts set forth by this court in *Greenwood Manor, LLC* v. *Planning & Zoning Commission*, 150 Conn. App. 489, 90 A.3d 1062, cert. denied, 312 Conn. 927, 95 A.3d 521 (2014), of which the trial court took judicial notice. As previously set forth, at the time Moutinho conveyed the property to Main Street's predecessor in interest, Greenwood, the property was situated in an R-A zone classified for single-family residences. Greenwood understood that a change in the property's zone classification from R-A

to R-C would be needed in order to utilize the property for denser residential development. The commission was in the process of revising the city's master plan of development, and the commissioners had several preliminary discussions in which some commissioners expressed an interest in rezoning the property from R-A to R-C.

A preliminary vote in April, 2009, suggested that there was support for a zone change, with six commissioners voting in favor and only one voting against. In August, 2009, Finch sent a letter to the commission proposing an unrelated amendment to the proposed revised master plan. In that letter, Finch also asked that the full commission not adopt proposed zone changes for three parcels, including the subject property, from low density residential land use arguing that the rezoning of those parcels "ha[d] become a distraction from the larger reforms at stake in the adoption of this progressive master plan and our new zoning regulations." Additional public hearings were held in September, October and November, 2009. See *Greenwood Manor, LLC* v. *Planning & Zoning Commission*, supra, 150 Conn. App. 493–97. At those hearings, the commission heard from a number of individuals, some of whom spoke in favor of rezoning the property and others who advocated for leaving the zone classification unchanged. Id. A preliminary vote taken at the November 14, 2009 hearing was five to three in favor of taking no action with respect to the property. Id., 497. When the issue was put to a final vote on November 30, 2009, no change in zone for the property was approved, with the commissioners voting six to three against a zone change. Id., 498.

Greenwood appealed from the final vote to the Superior Court, which dismissed the appeal on the ground that Greenwood was neither statutorily nor classically aggrieved by the commission's decision. Id., 498–99.

This court, after granting certification to appeal, affirmed the decision of the Superior Court. See id., 492.[11]

In its appellate brief, Main Street concedes that "there was no direct evidence adduced at trial that [the mayor] or anyone else in city government exercised improper influence or coerced any member of the commission to leave the zone designation of the property unchanged when the commission formally voted on a package of zoning changes . . . ." Nevertheless, Main Street contends that the "only evidence of an explanation for [the commission's] turnaround was Finch's letter to the commission stating that the proposed change was a 'distraction'." Main Street argues that it goes against common sense that the letter alone would have convinced commissioners to change their votes and that the only reasonable inference the court could have drawn was that the vote change was the result of tortious interference. We are wholly unpersuaded for the following reasons.

First, the city had no burden to demonstrate a rationale for the commission's decision. Rather, it was Main Street's burden to show by a preponderance of the evidence that the commission changed its vote on the zone change as a result of the tortious interference of the city. Second, the trial court expressly found that

[11] We held that if a zoning commission, during the process of sua sponte amending its zoning regulations or zoning map, refrains from altering in any manner the zoning classification of a particular property, and that property had not been specified as the subject of any application then before the commission, the property was not "land involved in the decision" of the commission pursuant to General Statutes § 8–8 (a) (1), and, therefore, the owner of such property was not statutorily aggrieved by the commission's inaction. *Greenwood Manor, LLC* v. *Planning & Zoning Commission*, supra, 150 Conn. App. 512. Furthermore, the owner of property not the subject of any zone change application was not classically aggrieved by a decision that retained that property's current zoning designation because the owner was not specially and injuriously affected by the commission's decision to maintain the status quo. Id., 513–14.

no evidence was presented that any member of the commission "acted improperly, was subject to a conflict of interest or in any way failed to discharge the duties of a member of [the commission] in this matter." Main Street admits that it failed to present such evidence, but nevertheless suggests that the court should have inferred from the circumstances presented that it met its burden of demonstrating tortious interference. The court, however, was entirely free to reject the inference suggested by Main Street and to conclude that the commission changed its decision for a reason other than improper interference by the city. Moreover, such a contrary inference is supported by the record. In this court's opinion dismissing the zoning appeal, we identified a number of possible reasons why the commission may have decided against the zone change despite initial support for a change, including the impassioned arguments of residents against a zone change. See *Greenwood Manor, LLC* v. *Planning & Zoning Commission*, supra, 150 Conn. App. 495–96. Finally, Main Street conceded at oral argument before this court that tortious interference was not the only reasonable inference that the court could have drawn on the basis of the record before it. For all these reasons, we reject this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* LASHAWN R. CECIL (AC 42097)

Keller, Bright and Bear, Js.

*Syllabus*

Convicted of the crimes of murder and criminal possession of a firearm, the defendant appealed. The defendant's conviction stemmed from an incident in which he entered an apartment building and shot the victim. Shortly thereafter, the defendant encountered his neighbor, L, who bought a gun from the defendant. After learning of the victim's murder,

L broke the gun into pieces and threw it into a river, but subsequently informed the police of what he had done. The trial court denied the defendant's motion in limine to preclude the state from introducing into evidence a handgun magazine recovered during an underwater search of the river. At trial, the state presented written and video recorded statements that two witnesses, C and D, had made to police inculpating the defendant in the victim's murder. C and D testified that their statements were false and the result of police coercion. *Held:*

1. The defendant's claim that the trial court erroneously admitted the video recorded statements into evidence under *State* v. *Whelan* (200 Conn. 743) was not reviewable, the defendant having failed to brief the claim adequately; although the defendant labeled his claim in his brief as evidentiary in nature, he predominantly analyzed it as instructional in nature, as he did not challenge the admissibility of the statements under *Whelan*, and his only contention was an undeveloped claim of instructional error, namely, that the court had the obligation to instruct the jury as to which portions of the video recorded statements could be used for impeachment purposes and which portions could be used substantively, the defendant's brief did not comply with the applicable rule of practice (§ 67-4 [e] [3]) concerning claimed evidentiary errors, and it was not the proper role for this court to guess at the nature of the defendant's claim and the legal analysis to apply thereto.

2. The defendant could not prevail on his claim that the trial court erroneously admitted into evidence the handgun magazine, which he claimed was irrelevant, prejudicial and misleading: the recovered magazine tended to show that the defendant had access to a firearm shortly after the victim's murder, supported the conclusion that the magazine belonged to the firearm used to kill the victim, and corroborated the state's theory of the case, as it corroborated L's testimony that the defendant sold him a handgun on the morning of the victim's murder and that he had thrown the disassembled handgun into the river, and the handgun magazine was relevant because a firearms examiner testified that the recovered magazine was consistent with a magazine that would fit the type of handgun used to kill the victim; moreover, even though the defendant claimed that the magazine was not reliable evidence because it had physically degraded, the state presented evidence that the condition of the magazine at the time it was recovered from the river was different from its condition at the time the crime was committed, but that the change was due to natural causes, not human activity, and it was relevant and probative because it aided the trier of fact in determining a material fact or in corroborating other direct evidence in the case.

Argued September 11—officially released November 19, 2019

*Procedural History*

Substitute information charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of New London, where the first count was tried to the jury before *Jongbloed, J.*, and the second count was tried to the court, *Jongbloed, J.*; verdict of guilty of murder; judgment of guilty of murder and criminal possession of a firearm, from which the defendant appealed. *Affirmed.*

*Christopher Y. Duby*, assigned counsel, with whom was *Robert L. O'Brien*, assigned counsel, for the appellant (defendant).

*Nancy L. Walker*, assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Stephen M. Carney*, senior assistant state's attorney, for the appellee (state).

*Opinion*

KELLER, J. The defendant, Lashawn R. Cecil, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a) and the judgment of conviction, rendered following a trial to the court, of criminal possession of a firearm in violation of General Statutes § 53a-217. On appeal, the defendant claims that the trial court erroneously (1) admitted video recorded statements into evidence under *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), and, simultaneously, admitted those same statements as impeachment evidence without instructing the jury how to evaluate that evidence, and (2) admitted into evidence a handgun magazine that was irrelevant, highly prejudicial, and misleading. We affirm the judgment of the trial court.

From the evidence adduced at trial, the jury reasonably could have found the following facts. At the time of the events underlying this appeal, the victim, Jaclyn Wirth, resided at the Mohegan Apartments located in Norwich. On the evening of December 13, 2011, the defendant was at the Mai Thai bar in Norwich with William Collelo and Harold Butler. Also present at the bar was an individual named Ezekial "Junie" Boyce. Boyce owed Butler a debt of approximately $160 for a prior sale of narcotics. The defendant, Collelo, and Butler left the bar at approximately 1 a.m. on December 14, 2011. The three men left in Collelo's rental car, a black Chrysler 300 with Florida license plates.

After leaving the bar, Collelo drove the three men to the Mohegan Apartments because Collelo had informed Butler that Boyce often spent time at the apartments, and Butler wanted to collect the money owed to him by Boyce. Collelo parked his vehicle outside the Mohegan Apartments, and Butler told the defendant to go see Boyce to collect the money that he owed Butler. The defendant exited the vehicle and approached the Mohegan Apartments.

At approximately 1:30 a.m., the defendant entered the building of the apartment complex in which the victim resided. Seconds after the defendant entered the building, a neighbor, Arthur Murray, heard a gunshot, a woman scream, and then four or five more gunshots.

Subsequently, the victim placed a 911 call, reporting that she had been shot. Norwich police received a call from dispatch at approximately 1:40 a.m. and responded to the scene. En route to the scene, responding Police Officer Mark Dean observed a dark colored Chrysler 300 with Florida license plates parked in a driveway on Boswell Avenue. At the scene, officers found the victim bleeding while lying on the floor of the main hallway of her apartment. The victim told a responding

officer that, prior to the shooting, she had been lying in bed, heard a loud bang, and left her bed to investigate. She further said that when she entered the hallway from her bedroom, she "kept getting hit." An ambulance transported the victim to Backus Hospital where she was pronounced dead at 2:50 a.m. on December 14, 2011, as a result of multiple gunshot wounds.

Immediately following the shooting, the defendant, out of breath from running, returned to Collelo's vehicle. The defendant told Collelo and Butler that he "handled it" and they should leave. Collelo drove the three men from the scene, and on Boswell Avenue they saw a police cruiser approaching from the opposite direction with its lights on. At the defendant's direction, Collelo parked the vehicle in a driveway as the police cruiser passed. While the vehicle was parked in the driveway, the defendant "said something about shooting a gun" and told Butler that "something went wrong . . . ." Collelo then drove the vehicle to the defendant's residence on Shetucket Avenue. Butler walked to his residence and Collelo and the defendant entered the defendant's residence. The defendant went upstairs with Evette Nieves, with whom he shared the residence. The defendant and Nieves then left the residence at approximately 2 a.m. and Collelo slept on the couch.

During an investigation of the scene, law enforcement found nine bullet holes in the victim's apartment door and six corresponding defects caused by bullets in the victim's apartment. Investigators also found nine spent shell casings, one live shell, and five brass colored projectiles. Gregory Klees, a firearms and tool mark examiner from the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives Laboratory (ATF), testified that the same firearm had fired all recovered ballistics evidence and that the firearm was likely a Beretta nine millimeter semiautomatic pistol.

Following the victim's murder, at approximately 2 a.m. on December 14, 2011, Luis Burgos, the defendant's neighbor, was sitting in front of his house when the defendant approached him, asked whether he was interested in purchasing a firearm, and sold him a nine millimeter firearm. Later that morning, Burgos learned that the victim had been shot and killed. Burgos, who was on parole, feared that his residence would be searched and the possession of the firearm would place him in violation of his parole. Burgos drove to a fishing area on the Thames River, dismantled and unloaded the firearm, and threw the pin, magazine, slider, and bullets into the river.

Burgos later was convicted and sentenced for an unrelated armed robbery committed on March 30, 2013. Hoping to reduce his own sentence and eliminate any personal affiliation with the victim's murder, Burgos contacted law enforcement in 2014 and shared the information he knew about the victim's murder. After he provided the information to police, law enforcement transported Burgos to the area near the Thames River where he claimed to have disposed of the firearm pieces. The Connecticut state police dive team performed a five day search of the Thames River and recovered a handgun magazine. The dive team found the magazine in approximately ten feet of water and approximately sixty-four feet from railroad tracks that ran alongside the shore. At trial, when asked about any markings on the gun the defendant had sold him, Burgos responded, "I think it said Llama; I think that's what it said."

Klees examined the magazine, which was heavily corroded due to water exposure, and determined that it was either an aftermarket or a replacement magazine that, prior to being submerged in the Thames River, likely could have fit a nine millimeter Beretta handgun.

Klees also concluded that the magazine would not have likely fit a Llama handgun.

Following the victim's murder, the defendant disclosed his involvement in the shooting to multiple parties. Prior to the shooting, on December 13, 2011, the defendant asked Jeremy Dawson if he wanted to participate in a robbery of Boyce. Dawson declined, and on the day after the shooting had occurred, the defendant told Dawson that he had gone to the Mohegan Apartments to find Boyce. Further, the defendant told Dawson that he had knocked on a door and a female asked who was there. When the defendant could not enter the apartment, he shot through the door. When Dawson later learned of the victim's death, he thought that the victim was the female to whom the defendant earlier had referred.

The defendant also made a reference to the victim's murder to his former girlfriend, Samantha Whitcher. In Whitcher's words, during an argument, the defendant told her that if she ever left him "he'd kill [her] like he supposedly killed the girl in Norwich." After the defendant and Whitcher ended their relationship, the defendant also told Whitcher that he kept a firearm at Nieves' residence.

In 2015, the defendant was in a prison transport van when a prisoner, Jesse Kamienski, overheard the defendant telling another prisoner "about how he was arguing with a woman to get into a door, and he couldn't get in so he fired shots through the door." The prisoner to whom the defendant was speaking refused to confirm Kamienski's account, instead stating, "I'm not going to tell on my friend."

Additionally, the defendant told his friend, Andrew Aviles, that he had "hit" the victim by mistake. The defendant further explained, "[Collelo] drove me to the spot on Baltic Street. I knocked on the door a few times.

I thought I heard someone [cocking] back a hammer, so I shot like nine shots through the door and took off . . . . I guess she was just unlocking the door or something."

Finally, in an interview with the lead investigator on the case, the defendant revealed that he knew the victim's killing involved shooting through a door, despite the fact that the police previously had not alerted the defendant to this detail of what had occurred during the shooting.

The defendant was arrested on February 4, 2015, and subsequently charged with murder in violation of General Statutes § 53a-54a (a), and criminal possession of a firearm in violation of General Statutes § 53a-217. Following a jury trial, the jury found the defendant guilty of murder, and the court found him guilty of criminal possession of a firearm. The defendant received a total effective sentence of fifty-eight years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court erroneously admitted video recorded statements into evidence under *State* v. *Whelan*, supra, 200 Conn. 743, and, simultaneously, admitted those same statements as impeachment evidence without instructing the jury how to evaluate that evidence. We conclude that the defendant's claim is inadequately briefed and decline to review it.

The record reveals the following relevant facts. On January 4, 2015, Jeremy Dawson provided police with a written statement regarding the disclosure the defendant previously had made referencing his involvement in the victim's murder. The making of the statement was video recorded. Dawson's statement inculpated the

defendant in the victim's murder.[1] At trial, Dawson testified that the contents of the written statement and the video recording were not true and that he was coerced by police into making the statement. The state moved to admit both Dawson's written statement, and the video recording of the statement. Defense counsel objected to the admission of the video recorded statement for several reasons. First, defense counsel posited that, because Dawson claimed he was coerced by police and, therefore, did not endorse the statement as his own, the statement could not be admitted under *Whelan*. Second, defense counsel argued that, if the video recorded statement was admitted, the jury must be instructed as to which portions of the video recorded statement could be used substantively and which portions could be used for impeachment purposes. Over defense counsel's objection, the court admitted both exhibits under *Whelan* as prior inconsistent statements. After admitting the exhibits, the court provided counsel with the opportunity to provide draft jury instructions with regard to the *Whelan* statements. The court noted: "I will hear from counsel, certainly, at some point if they wish to ask for some kind of an instruction from the court. I haven't received any request to charge for the instructions that the court is going to be giving at the end of the case. . . . If there are specific instructions that either side wishes to ask the court to give either during or at the end of the case, I would expect counsel to make those requests."

In addition, William Collelo provided to police three statements regarding the victim's murder; two on November 20, 2014, and one on January 7, 2015. All

[1] Pursuant to *State* v. *Carrion*, 313 Conn. 823, 837, 100 A.3d 361 (2014), "[i]n addition to signed documents, the *Whelan* rule also is applicable to tape-recorded statements that otherwise satisfy its conditions." (Internal quotation marks omitted.)

three statements inculpated the defendant in the victim's murder. At trial, Collelo testified that the information in the three police statements was false and "all lies." Collelo testified that the police coached him through the statements, and that he felt pressured to provide the statements because the police were harassing him and his family. In addition to the three written statements, the state also moved to admit a video recording of Collelo's January 7, 2015 statement. The state offered the video recorded statement under *Whelan* because the video recording contained statements that were inconsistent with Collelo's in-court testimony. Further, the state argued that the video recorded statement should be admitted for the jury to make a determination as to whether the police coerced Collelo. Defense counsel objected to the admission of Collelo's video recorded statement on multiple grounds. First, defense counsel argued that the video recording contained statements consistent with those made by Collelo in court, and that consistent statements should not be admitted under *Whelan*. Second, defense counsel argued that, if the video recorded statement was admitted, the court should instruct the jury as to which portions of the video recorded statement could be used to impeach Collelo as to his claim of police coercion. Defense counsel noted, "[a]bsent some instruction from the court as to what the usefulness and the utility is of a video . . . and what portions they can use for what, I think we're taking a big chance here. . . . The jury needs some direction, some instruction as to how it's to consider a piece of evidence . . . ." The court responded that "if counsel think it would be helpful to the jury at this stage to provide some preliminary instructions with regard to their use of the video, I'm happy to consider any specific language that counsel wants to suggest." In response to the court's offer, defense counsel noted, "I'm not going to take part in

curative instructions . . . . I leave that to the court to supply whatever instructions the court feels are appropriate." The court ultimately admitted the video recorded statement under *Whelan*, ruling that "by disavowing the sum total of his cooperation with the police, [Collelo's] testimony is inconsistent with the videotaped interview." Further, the court ruled that the video recorded statements were wholly admissible under *Whelan* as they were inconsistent with the testimony of the two witnesses in court that their prior statements were both false and coerced.

Immediately following the court's admission of the Collelo video recorded statement, defense counsel again raised the instructional issue, noting, "I suppose . . . the only thing you could do would be a line-by-line analysis . . . and then almost instruct . . . the jury in sections as to how it may use each piece of a video . . . ." Defense counsel, however, did not provide the court with a proposed instruction or suggest which portions of the video recorded statements he believed should be considered as substantive evidence and which portions of the video recorded statements should be considered for impeachment purposes. The court responded that "it will be the jury's determination as to what weight to give the evidence and I do intend to give them instructions as to how to evaluate *Whelan* evidence as well as inconsistent and even prior consistent statements." Further, before the court allowed Collelo's video recorded statement to be played for the jury, the state offered specific redactions, to which the defense agreed. The defense offered no further redactions of its own.

On January 27, 2017, after both video recorded statements were shown to the jury, the court provided to the jury preliminary instructions distinguishing the use of prior inconsistent statements and the use of Dawson's and Collelo's *Whelan* statements, which had been

admitted as exhibits. The preliminary instructions read as follows: "[E]vidence has been presented that some witnesses have made statements outside of court that may be inconsistent with their trial testimony. You should consider this evidence only as it relates to the credibility of the witnesses' testimony, not as substantive evidence. In other words, consider such evidence as you would any other evidence of inconsistent conduct in determining the weight to be given to the testimony of the witnesses in court.

"Further, in evidence as certain exhibits are prior statements of the witnesses. To the extent, if at all, you find such statements inconsistent with the witnesses' trial testimony, you may give such inconsistency the weight to which you feel it is entitled in determining the witness's credibility here in court. You may also use such statements for the truth of their content and find facts from them."

Also on January 27, 2017, the court provided counsel with a draft final charge, which incorporated in substance the preliminary charge it had given the jury.

On February 1, 2017, prior to the court's delivery of the final charge, defense counsel raised the issue of instructional language for the *Whelan* statements, noting, "I do think that this charge is lacking . . . ." Counsel went on to state, "I haven't necessarily an objection to this language, but I can tell you that it's just not sufficient . . . ." The court responded that "I am going to give the two charges on inconsistent statements and on the *Whelan* rule. . . . I think that the jury can be guided by these two instructions . . . . And it is certainly . . . up to [the jury] to determine how they treat any particular piece of evidence and within the boundaries of these instructions, so I think that it sufficiently gives [the jury] the guidance that they need to be able to do that."

The trial judge delivered its final charge on February 1, 2017, at the close of trial. The final charge regarding inconsistent statements and *Whelan* statements read as follows: "Now, evidence has been presented that some witnesses made statements outside of court that are either consistent or inconsistent with their trial testimony. You should consider this evidence only as it relates to the credibility of the witness's testimony, not as substantive evidence. In other words, consider such evidence as you would any other evidence of consistent or inconsistent conduct in determining the weight to be given to the testimony of the witness in court.

"In evidence as exhibits 92 and 93 are prior statements of Jeremy Dawson. Also in evidence as exhibits 96, 97, 98, and 99 are prior statements of William Collelo. To the extent, if at all, you find such statements inconsistent with the witness's trial testimony, you may give such inconsistency the weight to which you feel they are entitled in determining the witness's credibility here in court. You may also use such statements for the truth of their content and find facts from it."

Defense counsel did not take exception to this portion of the final charge.

In his brief, the defendant labels his first claim as evidentiary in nature and proceeds to set forth an abuse of discretion standard of review. In his convoluted analysis of the claim, however, the defendant does not challenge the admissibility of the statements under *Whelan*. Rather, the defendant's only contention is that the court had the obligation to instruct the jury as to which portions of the exhibits could be used for impeachment purposes and which portions could be used for substantive purposes. In particular, in his brief, the defendant states that "[t]he jury never knew what portions of the Dawson and Collelo tapes to use as evidence and which portions to use to discredit each man. They never knew

because the trial court refused the defendant's request to tell them." The defendant goes on to argue that "there was no limiting instruction despite a timely, proper request for one."[2]

In its brief, the state expresses its confusion over the nature of the defendant's claim, referring to the defendant's briefing of the first issue as "a confusing mélange of evidentiary complaints and instructional challenges." The defendant's lack of clarity in his brief is reflected by the state's decision to analyze the defendant's first claim as both a claim of evidentiary error and a claim of instructional error.

In his reply brief, the defendant, responding to the state's confusion as to the nature of his claim, confirms that his claim is evidentiary in nature. Specifically, the defendant states that he "is not raising a jury instruction issue" and that "the . . . claim is evidentiary . . . ." Despite the defendant's contention, his reply brief offers no analysis of whether the court properly admitted the video recorded statements under *Whelan*, but, rather, continues to advance an undeveloped claim of instructional error.

The defendant's brief is also inadequate with regard to the Practice Book rules of appellate procedure. The state notes, and we agree, that, if the defendant is asserting a claim of evidentiary error, then his brief failed to comply with the requirements under Practice Book § 67-4 (e) (3).[3]

[2] The defendant also claims on appeal that portions of the video recorded statement contained police statements that were untrue, hearsay or irrelevant, but at trial, he expressed only one specific objection relating to misinformation about nonexistent polygraph results, which the court instructed the jury to ignore as untrue. It was the defendant's obligation to identify other specific parts of the video recorded statements he found objectionable, which he failed to do, or to seek specific redactions or special instructions as to portions of the video recorded statements that did not contain *Whelan* statements, which he also declined to do.

[3] Practice Book § 67-4 (e) (3) requires: "When error is claimed in any evidentiary ruling in a court or jury case, the brief or appendix [of the

"It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Clelford* v. *Bristol*, 150 Conn. App. 229, 233, 90 A.3d 998 (2014).

It is not the proper role for this court to guess as to the nature of the defendant's claim and the relevant legal analysis to apply thereto. We only have in front of us a muddled analysis that labels a claim as evidentiary in nature, yet predominantly analyzes it as instructional in nature. Accordingly, relying, as we must, on the defendant's insistence that he raised only an evidentiary claim, we conclude that this claim is inadequately briefed, and we decline to review it.[4]

II

Next, the defendant claims that the court erroneously admitted into evidence a handgun magazine that was

appellant] shall include a verbatim statement of the following: the question or offer of exhibit; the objection and the ground on which it was based; the ground on which the evidence was claimed to be admissible; the answer, if any; and the ruling."

[4] Even when we pointed out to counsel during oral argument that the defendant's claim appeared to be instructional in nature, he insisted that it was not. Instead, he maintained that the defendant was making only an evidentiary claim.

irrelevant, highly prejudicial, and misleading. We disagree.

The following procedural history is relevant. On January 10, 2017, the defendant filed a motion in limine to "preclude the state from introducing any evidence concerning an underwater search of the basin of the Thames River by Connecticut State Police." In particular, the defendant sought to exclude the handgun magazine recovered during the underwater search. On January 19, 2017, the trial court heard arguments on the motion from both parties. The state made an offer of proof regarding the relevance of the magazine as it related to evidence the state anticipated admitting. The state's offer of proof was as follows: "The state anticipates the evidence generally being that shortly after the homicide of Jaclyn Wirth, the defendant encountered an individual named Luis Burgos. Luis Burgos said that he acquired a gun from the defendant, and that Luis Burgos soon thereafter became nervous about possessing the firearm because he believed it may have been involved in the homicide. Shortly after becoming nervous, he indicates that he went to the area of the Thames River in Ledyard, broke the gun down into three different pieces, and threw the gun and its separate parts into the water. Some years later . . . he gave this information to investigators; at the time, he was incarcerated. The state made arrangements to have correction officers . . . bring him to the area of the Thames River, and indicate where it is that he says that he broke the gun into its components and threw it into the river.

"Shortly thereafter, the state of Connecticut sent a dive team to search the area. As part of the dive, they recovered an item, which we assert is a magazine. We have then sent that magazine to [ATF], it was inspected by an examiner . . . who is on the witness list, and

he is prepared to tell us that it's an aftermarket magazine that would fit a Beretta, which is consistent with a weapon that would have fired, we believe the evidence will be, the fatal shot into Jaclyn Wirth, as well as the cartridges left at the scene, and the various shots into her as well as into the apartment. That would be our offer of proof as to why that magazine is admissible."

In support of its motion, defense counsel argued that, due to the size of the Thames River and the time elapsed since the crime, the recovered magazine could not be connected to the present case. The state countered that defense counsel's arguments went to the weight and not the admissibility of the magazine and that the magazine would corroborate Burgos' testimony. The court denied the defendant's motion on January 20, 2017. In denying the motion, the court found that "the proffered evidence is relevant and material . . . as it relates to the testimony of Mr. Burgos, is relevant to his credibility, and to the determination of credibility that the jury is going to have to make in this case. It's also ultimately relevant to whether or not the defendant had the means to commit the crime in question." The court further found that the defendant's arguments regarding the magazine's admissibility could be explored on cross-examination and went to weight and not admissibility. The court also found that "the evidence is not unduly prejudicial, and does not unduly arouse the jury's emotions, hostility, sympathy, or otherwise create a danger of unfair prejudice." Throughout the remainder of trial, the state presented evidence consistent with its offer of proof regarding the admission of the handgun magazine.[5]

[5] Although Burgos testified that he thought the handgun the defendant had sold him was a Llama, the question of whether Burgos accurately recalled the make of the firearm goes to the weight of the state's evidence, not its admissibility. In its closing argument, the state argued that Burgos shrugged when testifying as to the handgun's markings and that Burgos did not correctly remember the brand of firearm.

We begin our analysis of this claim with the appropriate standard of review. "It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion. . . . Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." (Internal quotation marks omitted.) *State* v. *Papineau*, 182 Conn. App. 756, 787, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018).

"[R]elevant 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. . . . Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . . All evidence adverse to a party is, to some degree prejudicial. To be excluded, the evidence must create prejudice that is undue and so great as to

threaten injustice if the evidence were to be admitted." (Citations omitted; internal quotation marks omitted.) *State* v. *Bullock*, 155 Conn. App. 1, 40, 107 A.3d 503, cert. denied, 316 Conn. 906, 111 A.3d 882 (2015); see also Conn. Code Evid. §§ 4-1 and 4-3.

Having examined the defendant's claim, we conclude that the court properly admitted the magazine into evidence because it tended to show that the defendant had access to a firearm shortly after the victim's murder, it supported the conclusion that the magazine belonged to the firearm used to kill the victim, and it corroborated the state's theory of the case. Specifically, the magazine corroborated Burgos' testimony that the defendant sold Burgos a handgun on the morning of the victim's murder. Further, the dive team's ability to recover the magazine at Burgos' direction corroborated Burgos' testimony that he had thrown the disassembled handgun into the Thames River after learning of the victim's death later that morning. The state's witness who performed the underwater search testified that, as part of an investigatory search, it is "[n]ot overly common" to find the item for which the dive team is looking. Notably, the dive team, in its five day search, did not recover any other firearms evidence, further supporting the conclusion that the recovered magazine was, in fact, the one thrown into the river on the morning of the victim's murder. Perhaps most importantly, the admission of the magazine was relevant because an ATF examiner determined that the recovered magazine was consistent with a magazine that would fit a Beretta style handgun, which is the type of handgun used to kill the victim. The admission of the magazine, therefore, tended to support the state's theory that the magazine could have been used in the firearm the defendant used to kill the victim. We agree with the court's conclusion that defense counsel's arguments went to the weight of the

evidence, not to its admissibility, and that defense counsel was able to explore those arguments on cross-examination.[6]

We disagree with the defendant's contention that the facts of *State* v. *Moody*, 214 Conn. 616, 573 A.2d 716 (1990), are analogous to the present case. In *Moody*, our Supreme Court concluded that the trial court erred in admitting into evidence the result of a "presumptive test for blood." (Internal quotation marks omitted.) Id., 628–30. In particular, the result of the "presumptive test for blood" was positive for a stain on the soles of the defendant's shoes. (Internal quotation marks omitted.) Id., 627. Our Supreme Court held that the presumptive test result "was entirely irrelevant" as it "did nothing toward establishing the likelihood of the presence of human blood on the sole of the defendant's shoe." Id., 628. Whereas in *Moody*, the presumptive test result could not demonstrate whether the stain was "human blood, animal blood, or something other than blood"; id; and, thus, was evidence that lacked any probative value, here, the ATF examiner determined that the recovered magazine matched the type of magazine used in the firearm used to kill the victim, and the recovery of the magazine corroborated Burgos's testimony. Therefore, the magazine was relevant and probative because its admission aided the trier of fact in determining a material fact or in corroborating other direct evidence in the case.

The defendant also argues that the court improperly admitted the magazine because, due to the substantial corrosion and marine growth found on the magazine,

[6] On cross-examination of the state's witness who recovered the magazine, defense counsel inquired into a number of issues on which he premised his motion to exclude the magazine. In particular, defense counsel inquired as to the amount of time the magazine was submerged, the tidal patterns of the Thames River, and the inability of the expert to attribute definitively the magazine to the victim's murder.

the magazine was not in substantially the same condition as when the crime was committed. The defendant takes the position that "[t]he magazine was so hopelessly degraded that it was not reliable evidence for the jury to form any link between it and Wirth's murder." In supporting its proposition, the defendant mistakenly relies on *State* v. *Johnson*, 162 Conn. 215, 292 A.2d 903 (1972). The relevant fifth claim in *Johnson*, however, focused on the preservation of evidence with regard to tampering, intermeddlers, and custody. Id., 232–33. Specifically, in *Johnson*, the defendant claimed that the court erred in admitting marijuana into evidence because "not all the individuals having access to the exhibits were called and the exhibits were not sealed or labelled in such a way as to avoid the possibility of tampering or misplacement . . . ." (Internal quotation marks omitted.) Id., 230. Here, the state presented evidence that the magazine was in a different condition when it was recovered from the Thames River from the time of the commission of the crime, namely, that it was "highly corroded" and surrounded by "numerous types of marine-like material . . . ." The state's witnesses explained, however, that the magazine's physical changes were due to natural causes as a result of the magazine being submerged in the Thames River, and not due to the types of human activity that occurred in *Johnson*.

In light of the broad discretion possessed by trial courts in admitting evidence, we conclude that the trial court did not abuse its discretion in admitting the magazine.

The judgment is affirmed.

In this opinion the other judges concurred.

# WELLS FARGO BANK, N.A. *v.* THOMAS J. FERRARO ET AL.
## (AC 42099)

Elgo, Devlin and Sheldon, Js.

*Syllabus*

The plaintiff bank, W Co., sought to foreclose a mortgage on certain real property owned by the defendants F and D following their alleged default on the promissory note secured by the mortgage. Thereafter, T Co., which had been substituted as the plaintiff in the action, filed a motion for summary judgment as to liability on the ground that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. In response, the defendants filed an objection, asserting that a genuine issue of material fact existed as to whether W Co. had complied with the notice provisions (§ 8-265ee) of the Emergency Mortgage Assistance Program, which require a mortgagee to provide certain specific notice to the mortgagor before it can commence a foreclosure of a qualifying mortgage under the program. At the hearing on the motion for summary judgment, T Co. presented the live testimony of two witnesses and introduced five exhibits into evidence in support of its contention that the notice provisions of the program had been complied with, and both of the defendants testified that they did not receive the required notice. At the conclusion of the hearing, the trial court, on the basis of the credible testimony and the evidence, found that there had been full compliance with the notice provisions of the program. The court therefore granted T Co.'s motion for summary judgment as to liability on the ground that there was no genuine issue of material fact regarding the sole issue in dispute. Subsequently, the trial court granted T Co.'s motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendants appealed to this court. *Held* that the trial court improperly permitted and considered live testimony from witnesses during the evidentiary hearing on T Co.'s motion for summary judgment as to liability and the defendants' objection to that motion; by weighing the credibility of the witnesses who testified and assessing the strength of the evidence submitted at the evidentiary hearing in deciding the motion, that court improperly decided a genuine issue of material fact, which rendered the granting of the motion for summary judgment improper.

Argued October 8—officially released November 19, 2019

*Procedural History*

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where Wilmington Trust,

National Association, as trustee for MFRA Trust 2015-2, was substituted as the plaintiff; thereafter, the court, *Hon. John W. Moran*, judge trial referee, granted the substitute plaintiff's motion for summary judgment as to liability; subsequently, the court granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant et al. appealed to this court. *Reversed*; *further proceedings*.

*William J. Whewell*, with whom, on the brief, was *Dorian D. Arbelaez*, for the appellants (named defendant et al.).

*Benjamin T. Staskiewicz*, for the appellee (substitute plaintiff).

*Opinion*

PER CURIAM. The defendants Thomas J. Ferraro and Danielle Ferraro[1] appeal from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff, Wilmington Trust, National Association, as trustee for MFRA Trust 2015-2.[2] The defendants claim that the trial court erred when it granted summary judgment as to liability in favor of the plaintiff after it held an evidentiary hearing, and weighed and relied on the evidence adduced at that hearing, in resolving an issue of material fact in favor of the plaintiff. We reverse the judgment of the trial court.

On July 1, 2013, the original plaintiff, Wells Fargo Bank, N.A. (Wells Fargo), filed this foreclosure action alleging that the defendants had executed a promissory

[1] Gaylord Hospital, Diagnostic Imaging of Milford, P.C., Milford Hospital, and M&T Bank/M&T Credit Services, LLC, are also defendants in this action. Because they are not parties to this appeal, any reference herein to the defendants refers only to Thomas J. Ferraro and Danielle Ferraro.

[2] On July 12, 2018, the court granted the named plaintiff's motion to substitute Wilmington Trust, National Association, as trustee for MFRA Trust 2015-2 (Wilmington Trust), as the plaintiff. We therefore refer in this opinion to Wilmington Trust as the plaintiff.

note and mortgage on certain property in its favor and that the defendants had defaulted on the note. The plaintiff thereafter filed a motion for summary judgment as to liability only on the foreclosure complaint against the defendants, arguing that there was no genuine issue as to any material fact and, therefore, that it was entitled to judgment as a matter of law. In response, the defendants filed an objection on the ground that a genuine issue of material fact existed as to whether Wells Fargo had complied with the notice provisions of the Emergency Mortgage Assistance Program (EMAP), General Statutes § 8-265cc et seq.[3]

On July 12, 2018, the court held an evidentiary hearing "limited to a singular issue by virtue of the defendants' objection to [the] plaintiff's motion for summary judgment dated May 14, 2018, raising an objection based on a—whether it was proper service of the EMAP notice."[4] At that hearing, the plaintiff presented the live testimony of two witnesses and introduced five exhibits

[3] General Statutes § 8-265ee (a) provides: "On and after July 1, 2008, a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, shall give notice to the mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. Such notice shall advise the mortgagor of his delinquency or other default under the mortgage and shall state that the mortgagor has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the authority with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the mortgagor and mortgagee are unable to resolve the delinquency or default."

[4] On April 30, 2018, the trial court denied a motion to dismiss in which the defendants claimed that the plaintiff failed to comply with the EMAP notice provisions and that that failure deprived the court of subject matter jurisdiction to hear this case. The record is thus clear that the July 12, 2018 evidentiary hearing was limited to the plaintiff's motion for summary judgment.

into evidence in support of its contention that it had complied with the notice provisions of EMAP. Both of the defendants testified that they did not receive an EMAP notice.

At the conclusion of the hearing, the court held in relevant part: "Based on the credible testimony and the evidence, the court finds that there has been full compliance with [General Statutes §] 8-265ee." On that basis, the court determined that there was no genuine issue of material fact and thus granted summary judgment as to liability only in favor of the plaintiff. The court thereafter granted the plaintiff's motion for judgment of strict foreclosure, from which the defendants now appeal.

On appeal, the defendants claim that the trial court improperly permitted, considered and relied on live testimony from witnesses at an evidentiary hearing on the plaintiff's motion for summary judgment. We agree.

This court's decision in *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, 183 Conn. App. 575, 579–80, 193 A.3d 700 (2018), is dispositive of the defendants' claim on appeal. In holding that the trial court improperly permitted and considered live testimony during the hearing on the motion for summary judgment, the court in *Magee Avenue, LLC*, set forth the following reasoning: "The fundamental purpose of summary judgment is preventing unnecessary trials. . . . If evidentiary presentations and testimony were to be permitted, the intent to reduce litigation costs by way of the summary judgment procedure would be undermined, and there may as well be a trial on the merits. . . . A summary judgment should be summary; that is, made in a prompt, simple manner without a full-scale trial. The opposition to such a motion may include the filing of affidavits or other documentary evidence; Practice Book § 17-45; but does not include the live testimony of any witnesses. . . .

"Here, it is undisputed that the defendant testified regarding the contents of his affidavit and his personal knowledge of it. The court's consideration of this testimony necessarily required it to make credibility determinations and factual findings, a reality supported by the court's memorandum of decision, in which it stated that the court *finds* [that] the defendant . . . did not enter into an agreement with the plaintiff . . . in his individual capacity but only as the managing member of . . . [the defendant]. . . . Because the court made credibility determinations, there were axiomatically genuine issues of material fact, and summary judgment therefore was improper." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 585–86.

As in *Magee Avenue, LLC*, the trial court in this case held an evidentiary hearing on the plaintiff's motion for summary judgment and the defendants' objection thereto, during which it permitted and considered live testimony from witnesses. The court weighed the credibility of the witnesses who testified and assessed the strength of the evidence submitted at the evidentiary hearing in deciding that motion, and, in so doing, improperly decided a genuine issue of fact. On this basis, the summary judgment cannot stand.

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

# M. M. *v.* H. F.*
## (AC 42136)

Elgo, Devlin and Harper, Js.

Argued October 17—officially released November 19, 2019

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury, and tried to the court, *Hon. Lloyd Cutsumpas*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Ficeto*, *J.*, denied the defendant's request for leave to file a motion for modification, and the defendant appealed to this court. *Affirmed*.

*H. F.*, self-represented, the appellant (defendant).

*M. M.*, self-represented, the appellee (plaintiff).

*Opinion*

PER CURIAM. In this postjudgment marital dissolution matter, the defendant, H. F., appeals from the judgment of the trial court denying her request for leave to file a motion to modify custody and visitation of the parties' minor child.[1] The trial court denied the defendant's request for leave to file a motion to modify on the ground that she failed to allege facts sufficient to constitute a substantial change in circumstances, and, further, that her motion simply reiterated allegations that she previously had presented to the court. On the basis of our careful and thorough review of the record, we cannot conclude that the trial court erred in so holding.

The judgment is affirmed.

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

[1] Because the defendant had a history of filing motions for contempt and/or modification "without sufficient cause or without alleging a substantial change in circumstance[s]," the trial court issued an order on July 19, 2017, requiring the defendant to seek leave of the court pursuant to Practice Book § 25-26 (g), prior to filing further motions.