R.D. CLARK & SONS, INC., ET AL. *v.* JAMES CLARK ET AL.

(AC 40592)

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

Syllabus

The plaintiff R Co. sought to recover damages from the defendant J, a minority shareholder of R. Co., for alleged breach of fiduciary duty. Since 1984, R Co., which was founded by R, the late father of the individual parties, who are all siblings, has operated as a specialty freight trucking business. When R died, C assumed R's shares of R Co., and the siblings managed R Co.'s operations until they had a falling out in 2011, and J resigned from his positions as an officer and director of R Co. After the plaintiffs commenced the underlying action, J filed a counterclaim seeking dissolution of R Co. on the ground that the individual plaintiffs had engaged in illegal, oppressive and fraudulent conduct to J's detriment. In lieu of dissolution, R Co. elected to purchase J's shares in it at fair value, and the plaintiffs withdrew their complaint. J thereafter filed a second amended counterclaim alleging that R Co. had engaged in oppressive conduct because for many years it provided shareholders with funds to pay federal income tax liabilities incurred as a result of the pass-through of R Co.'s profits to them, but J had not received any such payments for the years of 2012, 2013, and 2014, even though he remained a shareholder. Because the parties could not agree as to the fair value of J's shares or to the terms of R Co.'s purchase of them, those issues were presented to the court, which, after a trial, determined the value of R Co. and the fair value of J's shares, and concluded that because R Co., through its majority shareholders, engaged in oppressive conduct toward J, J's interest in R Co. would not be subject to a minority discount. The court held further evidentiary hearings and determined that J's shares would not be reduced by a marketability discount and that J was entitled to attorney's fees and expert witness fees, and the court ordered R Co. to pay J certain sums. R Co. appealed to this court from the judgment of the trial court determining the fair value of J's shares, establishing the terms of payment for the purchase of those shares, and awarding attorney's fees and expert witness fees. J, on cross appeal, claimed that the trial court erred in not awarding attorney's fees in the amount of one third of the value of his interest in R Co. pursuant to a contingency fee agreement that he had signed with his counsel. *Held:*

1. R Co. could not prevail on its claim that the trial court erred by not tax affecting its earnings in analyzing its valuation; the court did not abuse its discretion in declining to tax affect R's future cash flow, as the court, in the absence of binding authority, carefully considered cases from other jurisdictions, which provided considerable support for its

approach, the court was tasked with determining fair value, as opposed to fair market value, and the present case was ill-suited to tax affecting earnings in light of R Co.'s practice of extending loans to shareholders to cover their tax liabilities and then retiring those loans through the payment of bonuses, and it was entirely foreseeable that such a practice would continue after R Co. purchased J's shares.

2. The trial court did not err in declining to apply a minority discount to the value of J's shares, or in awarding attorney's fees and expert witness fees on the ground that J suffered oppression at the hands of R Co.'s majority shareholders: there was no basis in the record to support R Co.'s claim that J did not have a reasonable expectation of assistance from R Co. to cover his tax liabilities, and even though R Co. claimed that the decision of whether to assist J in covering his tax liabilities was made by its financial advisory board, not by the majority shareholders, that claim rested on the testimony of M, a financial advisor, who the court expressly found not credible; moreover, although R Co. claimed that J failed to establish his tax obligations for the years in question, the record supported the court's finding that R Co. provided tax adjustments to shareholders who had a potential tax liability, not only to those who proved an actual tax liability, and the court properly rejected R Co.'s claim that any oppression occurred only after J petitioned for dissolution, as the court's finding of oppression was not limited to the 2014 tax year, but began in 2011, when J resigned as an officer and director, and, therefore, the court's finding of minority oppression was not clearly erroneous, it did not abuse its discretion by not applying a minority discount to the value of J's shares in R Co., and R Co.'s challenge to the court's award of attorney's fees and expert witness fees failed.

3. R. Co. could not prevail on its claim that the trial court erred in declining to apply a marketability discount to the value of J's shares, which was based on its claim that the court's failure to do so caused an undue financial burden: the court examined R Co.'s finances and the value of J's shares, and determined that there were no extraordinary circumstances that warranted a marketability discount, and even though J's one-third share of R Co. was substantial, that did not mean that R Co. should not be required to pay fair value for J's shares; moreover, the court focused on the financial burden of its judgment on R Co., as well as on R Co.'s financial viability, when it fashioned the ten year payment plan afforded to R Co. to satisfy the judgment, and, therefore, R Co. could not prevail on a claim of unfair financial burden simply because it might experience difficulty satisfying the court's judgment.

4. The trial court did not abuse its discretion in accounting for a certain loan due to R Co. from J and in ordering that certain sums be paid to J within thirty days of the date of judgment; given the irregular bookkeeping employed by R Co., the court's treatment of those sums was reasonable and equitable, as the court included J's loan balance as an asset of R Co., adding it, along with the loan balances of other shareholders, to the capitalized cash flow in arriving at R Co.'s total value, and it

essentially credited J for the bonus provided to the two other shareholders in 2014 and reduced the value of J's share in R Co., and the court's decision to add the loan balance to the overall value of R Co. while reducing the value of J's shares by the credit was an imperfect, but justifiable treatment of those sums.

5. J could not prevail on his claim on cross appeal that the trial court abused its discretion by declining to award attorney's fees in the amount of one third of the value of J's shares in R Co. in accordance with a contingency fee agreement that he had signed with his counsel; although J claimed that the court did not first analyze the terms of the fee agreement before departing from its terms to prevent substantial unfairness to R Co., because the court reached the issue of substantial unfairness, the court necessarily first analyzed the terms of the contingency fee agreement and found that its terms were reasonable, and the court did not err in finding that adherence to the agreement would be substantially unfair to R Co., as the court did not hold that the agreement was unreasonable but, rather, found that the resulting award was unreasonable because it was over $100,000 more than an award based upon the actual services rendered by J's attorneys, and that finding was sufficient to sustain the court's determination that adhering to the agreement would be substantially unfair.

Argued September 9—officially released December 10, 2019

Procedural History

Action seeking damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant filed a counterclaim seeking, inter alia, dissolution of the named plaintiff corporation; thereafter, the named plaintiff elected to purchase the named defendant's stock in the named plaintiff at fair value; subsequently, the plaintiffs withdrew their complaint; thereafter, the named defendant filed a second amended counterclaim; subsequently, the matter was tried to the court, *Hon. Joseph M. Shortall*, judge trial referee; judgment determining the fair value of the named defendant's shares in the named plaintiff and establishing terms of payment; thereafter, the court awarded the named defendant attorney's fees and expenses, and the plaintiffs appealed to this court and the named defendant filed a cross appeal; subsequently, the defendant Carolyn Manchester et al. withdrew their claims on appeal. *Affirmed.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Lingerheld*, for the appellant-cross appellee (named plaintiff).

Jack G. Steigelfest, with whom was *Christopher M. Harrington*, for the appellee-cross appellant (named defendant).

Opinion

DEVLIN, J. In this case involving the buyout of minority shares of a closely held corporation, the plaintiff, R.D. Clark & Sons, Inc. (corporation),[1] appeals, and the defendant James Clark[2] cross appeals, from the judgment of the trial court determining the fair value of those shares, establishing the terms of payment for the purchase of those shares, and awarding attorney's fees to the defendant. On appeal, the corporation asserts that the trial court erred in determining the value of the defendant's shares by (1) not tax affecting the corporation's earnings in analyzing its valuation, (2) not applying a minority discount to the value of the defendant's shares, and awarding the defendant attorney's and expert witness fees and costs, on the ground that the defendant suffered minority oppression at the hands of the plaintiffs, (3) not applying a marketability discount to the value of the defendant's shares, and (4) incorrectly accounting for a certain loan due to the corporation from the defendant and ordering that certain sums be paid to the defendant within thirty days of the date of judgment. On cross appeal, the defendant claims that the court erred by not awarding him attorney's fees in the amount of one third of the value of

[1] Carolyn Manchester and John Clark also were plaintiffs in this action, and, initially, were parties to this appeal. They subsequently withdrew their claims on appeal, leaving the corporation as the sole appellant. Any reference herein to the plaintiffs includes the corporation, Carolyn Manchester and John Clark.

[2] Smart Choice Trucking, LLC (Smart Choice), also was a defendant in this action. Because the claims against Smart Choice were withdrawn, all references herein to the defendant refer only to James Clark.

his shares in the corporation in accordance with the retainer agreement that he had signed with his counsel. We affirm the judgment of the trial court.

The following factual and procedural history is relevant to the issues on appeal. Since 1984, the corporation, which was founded by Robert D. Clark, the late father of the individual parties, who are all siblings, has operated as a specialty freight trucking business, transporting primarily gasoline, kerosene and water. Robert D. Clark owned one third of the shares of the corporation, and John Clark and the defendant also each owned one third. When Robert D. Clark died in May, 2011, Carolyn Manchester assumed his shares of the corporation. The three siblings served as officers and directors of the corporation, and managed the operations of the corporation until they had a falling out later in 2011, and the defendant was terminated from his position as a driver and occasional dispatcher. The defendant resigned from his positions as an officer and director of the corporation in February, 2012.

On April 2, 2014, the plaintiffs commenced the underlying action against the defendant and Smart Choice. In their five count complaint, the plaintiffs alleged, inter alia, that the defendant, after being terminated from his employment with the corporation in 2011, improperly utilized certain proprietary information to start a new business, Smart Choice, and undermined the corporation's business operations.

On September 19, 2014, the defendant and Smart Choice filed an answer and special defenses, and the defendant, alone, filed a five count counterclaim seeking, inter alia, dissolution of the corporation pursuant to General Statutes § 33-896 (a),[3] on the ground that

[3] General Statutes § 33-896 (a) provides in relevant part: "The superior court for the judicial district where the corporation's principal office or, if none in this state, its registered office, is located may dissolve a corporation:

"(1) In a proceeding by a shareholder if it is established that: (A) (i) The directors are deadlocked in the management of the corporate affairs, (ii)

the individual plaintiffs had engaged in illegal, oppressive and/or fraudulent conduct to his detriment.

On November 21, 2014, the corporation elected, in lieu of dissolution, to purchase the defendant's shares in it at the fair value of those shares, pursuant to General Statutes § 33-900.[4]

On February 24, 2016, the plaintiffs withdrew their complaint against the defendant and Smart Choice. Also on that date, the defendant filed a second amended counterclaim alleging that the corporation had a practice for many years of providing shareholders with funds to pay the federal income tax liabilities incurred by them as a result of the pass-through of the corporation's profits to them, but that the defendant had not received any such payments from the corporation for the years 2012, 2013 and 2014, although he remained a shareholder of the corporation. The defendant claimed that said conduct by the plaintiffs was oppressive.

The parties were unable to reach an agreement as to the fair value of the defendant's shares in the corporation and the terms of the corporation's purchase of them, so those issues were presented to the court for determination. After a trial spanning several days in

the shareholders are unable to break the deadlock, and (iii) irreparable injury to the corporation is threatened or being suffered or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; (B) the directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent; (C) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; or (D) the corporate assets are being misapplied or wasted . . . ."

[4] General Statutes § 33-900 (a) provides in relevant part: "In a proceeding under subdivision (1) of subsection (a) of section 33-896 to dissolve a corporation, the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. . . ."

December, 2015, and February, 2016, the court issued a memorandum of decision on August 30, 2016, determining that (1) as of December 31, 2014,[5] the value of the corporation was $3,708,413, and the fair value of the defendant's shares of the corporation was $1,236,138, and (2) because the corporation, through the actions of its majority shareholders, engaged in oppressive conduct toward the defendant, the value of the defendant's interest in the corporation was not subject to a minority discount. The court further ordered that it would hold another hearing on the issues of whether there were extraordinary circumstances to justify the application of a marketability discount to the value of the defendant's shares, the terms according to which the corporation would purchase those shares, and whether the defendant was entitled to an award of reasonable attorney's and expert witness fees and expenses.

On September 8, 2016, the corporation filed a motion for reargument and reconsideration. On October 24, 2016, the court issued a memorandum of decision granting in part and denying in part that motion, determining that, upon reconsideration, the value of the corporation as of December 31, 2014, was $2,356,719, and the fair value of the defendant's shares in the corporation was $785,573.

On December 30, 2016, following another evidentiary hearing, the trial court issued a memorandum of decision determining, inter alia, that the value of the defendant's shares of the corporation should not be reduced by a marketability discount, the defendant was entitled to statutory attorney's and expert witness fees and expenses pursuant to § 33-900 (e),[6] and the defendant

[5] This date was agreed upon by the parties.

[6] General Statutes § 33-900 (e) provides in relevant part: "In a proceeding under subdivision (1) of subsection (a) of section 33-896, if the court finds that the petitioning shareholder had probable grounds for relief under said subdivision, it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts employed by him."

was not entitled to prejudgment interest, but was entitled to postjudgment interest.

On June 19, 2017, the trial court issued a memorandum of decision, following another hearing held on April 27, 2017, rendering judgment against the corporation and in favor of the defendant, holding that the defendant was entitled to a total sum of $983,028.09, including statutory attorney's fees and expert witness fees and expenses. The court also found that the defendant was entitled to postjudgment interest at the rate of 2.25 percent. The court ordered the corporation to pay $87,653 to the defendant within thirty days and, further, to pay $8339.29 per month to the defendant for a period of ten years, and to maintain a performance bond to secure payment of the judgment. The court also dismissed the defendant's counterclaim seeking a dissolution of the corporation.

On June 28, 2017, the corporation filed a motion for reconsideration limited to the portions of the trial court's June 19, 2017 decision requiring it to pay $87,653 to the defendant within thirty days and ordering it to obtain a performance bond. The court held an evidentiary hearing on these issues on August 24, 2017. On September 14, 2017, the court issued a memorandum of decision declining to modify its order that the corporation pay $87,653 to the defendant within thirty days. The court, however, vacated its order requiring the corporation to obtain a performance bond, but ordered that the corporation satisfy its monthly installments on the first of each month and that it be assessed a late charge if it did not timely satsisfy that obligation.

The corporation appeals from the judgment of the trial court determining the value of the defendant's shares and its award of attorney's and expert witness fees and expenses to the defendant. The defendant does not quarrel with the trial court's determination of the value of his interest in the corporation, but challenges,

by way of cross appeal, the court's decision not to award attorney's fees in the amount of one third of the value of his interest in the corporation pursuant to the contingency fee agreement that he had signed with his counsel.

I

APPEAL

Because all of the claims raised by the corporation on appeal stem from the valuation of the defendant's shares in it, we begin by setting forth the following general applicable legal principles. As noted herein, the corporation elected to purchase the defendant's shares at the fair value of those shares pursuant to § 33-900 (a). Section 33-900 (d) provides that, if the parties are unable to reach an agreement as to the fair value of the shares, the court shall determine the fair value of them as of the day before the date on which the petition was filed or as of such other date as the court deems appropriate under the circumstances.

"Fair value" is not defined in § 33-900. It is, however, defined in a separate provision of the Connecticut Business Corporation Act, which encompasses General Statutes §§ 33-600 to 33-998. General Statutes § 33-855 (3)[7] provides in relevant part: " 'Fair value' means the value of the corporation's shares determined . . . (B) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, and (C) without discounting for lack of marketability or minority status . . . ." This definition is identical to the definition of "fair value" contained in its counterpart under

[7] Although § 33-855 applies in the context of a determination of the rights of a dissenting shareholder, it has been observed, and we agree, that "there is no reason to believe that 'fair value' means something different when addressed to dissenting shareholders . . . than it does in the context of oppressed shareholders . . . ." (Citations omitted.) *Balsamides* v. *Protameen Chemicals, Inc.*, 160 N.J. 352, 374, 734 A.2d 721 (1999); see also *Robblee* v. *Robblee*, 68 Wash. App. 69, 77–80, 841 P.2d 1289 (1992) (holding that

§ 13.01 (4) of the American Bar Association's Model Business Corporation Act.[8] Given this definition, it seems evident that neither a minority discount nor a marketability discount would apply to the determination of the fair value of shares that are being purchased by a corporation, versus being sold on the market. This position is supported by the widely accepted principle that "fair value" is not synonymous with "fair market value." See, e.g., *Pueblo Bancorporation* v. *Lindoe, Inc.*, 63 P.3d 353, 363 (Colo. 2003); *Brynwood Co.* v. *Schweisberger*, 393 Ill. App. 3d 339, 353, 913 N.E.2d 150 (2009); *Franks* v. *Franks*, Court of Appeals of Michigan, Docket No. 343290, N.W.2d , 2019 WL 4648446, *15 (Mich. App. September 24, 2019); *Balsamides* v. *Protameen Chemicals, Inc.*, supra, 160 N.J. 374–77; *Columbia Management Co.* v. *Wyss*, 94 Or. App. 195, 202–206, 765 P.2d 207 (1988); *HMO-W, Inc.* v. *SSM Health Care System*, 234 Wis. 2d 707, 717–23, 611 N.W.2d 250 (2000). Accordingly, most courts disfavor the application of minority or marketability discounts in situations such as the one presented in this case. Connecticut has no appellate authority on this issue.

Here, the trial court did not make a pronouncement regarding the allowance or prohibition of minority or marketability discounts as a matter of law. Rather, the trial court presumed the propriety of their application, but declined to apply either given the facts presented in this case. We thus limit our analysis to the holdings

"fair value" means same in oppressed shareholder action as in dissenting shareholder action [internal quotation marks omitted]).

[8] "Connecticut's corporate law is substantially similar to the provisions of the American Bar Association's Model Business Corporation Act; see, e.g., *Trevek Enterprises, Inc.* v. *Victory Contracting Corp.*, 107 Conn. App. 574, 583 n.4, 945 A.2d 1056 (2008) ([i]n 1994, the General Assembly enacted . . . a comprehensive revision . . . designed to bring our corporations statutes into conformity with the American Bar Association's revised Model Business Corporation Act) . . . ." (Internal quotation marks omitted.) *Financial Freedom Acquisition, LLC* v. *Griffin*, 176 Conn. App. 314, 329, 170 A.3d 41, cert. denied, 327 Conn. 931, 171 A.3d 454 (2017).

of the trial court and the corporation's specific challenges to them.

There is no appellate authority mandating that a particular methodology be employed in determining fair value when a corporation elects to buy out a minority shareholder in lieu of dissolution. It is, however, well settled that "valuation is a factual determination. In assessing the value of . . . property . . . the trier arrives at [its] own conclusions by weighing the opinions of the appraisers, the claims of the parties, and [its] own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation. . . . The trial court has the right to accept so much of the testimony of the experts and the recognized appraisal methods which they employed as [it] finds applicable; [its] determination is reviewable only if [it] misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard. . . . In determining whether the trial court reasonably could have concluded as it did on the basis of the evidence before it, we will give every reasonable presumption in favor of the correctness of [its] action." (Citation omitted; internal quotation marks omitted.) *Siracusa* v. *Siracusa*, 30 Conn. App. 560, 568–69, 621 A.2d 309 (1993). "The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Britto* v. *Britto*, 166 Conn. App. 240, 245–46, 141 A.3d 907 (2016).

The methodology used by the trial court in this case, as well as the parties' expert witnesses, to determine the value of the corporation as a going concern as of December 31, 2014, was (1) to make a projection of future cash flow, (2) to make adjustments to normalize this cash flow and (3) to apply a capitalization rate to arrive at a value for the business. Both parties presented expert testimony in support of their respective positions. The trial court expressly considered the various opinions of both expert witnesses, but, for the most part, agreed with the valuation methods and calculations utilized by the corporation's expert witness.

Despite the multitude of factors considered by the trial court in calculating the fair value of the defendant's shares in the corporation, and the complexity of those calculations, the corporation challenges the trial court's valuation on only three grounds. The corporation claims that the trial court erred by (1) not tax affecting the corporation's earnings in connection with its cash flow valuation analysis, (2) not making a downward adjustment in the value of the defendant's shares because the defendant was a minority shareholder, and (3) not making a downward adjustment in the value of the defendant's shares because of the limited marketability of shares in a closely held corporation. We address each of these claims, in addition to the plaintiff's challenge to the trial court's award of attorney's and expert witness fees to the defendant, in turn.

A

The corporation first challenges the trial court's decision not to tax affect earnings in its analysis of the corporation's cash flow valuation. In performing their respective analyses of the value of the corporation, both of the parties' expert witnesses decreased the corporation's normalized earnings to reflect a pass-through tax rate; the corporation's expert applied a 25 percent tax rate and the defendant's expert applied a 12.6 percent

tax rate. The trial court declined to apply any tax affecting adjustment. The corporation argues that "the [trial court's] failure to apply any tax adjustment results in an artificially inflated value of the corporation because it fails to take into account that shareholders will not receive the full benefit of the corporation's earnings because they must pay income tax on same."[9] (Emphasis omitted.) In other words, the corporation contends that the trial court should have reduced its projected future income by deducting hypothetical corporate income taxes even though, as an S corporation,[10] it does not pay taxes. We disagree.

"[V]aluation is a fact specific task exercise; tax affecting is but one tool in accomplishing that task." (Internal quotation marks omitted.) D. Tinkelman et al., "Sub S Valuation: To Tax Effect, or Not to Tax Effect, Is Not Really the Question," 65 Tax Law. 555, 587 (2012). Tax affecting "is the discounting of estimated future corporate earnings on the basis of an assumed future tax burden imposed on those earnings . . . ." *Dallas* v. *Commissioner of Internal Revenue*, T. C. Memo 2006-212, 92 T.C.M. (CHH) 313, 315 n.3 (T.C. 2006). The application of tax affecting to S corporations is complicated by the fact that S corporations do not pay taxes. See 26 U.S.C. § 1363 (a). Rather, the S corporation passes its income through to its shareholders who report their *pro rata* shares of that income on their individual tax returns. See 26 U.S.C. § 1366. Indeed, in the view of the United States Tax Court (tax court) and the Internal Revenue Service, the principal benefit enjoyed by S corporation shareholders is the reduction in the

[9] The corporation also argues that "[b]ecause both experts applied a tax adjustment, it was error for the trial court to substitute its own judgment and fail to apply any tax adjustment." This argument is belied by the axiomatic principle that the court is not bound by the opinions of expert witnesses. See, e.g., *Johnson* v. *Healy*, 183 Conn. 514, 516–17, 440 A.2d 765 (1981).

[10] An S corporation is a corporation with no more than 100 shareholders that passes through net income or losses to those shareholders in accordance with Internal Revenue Code, Chapter 1, Subchapter S.

total tax burden imposed on the enterprise, a burden that should be considered when valuing an S corporation. *Gross* v. *Commissioner of Internal Revenue*, T. C. Memo. 1999-254, 78 T.C.M. (CCH) 201, 209 (T.C. 1999), aff'd, 272 F.3d 333 (6th Cir. 2001). Accordingly in *Gross*, the tax court approved, and the United States Court of Appeals for the Sixth Circuit affirmed, a valuation of stock in an S corporation that did not tax affect future earnings. Id., 335. Subsequent to *Gross*, the tax court has repeatedly refused to tax affect estimated earnings to determine the value of an S corporation. See, e.g., *Estate of Gallagher* v. *Commissioner of Internal Revenue*, T. C. Memo 2011-148, p. 12, 101 T.C.M. (CCH) 1702 (T.C. 2011) ("we will not impose an unjustified fictitious corporate tax rate burden on [the company's] future earnings")

The propriety of the application of tax adjustments has been, and remains, the subject of considerable debate, and there is no Connecticut law that mandates a specific approach to tax affecting. Like the tax court, some courts have chosen to reject an adjustment to S corporation cash flows based on taxes. See *In re Radiology Assocsiates, Inc. Litigation*, 611 A.2d 485, 495 (Del. Ch. 1991) (ignoring taxes altogether is only way discounted cash flow analysis can reflect accurately value of cash flow to investors); *In the Matter of the Dissolution of Bambu Sales, Inc.*, New York Supreme Court, 177 Misc. 2d 459, 464–66, 672 N.Y.S. 2d 613 (N.Y. Sup. December 17, 1997) (use of income method approach to value interest of minority shareholder without adjusting for taxes); *Vicario* v. *Vicario*, 901 A.2d 603, 609 (R.I. 2000) (trial court did not abuse discretion in not tax affecting earnings of S corporation).

Some courts, however, take a different view. The Delaware Court of Chancery approved the tax affecting

of S corporation earnings in *Delaware Open MRI Radiology Associates, P.A.* v. *Kessler*, 898 A.2d 290 (Del. Ch. 2006). In *Kessler*, the court rejected both tax affecting at corporate rates and not tax affecting at all. Id. 326–30. Instead, comparing the income that could be received by shareholders in an S corporation and a C corporation after consideration of corporate taxes, dividend taxes and individual taxes, the court calculated a tax adjustment that would equalize the after-tax income each shareholder would receive. Id. The *Kessler* opinion cited to and acknowledged the earlier decision of the Delaware Chancery Court, *In re Radiology Associates, Inc. Litigation*, supra, 611 A.2d 485, and embraced its reasoning that the tax advantages of an S corporation should be given weight in the valuation analysis. *Delaware Open MRI Radiology Associates, P.A.* v. *Kessler*, supra, 327–28. *Kessler*, however, disagreed that the proper method to implement the S corporation tax benefits was to ignore taxes. Id.

The Supreme Judicial Court of Massachusetts approved of this approach in a case involving the valuation of an S corporation in a marital dissolution matter. *Bernier* v. *Bernier*, 449 Mass. 774, 782–83 n.15, 873 N.E. 2d 216 (2007). Some experts on corporate finance continue to advocate for tax affecting despite criticism by the tax court. *Wall* v. *Commissioner of Internal Revenue*, T. C. Memo 2001-75, 81 T.C.M. (CCH) 1425, 1439 n.25 (T.C. 2001).

Against this complicated legal backdrop, the trial court in the present case decided not to tax affect the future cash flow of the corporation. In this regard, the trial court did not abuse its discretion for several reasons. First, such an approach finds considerable support in the previously cited tax cases as well as *Gross*, the only reported decision on tax affecting by a United States Court of Appeals. Second, the trial court in the present case was tasked with determining fair value, not

fair market value. *Kessler*, in particular, was concerned with how willing buyers and sellers in a free market would value the stock in question. *Bernier* likewise involved a fair market valuation. Third, the issue of tax affecting continues to be an open debate among experts in the field. See D. Tinkelman, supra, 65 Tax Law. 557 (appraisal profession considers this controversial area, with some experts believing no S corporation premium is appropriate, and others endorsing use of one of number of different models to measure S corporation premium). Finally, the present case seems particularly ill-suited to tax affecting earnings in light of the corporation's practice of extending loans to shareholders to cover their tax liabilities and then retiring those loans through the payment of bonuses. It was entirely foreseeable that such a practice would continue after the defendant's shares were purchased by the corporation.

Our decision that the trial court did not abuse its discretion in not tax affecting projected future earnings is based on the facts of this case. We discern no bright line rule in this area. A trial court facing the issue of tax affecting in the future would certainly be able to consider cases such as *Gross*, *Kessler* and *Bernier* to decide whether tax affecting is appropriate under the circumstances. We conclude that, in the absence of binding authority, the trial court carefully considered the approaches employed by other jurisdictions and properly exercised its broad discretion by declining to tax affect the corporation's earnings.

B

The corporation next asserts that the trial court erred in not applying a discount to the value of the defendant's shares because of his status as a minority shareholder. The idea behind this so-called minority discount is that in an arms-length transaction, a willing buyer would pay less for a noncontrolling interest in a closely held

corporation. *Pueblo Bancorporation* v. *Lindoe, Inc.*, supra, 63 P.3d 360. The trial court declined to reduce the value of the defendant's shares by a minority discount on the basis of its determination that the defendant had been subjected to oppressive conduct at the hands of the majority shareholders of the corporation. The corporation claims on appeal that the evidence presented at trial did not support the trial court's finding of minority oppression. The corporation also argues that the court improperly awarded attorney's fees and expert witness fees and expenses pursuant to § 33-900 (e) on the basis of that erroneous finding of oppression.

1

We first address the corporation's argument that the trial court erroneously determined that the majority shareholders engaged in oppressive conduct against the defendant. In addressing the defendant's claim of minority oppression, the trial court explained: "In his second amended counterclaim, seeking dissolution of the corporation pursuant to . . . § 33-896 (a) (1) [(B)], [the defendant] limits his claim of oppression to the allegation that, even though he remained a shareholder after his firing in September, 2011, John [Clark] and Carolyn [Manchester] excluded him from the corporation's long-standing policy of providing shareholders with funds to pay the federal tax liabilities they incurred as shareholders in an S corporation." Noting that the defendant's claim of oppression impacted both the corporation's claim for a minority discount and the defendant's claim for attorney's fees and expert witness fees and expenses, the court set forth the following definition of oppression, which is applied in numerous jurisdictions and has been accepted by the parties in this case: "Oppression in the context of a dissolution suit suggests a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing

and a violation of fair play as to which every shareholder who entrusts his money to a company is entitled. . . . [O]ppressive conduct in the corporate dissolution context . . . arise[s] when the controlling directors' conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the firm." (Citation omitted; internal quotation marks omitted.) See, e.g., *Rullan* v. *Goden*, 134 F. Supp. 3d 926, 949 (D. Md. 2015); *Natale* v. *Espy Corp.*, 2 F. Supp. 3d 93, 104 (D. Mass. 2014); *Bontempo* v. *Lare*, 444 Md. 344, 365–66, 119 A.3d 791 (2015); *Muellenberg* v. *Bikon Corp.*, 143 N.J. 168, 178–80, 669 A.2d 1382 (1996); *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 73, 473 N.E.2d 1173, 484 N.Y.S.2d 799 (1984); *Scott* v. *Trans-System, Inc.*, 148 Wash. 2d 701, 710–11, 64 P.3d 1 (2003).

With the foregoing definition in mind, the court set forth the following findings and reasoning: "The facts underlying [the defendant's] claim are not in dispute. [The defendant] testified that his father had begun the practice of making funds available to the shareholders to cover their income tax liabilities on their share of the corporation's profits right from the establishment of the corporation. Brian McAnneny, a financial consultant who has served as the corporation's chief financial officer for many years, affirmed that in 2009, John [Clark] and [the defendant] received approximately $60,000–$70,000 each from the corporation to pay federal income taxes on their share of the corporation's profits. No such payments were made to them in 2010 because the corporation lost money that year. That loss provided both John [Clark] and [the defendant] with a loss carryforward for succeeding years' taxes. . . . McAnneny estimated the amount of the carryforward for each at $200,000, but he provided no documentation of those amounts. Moreover, though he assumed that both John [Clark] and [the defendant] enjoyed the tax benefits of

those carryforwards in 2013 and 2014, he had no first-hand knowledge. And, other evidence revealed that John [Clark] received funds from the corporation in 2013 and 2014 to defray his federal income tax liabilities.

"Carolyn [Manchester] received no funds from the corporation prior to 2011 because she did not become a shareholder until after her father's death that year. Thereafter, she received substantial payments from the corporation for her use in paying her federal tax liability on the corporation's profits.

"For example, in 2014, the corporation's most successful year ever, the pass-through of corporate taxes to each of John [Clark], Carolyn [Manchester] and [the defendant] was $233,786. While John [Clark] and Carolyn [Manchester] received $180,000 each to defray the taxes they were required to pay, [the defendant] received nothing even though, by virtue of his continuing status as a shareholder, he was liable for taxes due on corporate profits. . . .

"John [Clark] and Carolyn [Manchester] seek to justify this disparity in treatment by characterizing the payments to them as 'loans' from the corporation even though no notes were ever signed, no interest was ever charged, no due dates for repayment were ever specified, and the 'loans' were repaid via 'bonuses' they received for that purpose from the corporation. As explained by . . . McAnneny, 'bonuses' were voted by an 'advisory board,' composed of . . . McAnneny and Attorneys Michael McDonald, corporate counsel, and Thomas Generis, counsel for selected corporate matters, specifically for the purpose of allowing John [Clark] and Carolyn [Manchester] to pay down 'loans' they had previously received. Funds sufficient to pay their income taxes on the 'bonuses' were deducted and paid to the government by the corporation. The balance of the 'bonuses' was credited to the loan account for each shareholder carried on the corporation's books.

John [Clark] and Carolyn [Manchester] received no cash from these transactions.

"These 'loans' were carried as receivables on the corporation's books, including those made to [the defendant] prior to 2012. . . . At the end of 2014, John [Clark's] 'loan' balance was $234,333; Carolyn [Manchester's], $203,594. Unless and until the advisory board votes additional 'bonuses' to John [Clark] and Carolyn [Manchester], these 'loans' will remain unpaid.

"According to . . . McAnneny, these 'loans' were made to John [Clark] and Carolyn [Manchester] in their capacity as officers of the corporation, not as shareholders. Further, he testified, were the corporation to make such a 'loan' to [the defendant], who resigned as an officer early in 2012, the [Internal Revenue Service (IRS)] would have forced the corporation to treat it as a dividend, which would have triggered covenants in its outstanding loans, 'probably' resulting in the loans being called. This would have been a 'disaster' for the corporation, he testified.

"The court places little weight on this testimony. . . . McAnneny more than once in his testimony disavowed familiarity with IRS regulations, but he now relied on some unspecified IRS demand to explain why [the defendant] could not be treated the same as his fellow shareholders. He provided no documentation to support his vague testimony that a loan to [the defendant] would have triggered some unspecified covenants in the corporation's outstanding loans and what would be the effect for the corporation. . . .

"McAnneny never explained to the court's satisfaction why the corporation could not make a genuine loan to [the defendant] for the purpose of defraying the potential tax liability on his share of the corporate profits in 2012, 2013 and 2014, memorialized in a promissory note, with a market interest rate and a specified

payoff date. The court concludes that the corporation never seriously considered such a mechanism as a vehicle to treat [the defendant] the same as John [Clark] and Carolyn [Manchester].

"John [Clark] and Carolyn [Manchester] also contend that they did not make the decision whether to provide funds to pay [the defendant's] taxes; rather, the advisory board made that decision, just as the same board decided what salaries to pay John [Clark] and Carolyn [Manchester] and whether to award them 'bonuses' for the purpose of paying down their loan accounts. The court considers this argument disingenuous. Suffice it to say that, should John [Clark] and Carolyn [Manchester], as majority shareholders, be dissatisfied with any of the advisory board's decisions, such as a refusal by the board to 'loan' them more money to pay their taxes, it is entirely within their authority to replace the members of the board with others who would bend to their will.

"They also point to a lack of proof that [the defendant] had any actual tax liability in 2012, 2013 or 2014. . . . But, the advisory board did not 'loan' John [Clark] and Carolyn [Manchester] money only when it was satisfied that they had an actual tax liability. The board made these 'loans' because John [Clark] and Carolyn [Manchester] were shareholders who had a *potential* tax liability by virtue of the corporation's status as an S [corporation]. [The defendant] occupied the same status, yet he was treated differently.

"The court finds that [the defendant] has proven by a preponderance of the evidence that the corporation, through the actions of its majority shareholders, John [Clark] and Carolyn [Manchester], acted in an oppressive manner toward [the defendant], within the meaning of § 33-896 (a) (1). The disparate treatment of [the defendant] deviated from the standard of 'fair dealing' to which he was entitled and 'substantially defeat[ed]

[his] expectation,' based on the corporation's established practice, that funds would be made available to him to defray any tax obligation he had as a shareholder in an 'S [corporation].' " (Footnotes omitted.) On the basis of the foregoing, the court declined to apply a minority discount to the value of the defendant's shares in the corporation.

The corporation now challenges the trial court's finding of oppressive conduct. In support of its claim that the court's finding of oppression was erroneous, the corporation asserts four arguments, all of which were considered and rejected by the trial court, and require little additional discussion. First, the corporation argues that the evidence presented at trial demonstrated that it was the customary practice of the corporation to provide loans only to officers and directors, not to shareholders, to help cover their pass-through tax liabilities. The corporation contends that there was "no basis to conclude that [the defendant] had any reasonable expectation that as merely a shareholder, he would receive loan payment[s] to defray taxes." The corporation asserted this same argument at trial, relying only upon McAnneny's testimony that its practice was to afford the tax benefit only to officers and directors, not shareholders. The court found McAnneny not credible, and rejected the corporation's argument. The corporation failed to establish that it was the custom and practice of the corporation to afford tax assistance only to officers and directors, and not to shareholders. We therefore agree that there is no basis in the record to support the corporation's argument that the defendant did not have a reasonable expectation of assistance from the corporation to cover his pass-through tax liabilities.

Second, the corporation argues that the decision of whether to afford the defendant assistance to cover his pass-through tax liabilities was not made by the

majority shareholders but, rather, was made by the corporation's financial advisory board, and that that decision was founded on the belief that "any such loans to shareholders would be a red flag to the IRS and the loans would be construed as dividends." These arguments also rested on the testimony of McAnneny, who the trial court expressly found not credible. Because it is not the role of this court to second-guess the trial court's credibility determinations, we cannot conclude that the trial court erred in finding the corporation's argument in this regard disingenuous.

Third, the corporation argues that the trial court erred in finding oppressive conduct by the majority shareholders because the defendant failed to establish his tax obligations for the years in question. As the trial court aptly found, it had not been the practice of the corporation to provide loans to officers only after individual tax liabilities were determined. The record supports the trial court's finding that the corporation provided tax adjustments to shareholders who had a potential tax liability, not only to those who proved that they had an actual tax liability.

Finally, the corporation contends that any alleged oppression occurred only after the defendant petitioned for its dissolution because any tax assistance that the defendant may have received for his 2014 tax obligations would not have been awarded until after the valuation date of December 31, 2014. Because the trial court's finding of oppression was not limited to the 2014 tax year, but began in 2011, when the defendant resigned from his position as an officer and director of the corporation, the corporation's argument is unavailing.

On the basis of the foregoing, we conclude that the trial court's finding of minority oppression was not clearly erroneous and, thus, that it did not abuse its discretion by not applying a minority discount to the value of the defendant's shares in the corporation.

2

The corporation also claims that the court erred in awarding attorney's fees and expert witness fees and expenses to the defendant. On the basis of the trial court's finding that the defendant suffered from minority oppression at the hands of the plaintiffs, the court held that he had "probable grounds for relief" and was therefore entitled to attorney's fees and expert witness fees and expenses under § 33-900 (e). The corporation claims that the court erred in awarding those fees and expenses to the defendant on the ground that its determination of minority oppression was erroneous. Because we have concluded, as discussed previously, that the trial court's finding of oppression was supported by the record and, therefore, was not clearly erroneous, the corporation's challenge to the award of attorney's fees and expert witness fees and expenses must fail.

C

The corporation next claims that the trial court erred in not applying a marketability discount to the value of the defendant's shares. The corporation claims that the trial court erred in failing to apply a marketability discount to the value of the defendant's shares because such failure resulted in an "undue financial burden" on the corporation.[11] We are not persuaded.

As noted herein, the application of a marketability discount is generally disfavored when determining the fair value, versus the fair market value, of the shares of a closely held corporation when the shares at issue are to be purchased in lieu of dissolution and where there is to be no actual sale of the shares on the open market. This position is supported by the language of § 33-855. Here, in addressing the corporation's claim

[11] We note that this argument has nothing to do with the actual marketability of the shares at issue.

that the value of the defendant's shares should be discounted for lack of marketability, the court explained that such a discount contemplates "the lack of liquidity on the open market of an ownership interest in a closely held corporation . . . ." The court noted that Connecticut law is "silent on whether and under what circumstances a marketability discount should be applied in valuing a dissenting shareholder's interest in a corporation," but observed that some courts have applied such a discount in the presence of extraordinary circumstances in order to "promote fairness and equity to all parties . . . ." The court then contrasted the facts presented in this case to other cases in which a marketability discount was applied on the basis of extraordinary circumstances where "the full value of a buyout greatly exceeded certain measures of the corporation's financial condition . . . ." That was not the case here.

The court further reasoned: "[T]here is no basis in the evidence or in reason for this court to adopt a certain percentage reduction for a marketability discount in this case. . . . There is no question from the evidence that 2015 was a bad year for the corporation financially, and 2016 appears to have been just as difficult. The court recognizes that requiring a buyout at full value for [the defendant's] share could place unrealistic financial demands on the corporation and reduce the cash flow and earnings necessary for future growth or even survival, especially in view of the large debt load the corporation carries. The way to deal with this issue is in setting the terms and conditions of purchase not in applying an arbitrary percentage discount." (Citations omitted; footnote omitted.) The court thus declined to apply a marketability discount to the value of the defendant's shares of the corporation.

Here, it is clear that the trial court carefully examined the relative finances of the corporation and the value of the defendant's shares, and determined that there

were no extraordinary circumstances that warranted the application of a marketability discount. To be sure, the value of the defendant's one-third share of the corporation is substantial. That is not to say, however, that the corporation should not be required to pay fair value for those shares simply because they are valuable. Of course, the payment for the purchase of the defendant's shares, a purchase voluntarily elected by the corporation, undoubtedly would have some negative impact on the corporation's operations going forward. With that in mind, the court carefully considered the financial burden of its judgment on the corporation, and focused on that burden and the financial viability of the corporation when it fashioned the ten year payment plan afforded to the corporation to satisfy the judgment. The corporation cannot prevail on a claim of extraordinary circumstance and unfair financial burden simply because it might experience difficulty satisfying the court's judgment. We therefore cannot conclude that the court abused its discretion by declining to apply a marketability discount to reduce the value of the defendant's shares in the corporation.

D

The corporation finally claims that the trial court incorrectly accounted for a $92,365 loan due to the corporation from the defendant and erred in ordering it to pay the defendant $87,635 within thirty days of the date of judgment. At trial, the defendant asserted that the $87,635 should be paid, but not deducted from the value of his one-third interest in the corporation. On appeal, the defendant conceded that the trial court's determination was justifiable. We agree with the defendant's position on appeal.

In 2014, the corporation made payments to John Clark and Carolyn Manchester in the amount of $180,000 each for their respective tax liabilities. The

defendant received nothing, although his loan account supposedly received a $180,000 credit. The defendant's loan account at that time had carried a balance of $92,365. Theoretically, the $180,000 credit should have resulted in the payoff of the $92,365 loan, leaving a credit balance of $87,635. The corporation, however, did not account for it in that manner. Instead, it maintained on its books both a loan balance of $92,365, and a credit to the defendant of $87,635 that was held in a restricted account.

The trial court was dubious of the genuineness of the "loans" extended by the corporation, as well as the subsequent ''bonuses'' issued to repay them. In addressing the defendant's loan balance and credit balance reflected on the corporation's books, the trial court did three things. First, it included the $92,365 loan balance as an asset of the corporation and added it, along with the loan balances of other shareholders, to the capitalized cash flow in arriving at the corporation's total value. Second, it essentially gave the defendant credit for the $180,000 bonus provided to the other two shareholders in 2014 by (1) reducing to zero the $92,365 loan balance, and (2) ordering payment to the defendant of the credit balance of $87,635. Third, and importantly, the trial court reduced the value of the defendant's one-third share in the corporation by $87,635.

Given the irregular bookkeeping employed by the corporation, the trial court's treatment of these sums was reasonable and equitable. It neither reduced the value of the defendant's shares to reflect the value of the repaid "loan" as requested by the corporation, nor treated the credit balance as an independent nonoperating asset to be paid in addition to the value of his one-third interest as requested by the defendant. The trial court's decision to add the loan balance to the overall value of the corporation while reducing the value of the defendant's shares by the credit was an imperfect, but justifiable treatment of these sums. In this regard, the trial court did not abuse its discretion.

II

CROSS APPEAL

On cross appeal, the defendant claims that the trial court erred in not awarding him legal fees in accordance with the contingency fee based retainer agreement that he had signed with his counsel. We disagree.

On April 14, 2014, the defendant signed a retainer agreement providing that his counsel would be paid fees in the amount of one third of the amount that he recovered from the plaintiffs. After the court found the value of the defendant's shares of the corporation to be $785,573, the defendant sought attorney's fees from the corporation of one third of that award pursuant to the contingency fee agreement.

In addressing the defendant's request for attorney's fees, the trial court held: "An award of $261,596 for counsel fees, i.e., one third of the value of [the defendant]'s share of the corporation as found by the court, is patently unreasonable when the time sheets kept by his counsel demonstrate that the services rendered costed out at a maximum of $158,620. For that reason and because adhering to the contingency fee agreement entered into by [the defendant] would be 'substantially unfair' to the corporation that will have to pay his 'reasonable' fees; *Schoonmaker v. Lawrence Brunoli, Inc.*, 265 Conn. 210, 270–71, [828 A.2d 64] (2003); the court will depart from the agreement in determining what are the fees to be awarded [the defendant]." The court proceeded to consider the time sheets and affidavits submitted by the defendant's counsel, and ruled that the defendant was entitled to attorney's fees for services rendered by his counsel for the time period of June 18, 2015, to October 31, 2016, to be calculated at an hourly rate of $350. The court ordered the defendant's attorney to file a statement of claimed attorney's fees consistent with its ruling.

The defendant thereafter moved for reargument or for reconsideration of the court's decision not to enforce the contingency fee agreement, and the court summarily denied that motion. The court subsequently ruled, by way of written memorandum of decision filed on June 19, 2017, that the defendant was entitled, inter alia, to attorney's fees in the amount of $150,045. The defendant now challenges the trial court's award of attorney's fees on the ground that it erred in departing from the contingency fee agreement.

"In reviewing the defendant['s] claim, we are mindful of the delicate nature of the trial court's duty in calculating reasonable attorney's fees, and that [t]he amount of attorney's fees to be awarded rests in the sound discretion of the trial court and will not be disturbed on appeal unless the trial court has abused its discretion. . . . The trier is always in a more advantageous position to evaluate the services of counsel than are we. . . .

"Moreover, as discussed previously, Connecticut follows the American rule, a general principle under which, attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Citations omitted; internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 268–69.

In *Schoonmaker*, our Supreme Court held that "when a contingency fee agreement exists, a two step analysis is required to determine whether a trial court permissibly may depart from it in awarding a reasonable fee pursuant to statute or contract. The trial court first must analyze the terms of the agreement itself. . . . If the agreement is, by its terms, reasonable . . . the trial court may depart from its terms only when necessary to prevent substantial unfairness to the party, typically

a defendant, who bears the ultimate responsibility for payment of the fee. . . . By contrast, if the trial court concludes that the agreement is, by its terms, unreasonable, it may exercise its discretion and award a reasonable fee in accordance with the factors enumerated in rule 1.5 (a) of the Rules of Professional Conduct." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 270–72.

Here, the defendant claims that the trial court "omitted the first step [of the analysis required under *Schoonmaker*] and never undertook an analysis of the terms of the fee agreement itself. Instead, the sole basis for the trial court's determination that the fee awardable under the [retainer] agreement was unreasonable was [its] comparison to counsel's time sheets, a comparison that was irrelevant to the first step of the analysis." The defendant acknowledges that "the trial court recited compliance with this standard," but that "no analysis was provided" and that "the record does not support [the trial court's] conclusion [that an award of attorney's fees based upon the retainer agreement would be substantially unfair]." To the contrary, because the trial court reached the issue of substantial unfairness, the court necessarily first analyzed the terms of the contingency agreement itself, and found that those terms were reasonable. Inferring that the trial court considered the first step required in *Schoonmaker* before moving to the second step of substantial unfairness is consistent with the well settled principle that "[i]n determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling." (Internal quotation marks omitted.) *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 645, 203 A.3d 645, cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019).[12]

[12] Indeed, the parties did not dispute the reasonableness of the terms of the contingency fee agreement itself.

The defendant also argues that the court erred in finding that adherence to the contingency fee agreement would be substantially unfair to the corporation. The defendant contends that "[i]t is not substantially unfair for the corporation to satisfy a reasonable contingency fee owed by [the defendant]" and that the court failed to set forth any factual findings in support of its determination that a fee awarded under the contingency fee agreement would be substantially unfair. In so arguing, the defendant overlooks the trial court's finding that "[a]n award of $261,596 for counsel fees, i.e., one-third of the value of [the defendant's] share of the corporation as found by the court, is patently unreasonable when the time sheets kept by his counsel demonstrate that the services rendered costed out at a maximum of $158,620." In so doing, the court was not holding that the contingency fee agreement itself was unreasonable, but, rather, that the award resulting from that agreement was unreasonable in light of the fact that it was over $100,000 more than an award based upon the amount of and cost of services actually rendered by the defendant's attorneys. That finding is sufficient to sustain the trial court's determination that adhering to the contingency fee agreement would be substantially unfair to the corporation. Moreover, it is clear from the several memoranda of decision issued by the trial court in this case that the court was guided in those decisions by an overarching goal of ensuring fairness to both parties, including ensuring the future financial viability of the corporation. We therefore conclude that the court did not abuse its discretion in declining to award attorney's fees pursuant to the contingency fee agreement between the defendant and his counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

M. B. *v.* S. A.*
(AC 42149)

DiPentima, C. J., and Lavine and Bishop, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court denying an application for relief from abuse that he had filed, pursuant to statute (§ 46b-15), and issuing sanctions against him. On appeal, the plaintiff claimed, inter alia, that the trial court, in making certain findings, failed to consider certain facts in evidence. *Held*:

1. The trial court did not abuse its discretion in denying the plaintiff's application for relief from abuse from the defendant; the record showed that the court did, in fact, consider the evidence that the plaintiff claimed it ignored, the factual findings made by the court were supported by testimony that the court alone had the discretion to credit or to disregard, and the fact that the plaintiff disagreed with the outcome did not render the court's factual findings clearly erroneous.
2. The trial court did not abuse its discretion in issuing sanctions against the plaintiff and ordering him to pay attorney's fees to the defendant pursuant to the applicable rule of practice (§ 1-25) for filing a frivolous application; that court made it clear that it considered the plaintiff's actions throughout the course of the parties' litigation and, in the context of § 1-25, found the plaintiff's argument that he had a good faith basis for filing the application at issue to be unpersuasive.

Argued October 10—officially released December 10, 2019

Procedural History

Application for relief from abuse, brought to the Superior Court in the judicial district of Stamford, where the court, *Sommer*, *J.*, granted the application; thereafter, the court granted the defendant's motions to vacate and transfer and for reargument or reconsideration and transferred the matter to the judicial district of New Haven, where the court, *Tindill*, *J.*, denied the

* 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.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2012); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

application and issued sanctions against the plaintiff, and the plaintiff appealed to this court. *Affirmed.*

M. B., self-represented, the appellant (plaintiff).

Opinion

PER CURIAM. The self-represented plaintiff, M. B., appeals from the trial court's order denying his application for relief from abuse seeking the issuance of a domestic violence restraining order against the defendant, S. A., who he alleges has engaged in a "continuous pattern of stalking and harassment." Specifically, the plaintiff contends that the court abused its discretion in (1) denying his application for relief from abuse and (2) issuing sanctions against him pursuant to Practice Book § 1-25 for filing a frivolous application for relief from abuse. We affirm the judgment of the trial court.

The following facts, as evidenced by the record, and procedural history are relevant to our consideration of this appeal. On August 3, 2018, the plaintiff filed, pursuant to § 46b-15, an application for relief from abuse seeking a temporary restraining order against the defendant. The plaintiff alleged in the application for relief from abuse that the defendant engaged in a "clear and continuous pattern of stalking and harassment" that included incidents of her secretly photographing the plaintiff in public, and hiring a third party to surveil the plaintiff at his apartment in Greenwich. The court, *Tindill*, *J.*, thereafter set a hearing date for August 17, 2018. That hearing resumed on September 10, 2018, and concluded on September 11, 2018.

At the hearing, both the defendant and the self-represented plaintiff appeared, testified, and submitted evidence on the issue of the plaintiff's application for relief from abuse. The court, *Tindill*, *J.*, subsequently denied the plaintiff's application for relief from abuse and, pursuant to Practice Book § 1-25, issued sanctions against him for filing a frivolous General Statutes § 46b-15 appli-

cation.[1] Accordingly, the plaintiff was ordered to pay the defendant's attorney's fees incurred in defending against the application. This appeal followed.[2] Additional facts and procedural history will be set forth as necessary.

Though the plaintiff has presented ten issues on appeal,[3] the substance of his claims is encapsulated within two broader claims. The plaintiff asks this court to consider whether the trial court abused its discretion in (1) denying his application for relief from abuse on

[1] The plaintiff previously had filed an application for relief from abuse from the defendant on May 14, 2018, in the judicial district of Stamford, which was granted by the trial court, *Sommer*, *J.*, after a hearing on June 19, 2018. The court issued an order of protection against the defendant with an expiration date of June 19, 2019. On July 3, 2018, the defendant filed a motion to vacate and transfer, and a motion for reargument/reconsideration, to which the plaintiff objected on July 13, 2018.

On July 30, 2018, the court heard arguments on the defendant's motion to vacate and transfer the protection order, and subsequently vacated the order and transferred the matter to the judicial district of New Haven where the parties' custody matter was pending. The matter officially was transferred on August 10, 2018.

The plaintiff interpreted "vacated and transferred" to mean that he would have to refile his application for relief from abuse in the appropriate venue and, accordingly, he filed the application at issue here in the judicial district of New Haven on August 3, 2018. The present application is virtually identical to that which Judge Sommer vacated and transferred on July 30, 2018. Both applications were adjudicated by Judge Tindill in the September 11, 2018 proceeding.

[2] The defendant did not file a brief in this appeal. On June 25, 2019, this court ordered that the appeal be considered on the basis of the plaintiff's brief and the record only.

[3] On appeal, the plaintiff claims that the court abused its power "[1] in finding that the defendant did not [stalk or harass the] plaintiff . . . [2] in finding that the defendant did not [block the] plaintiff from exiting a parking lot . . . [3] in denying [the] plaintiff's attempt to introduce exhibits/evidence of a third party stalking . . . [4] in finding that [the] plaintiff was not terrified by the defendant . . . [5] in finding that the plaintiff was not the victim of an assault by the defendant on August 22, 2014 . . . [6] in finding that [the] plaintiff's future applications for restraining order[s] shall not contain allegations [of events occurring] prior to September 11, 2018 . . . [7] in finding that [the] plaintiff purposefully [left] out certain information in his applications . . . [8] in finding that [the] plaintiff abused the [§] 46b-15 process in an attempt to have the defendant arrested . . . [9] in finding that [the] plaintiff harasses the defendant [and] [10] in finding that [the] plaintiff shall be sanctioned and pay attorney's fees for the defendant."

the basis of the evidence presented at trial and (2) issuing sanctions in the form of attorney's fees against him for filing a frivolous § 46b-15 application. Following our review of the record, we conclude that the trial court did not abuse its discretion. We address both claims in turn.

I

The plaintiff's first claim on appeal is that the court abused its discretion in denying his application for relief from abuse from the defendant. Specifically, the plaintiff claims that the court erred in making several findings by improperly considering or failing to consider certain facts in evidence. For example, the plaintiff asserts that the court "abused its power . . . in finding that the plaintiff was not terrified by the defendant." Additionally, the plaintiff contends that the court "abused its power . . . in denying [the] plaintiff's attempt to introduce exhibits/evidence of a third party stalking." The record reveals that the court did in fact admit the evidence that the plaintiff claims was not introduced. The plaintiff also argues that the court did not give the weight to the evidence that he felt it deserved. We disagree.

We first set forth the applicable standard of review. "The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not

reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Krahel* v. *Czoch*, 186 Conn. App. 22, 47, 198 A.3d 103, cert. denied, 330 Conn. 958, 198 A.3d 584 (2018).

"It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony . . . and the trial court is privileged to adopt whatever testimony [she] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *Bay Hill Construction, Inc.* v. *Waterbury*, 75 Conn. App. 832, 837–38, 818 A.2d 83 (2003).

The record reveals that the court, *Tindill, J.*, held a hearing on September 11, 2018, prior to issuing the judgment and sanctions now on appeal. The record further indicates that, at that hearing, "[t]he [c]ourt heard evidence from the plaintiff applicant and the defendant respondent. The [c]ourt took judicial notice of relevant portions of various court files, specifically pleading number 105.02, which is a July 30, 2018 excerpt of [o]rders by Judge Sommer in the Stamford-Norwalk [j]udicial [d]istrict. There were eight exhibits introduced into evidence. The [c]ourt also considered proposed orders of the defendant respondent and opposing argument of the plaintiff applicant and the defendant respondent counsel." Thus, the court did consider the evidence that the plaintiff claims it ignored.

Additionally, the factual findings made by the court that the plaintiff now challenges were supported by testimony that the court alone had discretion to either

credit or disregard. The fact that the plaintiff disagrees with the outcome does not render the court's factual findings clearly erroneous. Because factual findings and credibility determinations are well within the province of the trial court, the trial court did not abuse its discretion in making the factual findings it did to support its denial of the plaintiff's application in the present case.

II

The plaintiff's second claim is that the trial court abused its discretion in sanctioning him and awarding attorney's fees to the defendant.[4] We disagree.

"[W]e review the trial court's granting of a motion for sanctions and attorney's fees for an abuse of discretion. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Przekopski* v. *Zoning Board of Appeals*, 131 Conn. App. 178, 198, 26 A.3d 657, cert. denied, 302 Conn. 946, 30 A.3d 1 (2011).

Pursuant to Practice Book § 1-25, the trial court has the authority to impose sanctions and award attorney's fees where a party files a document that violates § 1-25 (a), which provides in relevant part that "[n]o party . . . shall bring . . . an action . . . unless there is a basis in law and fact for doing so that is not frivolous. . . ." At the September 11, 2018 hearing, the court

[4] Although the total amount of attorney's fees awarded was not yet determined by the court at the time that the plaintiff filed this appeal, the plaintiff nonetheless has appealed from a final judgment. See *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1988) (adopting bright line rule that "a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined").

informed the plaintiff of the following: "You have for four years—a better part of four years, represented yourself . . . quite well, better quite frankly than some attorneys that come before me. So you were not confused about this process. You are not unable to read and understand the forms . . . . So I reject out of hand your argument that [the provisions of § 1-25] don't apply to what you have done in this case."[5] The court made clear that it considered the plaintiff's actions throughout the course of the parties' litigation and, in the context of § 1-25, found the plaintiff's argument that he had a good faith basis for filing the application at issue to be unpersuasive. Accordingly, the trial court's issuance of sanctions against the plaintiff and order for him to pay attorney's fees to the defendant pursuant to § 1-25 for filing a frivolous application was not an abuse of its discretion.

The judgment is affirmed.

M. B. *v.* S. A.*
(AC 42237)

DiPentima, C. J., and Lavine and Bishop, Js.

Syllabus

The plaintiff, who previously had filed an application for joint custody of his minor child with the defendant, to whom he was never married, appealed to this court from orders of the trial court granting certain postjudgment motions for contempt filed by the defendant and awarding her attorney's fees. After the trial court awarded sole legal and primary

[5] The court later added, "[the defendant is asking] [w]hether or not I should sanction you under [§ 1-25] because you knew that you hadn't gotten relief in Stamford. You knew that when you go to the police—and by your own testimony [that] the goal was to get [the defendant] arrested because as you say that's the only thing you believe will stop her. That was your testimony. That's why you filed [the restraining order application] here on August 3 so I'm trying to give you an opportunity to argue why it is that you should not be sanctioned under that Practice Book section."

* 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.

physical custody of the parties' minor child to the defendant and ordered the plaintiff to pay child support to the defendant, the plaintiff filed a separate appeal from that judgment. While that appeal was pending, the trial court granted multiple postjudgment motions for contempt filed by the defendant for the plaintiff's failure to make, inter alia, child support payments, and ordered the plaintiff to pay attorney's fees incurred by the defendant in litigating her motions for contempt. On appeal, the plaintiff claimed that the trial court erred in finding him in contempt for nonpayment of support orders while those orders were on appeal, prioritizing the resolution of motions for contempt over a pending motion pertaining to visitation, failing to consider his financial affidavits, awarding attorney's fees to the defendant and accepting the defendant's affidavits of fees with incorrect docket numbers. *Held*:

1. The trial court did not abuse its discretion in granting the defendant's postjudgment motions for contempt against the plaintiff for his failure to make timely support payments; the plaintiff having failed to file a motion for a stay of the support orders during the pendency of the appeal, his weekly support payments were still due as scheduled.
2. The trial court did not abuse its discretion in scheduling and adjudicating the defendant's postjudgment motions for contempt before resolving the defendant's motion for modification of visitation; that court had broad discretion to manage its docket and resolve cases as it saw fit, and the record did not reveal, nor did the plaintiff point to, any evidence establishing that the court's decision was unreasonable, as it was reasonable for the court to dispose of motions in the manner it considered to be most efficient, especially given the number of motions filed by both parties throughout this case.
3. The plaintiff could not prevail on his claim that the trial court erred in not considering his financial affidavits in ruling on the defendant's motions for contempt; it was plain from the record that the court did consider the evidence the plaintiff presented but found his affidavits and testimony to be not credible, and that he had the ability to pay his portion of ordered child care expenses, and because the court had the sole discretion to assign weight to the evidence, it was free to make that credibility determination, and it did not abuse its discretion in finding the plaintiff in contempt for failing to make support payments.
4. The trial court did not abuse its discretion in ordering the plaintiff to pay attorney's fees incurred by the defendant in connection with her postjudgment contempt motions; although the plaintiff claimed that a ruling of the court regarding arrearages had the effect of vacating the contempt orders underlying the arrearages, the court's order vacating any findings of arrearages, which was made in accordance with this court's decision in the plaintiff's separate appeal, did not trigger a retroactive vacation of the underlying contempt orders or the related sanctions, and, thus, the contempt orders stayed intact.

5. The trial court did not abuse its discretion by accepting certain financial affidavits that had been filed by the defendant under incorrect docket numbers; a scrivener's error such as an incorrect docket number constitutes a circumstantial defect and does not deprive the trial court of jurisdiction.

Argued October 10—officially released December 10, 2019

Procedural History

Application for custody of the parties' minor child, brought to the judicial district of Stamford-Norwalk and transferred to the judicial district of New Haven, where the court, *Tindill*, *J.*, rendered judgment in favor of the defendant; thereafter the court granted the defendant's motions for contempt and awarded her attorney's fees, and the plaintiff appealed to this court. *Affirmed*.

M. B., self-represented, the appellant (plaintiff).

David M. Moore, for the appellee (defendant).

Opinion

BISHOP, J. The self-represented plaintiff, M. B., appeals from the trial court's orders, rendered in a child custody action, granting certain postjudgment motions for contempt filed by the defendant, S. A., and awarding her attorney's fees as a sanction against the plaintiff. Specifically, the plaintiff contends that the court erred in (1) finding him in contempt for nonpayment of support orders when the support orders were on appeal, (2) prioritizing the resolution of motions for contempt over a simultaneously pending motion pertaining to child visitation (3) failing to consider financial affidavits he had submitted, (4) awarding the defendant attorney's fees in connection with the granted contempt motions, and (5) accepting the defendant's affidavits of fees with incorrect docket numbers. We affirm the judgment of the trial court.

The following facts, as evidenced by the record, and procedural history are relevant to this appeal. The plaintiff and the defendant are an unmarried couple who are

the parents of their minor child, born in June, 2014. After the child's birth, the plaintiff filed an action seeking joint legal custody of the child. By way of a memorandum of decision issued on September 7, 2016, the trial court, *Tindill*, *J.*, awarded sole legal and primary physical custody to the defendant. The award provided for the plaintiff to have parenting time on weekends, restricted entirely to the town of Greenwich. The plaintiff, who resided in New York City at the time, thereafter rented an apartment in Greenwich solely to exercise parenting time with his child. The award further ordered the plaintiff to pay $253 per week to the defendant in child support payments. Additionally, the court granted a number of motions for contempt filed by the defendant that were predicated on the plaintiff's failure to pay unreimbursed medical expenses and work-related child care, as ordered pendente lite, and the court calculated an arrearage. On November 18, 2016, the court issued a corrected memorandum of decision in which, inter alia, it corrected various grammatical and calculation errors.

Prior to the issuance of the corrected memorandum of decision on November 18, 2016, the plaintiff filed an appeal on September 22, 2016, asking this court to consider whether the trial court erred in not considering how its orders impacted his rental expenses for the Greenwich apartment that he is required to maintain to have parenting time with his child.

During the pendency of that appeal, between October, 2016 and June, 2017, the defendant filed multiple postjudgment motions for contempt against the plaintiff for failing to make both arrearage payments and child support payments as required by the September 7, 2016 support orders. On June 16, 2017, the court ordered the defendant to submit an affidavit regarding attorney's fees she had incurred in pursuing her postjudgment motions for contempt.

On December 11, 2017, the court granted one of the defendant's motions for contempt, filed on October 17, 2016, finding that the plaintiff had failed to pay his required share of the work-related child care expenses. Following the plaintiff's failure to pay the arrearage by the date set by the court, January 31, 2018, the court ordered the plaintiff to be incarcerated, setting a purge amount of $15,000. The plaintiff paid the purge amount that same day and was released from custody. On April 16, 2018, the court granted four more of the defendant's postjudgment motions for contempt, two of which were filed on December 21, 2016, and two others that were filed on March 9, 2017, determining that the plaintiff had failed to pay work-related child care costs, unreimbursed medical expenses, child support payments, and child support arrearages.

In May, 2018, this court issued its decision in the prior appeal. This court determined that the trial court had abused its discretion in failing to analyze whether the plaintiff's significant visitation expenses warranted a deviation from the child support guidelines and remanded the matter for a new hearing on this issue. This court otherwise affirmed the judgment of the trial court.

Also in May, 2018, the trial court issued an order vacating its findings of arrearages with respect to the expenses underlying the defendant's postjudgment motions for contempt.[1] On October 15, 2018, the trial court ordered $9825 in attorney's fees to be paid by the plaintiff in connection with expenses incurred by the defendant for litigating those same motions for contempt. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[1] The order provides as follows: "In light of the Appellate Court decision . . . the court hereby vacates any findings of arrearages of child support, childcare expenses, and unreimbursed medical expenses with respect to defendant's postjudgment motions for contempt # 258.01, # 258.02, # 263, and # 266."

We first set forth the applicable standard of review. "The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case, such as demeanor and attitude of the parties at the hearing. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . .

"[Further, in] determining [whether there has been an abuse of discretion] the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . [W]e do not review the evidence to determine whether a conclusion different from the one reached could have been reached." (Citations omitted; internal quotation marks omitted.) *Stewart* v. *Stewart*, 57 Conn. App. 335, 336–37, 748 A.2d 376, cert. denied, 253 Conn. 918, 755 A.2d 216 (2000).

I

On appeal, the plaintiff claims that the court abused its discretion by granting the defendant's postjudgment motions for contempt against him for failing to make required support payments, as set forth in the September 7, 2016 support orders, while the plaintiff's appeal of the support orders was pending. We disagree.

It is well established in our case law that filing an appeal from a family support order does not automatically stay the order's payment requirements. See *Wolyniec* v. *Wolyniec*, 188 Conn. App. 53, 55 n.2, 203 A.3d

1269 (2019); see also Practice Book § 61-11.[2] Therefore, if a party in a family matter wishes the court to stay a family support order during an appeal, that party must file a motion to stay the order pursuant to § 61-11 (c).

Here, the support orders at issue were entered on September 7, 2016, and the plaintiff filed his appeal from the support orders on September 23, 2016. The plaintiff never moved for a stay of the court's support orders and, as a result, his weekly support payments were still due as scheduled. Accordingly, the court did not abuse its discretion in granting the defendant's postjudgment motions for contempt against the plaintiff for his failure to make timely support payments.

II

The plaintiff's second claim is that the court abused its discretion when it scheduled and adjudicated the defendant's postjudgment motions for contempt before resolving the defendant's motion for modification of the visitation schedule. Specifically, the plaintiff claims that because the court appeared to prioritize the resolution of the motions for contempt over the motion to modify the visitation schedule, the court abused its discretion. This claim is baseless.

It is well recognized that ''[t]he trial court has a responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. . . . In addition, matters involving judicial

[2] Practice Book § 61-11 (c) provides in relevant part: "Unless otherwise ordered, no automatic stay shall apply to . . . orders of periodic alimony, support, custody or visitation in family matters brought pursuant to chapter 25 . . . . The automatic orders set forth in Section 25-5 (b) (1), (2), (3), (5) and (7) shall remain in effect during any appeal period and, if an appeal is filed, until the final determination of the cause unless terminated, modified or amended further by order of a judicial authority upon motion of either party."

economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court." (Internal quotation marks omitted.) *Yuille* v. *Parnoff*, 189 Conn. App. 124, 128, 206 A.3d 766, cert. denied, 332 Conn. 902, 208 A.3d 659 (2019). "The court inherently holds reasonable control over its schedule." *Lane* v. *Lane*, 84 Conn. App. 651, 654, 854 A.2d 815 (2004).

Here, the plaintiff claims that the court abused its discretion when it held hearings to resolve the defendant's numerous contempt motions filed immediately following the court's November 18, 2016 corrected memorandum of decision, but prior to the resolution of the defendant's motion for modification of visitation. The guardian ad litem filed a motion for contempt against the plaintiff on December 20, 2016. The defendant's postjudgment motions for contempt at issue were filed on December 21, 2016, and March 9, 2017. The defendant's motion for modification, filed January 30, 2017, was first scheduled for a hearing on March 20, 2017, and was thereafter continued to May 8, 2017, and then to November 27 through 29, 2017. On November 27, 2017, the defendant filed a motion for a continuance, and the court reassigned the hearing on the motion for modification to December 27 through 29, 2017.

In the meantime, the court scheduled a hearing on May 11, 2017, to hear the postjudgment motions for contempt filed against the plaintiff by the defendant and the guardian ad litem. The hearing relevant to the guardian ad litem's motion for contempt concluded on June 16, 2017, and the motion was granted on December 3, 2017. The hearing relevant to the defendant's motions for contempt at issue concluded on July 14, 2017, and the motions were later granted on December 11, 2017, April 16, 2018, and April 17, 2018.

As we have noted, the court has broad discretion to manage its docket and resolve cases as it sees fit. See *Yuille* v. *Parnoff*, supra, 189 Conn. App. 128. In this instance, the court scheduled and concluded its hearings on the motions for contempt prior to scheduling a hearing on the motion for modification. However, the record does not reveal, nor has the plaintiff pointed to, any evidence establishing that the court's decision to manage the docket in this manner was unreasonable. Indeed, given the number of motions filed by both parties throughout this case, it is reasonable for the court to dispose of motions in the manner it considers to be most efficient. Therefore, although we acknowledge that some of the motions for contempt chronologically were filed after the motion for modification, the trial court nevertheless had broad discretion to hear pending motions in the order it deemed most appropriate in this case. Accordingly, the court did not abuse its discretion.

III

The plaintiff's third claim is that the court erred in "not considering [the plaintiff's] financial affidavit[s]" in ruling on the defendant's motions for contempt. Specifically, the plaintiff claims that, had the court considered properly his affidavits, it could not have reasonably concluded that his nonpayment of the required support payments was wilful because his finances were insufficient to afford his support obligations. We disagree.

"It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony . . . and the trial court is privileged to adopt whatever testimony [she] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *Bay Hill Construction, Inc.* v. *Waterbury*, 75 Conn. App. 832, 837–38, 818 A.2d 83 (2003).

Despite the plaintiff's urgings, there is no necessary correlation between the plaintiff's disagreement with the court's orders and the question of whether the court considered the plaintiff's affidavits in framing its orders. Also, at various points the court stated that, while it did review the evidence submitted on the plaintiff's behalf, it found the plaintiff's affidavits and testimony to not be credible. In the court's October 6, 2016 memorandum of decision issued in response to a motion for articulation filed by the plaintiff regarding the court's determination of the plaintiff's minimum net annual earning capacity, the court found that, at trial, "(1) the [plaintiff's] testimony regarding his current earnings, living expenses, debts and liabilities, financial resources and assets was neither forthcoming nor honest, and (2) the information on the [plaintiff's] sworn financial affidavits regarding his income from employment and expenses was not truthful." Additionally, in ruling on the defendant's motions for contempt on December 11, 2017, the court affirmed its finding that the plaintiff had the ability to pay his portion of ordered child care expenses.[3] The court stated: "The [p]laintiff's testimony and evidence regarding his personal and business income, profit, business expenses, accounting, debts, and liabilities are not credible. . . . There is no credible evidence before the [c]ourt regarding how the [p]laintiff meets his monthly personal and business expenses."

Because it is plain from the record that the evidence the plaintiff presented was, indeed, considered by the court, though not necessarily credited, and because the judge had the sole discretion to assign weight to the evidence, the court here was free to find the plaintiff's

[3] The court supported this determination by explaining that the evidence established that "[t]he [p]laintiff's business . . . of which he is 100 [percent] owner, president, and only employee, loaned him $242,789 according to his April 28, 2017 financial affidavit ([p]laintiff's exhibit 4). Further, the [p]laintiff has paid for discretionary, noncourt-ordered debts and liabilities in full since September, 2016."

testimony and evidence not to be credible. Accordingly, the court did not abuse its discretion in finding the plaintiff to be in contempt for failing to make support payments.

IV

The plaintiff's fourth claim is that the court erred in awarding the defendant attorney's fees in connection with the granted contempt motions. Specifically, the plaintiff asserts that the court's May 15, 2018 ruling regarding arrearages had the effect of vacating the contempt orders underlying the arrearages assigned by the court on April 16, 2018. The plaintiff therefore claims that the court abused its discretion when it ordered him to pay the legal fees incurred by the defendant in connection with her postjudgment contempt motions filed between October 31, 2016, and September 10, 2018. We disagree.

The plaintiff's contention that the court vacated its contempt orders is simply incorrect. The court's May 15, 2018 order provides: "In light of the Appellate Court decision . . . the court hereby vacates *any findings of arrearages* of child support, childcare expenses, and unreimbursed medical expenses with respect to defendant's postjudgment motions for contempt # 258.01, # 258.02, # 263, and # 266." (Emphasis added.) The vacation of the arrearage amount in this instance does not trigger a retroactive vacation of the underlying contempt orders or the related sanctions. Therefore, while the arrearage amounts owed by the plaintiff were vacated pursuant to the order, the contempt orders themselves remained intact, along with the attorney's fee sanctions subsequently imposed on October 15, 2018. Accordingly, the court did not abuse its discretion.

V

The plaintiff's fifth and final claim on appeal is that the court "erred in accepting affidavits of fees with incorrect docket number[s]." We disagree.

General Statutes § 52-123 provides: "No writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court."

"Furthermore, our Supreme Court has held that the use of an incorrect docket number is a circumstantial defect. In *Plasil* v. *Tableman*, 223 Conn. 68, 612 A.2d 763 (1992), our Supreme Court reviewed whether a trial court had subject matter jurisdiction to grant prejudgment remedies in a case in which an incorrect docket number that referred to a previously dismissed case was used. The court held that [t]he failure to collect an entry fee for the re-served complaint or to assign it a new docket number did not deprive the court of jurisdiction or presumptively prejudice the defendants. To strip the plaintiff of her prejudgment remedies would neither facilitate the business of the court nor advance justice, but rather would serve merely to exalt technicalities above substance." (Internal quotation marks omitted.) *State* v. *Gillespie*, 92 Conn. App. 143, 152–53, 884 A.2d 419 (2005).

Here, the plaintiff argues that because the defendant misfiled three affidavits of fees under incorrect docket numbers, the court "abused its power" in accepting those affidavits in connection with the present case. It is clear that a scrivener's error such as an incorrect docket number will not deprive the court of jurisdiction, as it constitutes merely a circumstantial defect. See General Statutes § 52-123. Therefore, the court did not abuse its discretion by accepting the financial affidavits submitted by the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

PAUL DOMBROWSKI *v.* CITY OF NEW HAVEN ET AL.
(AC 40899)

Alvord, Moll and Norcott, Js.

Syllabus

The plaintiff, a retired police officer, appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner denying his motion to open a certain stipulation that he and the defendants, the city of New Haven and its workers' compensation administrator, had executed to settle several pending workers' compensation claims related to his employment with the city. The plaintiff had agreed to accept a settlement of his claims for $22,500. On the morning of the stipulation approval hearing before the commissioner, the defendants' counsel presented the plaintiff with the stipulation and a settlement agreement, neither of which the plaintiff had seen before and both of which he signed. The stipulation did not reference the settlement agreement, which required the plaintiff to waive, inter alia, causes of action under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.). At the stipulation approval hearing, the commissioner canvassed the plaintiff with regard to the stipulation, and approved it after determining that the plaintiff had executed it knowingly and voluntarily. None of the parties asked the commissioner to review or to sign the settlement agreement, and the commissioner did not examine or sign the settlement agreement. After the plaintiff received a $22,500 settlement check, he returned it and sought to open the stipulation pursuant to statute (§ 31-315). He claimed, inter alia, that the stipulation was nugatory on the ground that his execution of the settlement agreement was not knowing and voluntary because the parties had agreed to settle only the workers' compensation claims. The commissioner concluded that opening the stipulation was not warranted because, inter alia, the plaintiff had failed to offer any evidence of fraud, misrepresentation, accident or mistake. The board thereafter affirmed the commissioner's denial of the motion to open, determining that the parties had agreed that the plaintiff would receive $22,500 for the withdrawal of the workers' compensation claims, that he was canvassed with respect to the stipulation by the commissioner who presided at the stipulation approval hearing, and that no mistake was made that warranted the opening of the stipulation. The board further concluded that the plaintiff would need to seek redress in a forum that has jurisdiction to consider issues relative to the settlement agreement. On the plaintiff's appeal to this court, *held* that the board did not err in affirming the commissioner's denial of the plaintiff's motion to open the stipulation, as the board and the commissioner correctly concluded that the Workers' Compensation Commission lacked subject

matter jurisdiction to entertain issues that related to the settlement agreement: the plaintiff presented no claims that challenged the integrity of the settlement of his workers' compensation claims, as he had agreed to be paid $22,500 in exchange for the settlement, he was canvassed, adequately by his own admission, with respect to the stipulation, and the $22,500 sum was remitted to him, and the issues he raised as to the waiver of any rights he may have had were beyond the commission's jurisdiction, which is limited by statute to claims arising out of the Workers' Compensation Act (§ 31-275 et seq.); moreover, this court declined to review the merits of the various claims the plaintiff raised in his appellate briefs, as those claims were not presented to the commissioner during the underlying proceedings.

Argued September 19—officially released December 10, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District denying the plaintiff's motion to open a certain stipulation, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Paul T. Dombrowski, self-represented, the appellant (plaintiff).

Brian L. Smith, for the appellees (defendants).

Opinion

MOLL, J. The self-represented plaintiff, Paul Dombrowski, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Third District (commissioner) of the Workers' Compensation Commission (commission), denying the plaintiff's motion to open a stipulation executed by the plaintiff and the defendants, the city of New Haven (city) and the Connecticut Interlocal Risk Management Agency (CIRMA). On appeal, the plaintiff raises a number of claims that, in essence, challenge the propriety of the board's decision affirming the commissioner's denial of his motion to open. We affirm the decision of the board.

The following procedural history and facts, as found by the commissioner in her "finding and dismissal,"

dated October 11, 2016, or as undisputed in the record, are relevant to our resolution of this appeal. The plaintiff is a retired police officer who was formerly employed by the city.[1] Following his retirement, the plaintiff sought to settle certain pending workers' compensation claims relating to several injuries that he had sustained during his employment with the city. After numerous informal hearings, the plaintiff, without the assistance of counsel, agreed to accept a global settlement of his workers' compensation claims for a lump sum payment of $22,500. The settlement was contingent upon the approval of the funds by the city's litigation settlement committee, which approved the funds on September 23, 2015. On September 29, 2015, the commission issued a notice providing that a stipulation approval hearing was scheduled for September 30, 2015.

On the morning of September 30, 2015, prior to the stipulation approval hearing, the plaintiff, accompanied by Craig Miller, the president of the police union, met with the defendants' counsel. The defendants' counsel presented the plaintiff with two documents: (1) a "Stipulation," dated September 28, 2015 (stipulation); and (2) a "Settlement Agreement, General Release and Covenant Not to Sue," dated September 29, 2015 (settlement agreement). The stipulation provided in relevant part: "[I]t is agreed by and between the parties hereto that the [defendants] shall pay to the [plaintiff] in addition to the compensation and medical benefits already paid by the [defendants] the further sum of [$22,500], the same is to be in full, final and complete settlement, adjustment accord, and satisfaction of all claims which the aforesaid [plaintiff] might otherwise have against the [defendants], or either of them, and be made and accepted in lieu of all other compensation payments, in accordance with our [Workers' Compensation Act (act), General Statutes § 31-275 et seq.]." The stipulation

[1] The plaintiff represents that the city hired him in 1989 and that he retired in 2011.

did not reference the settlement agreement. The settlement agreement provided in relevant part: "[The plaintiff] . . . for and in consideration of both monetary sums and by action previously recited within the content of [the stipulation] attached as Exhibit A hereto, receipt of which is hereby acknowledged, [does] remise, release and forever discharge . . . [the city] . . . as to any and all actions, causes and causes of action, sums of money, covenants, contracts, controversies, agreements, promises, damages, claims and demands whatsoever, in law or in equity . . . as a result of [the plaintiff's] employment or with severance of [the plaintiff's] employment with [the city] from the commencement of [the plaintiff's] employment with [the city] to the date of [the plaintiff's] execution of the [settlement agreement], whether known or unsuspected, including all claims, demands, or causes of action under any federal or state law, regulation or decision including but not limited to causes of action under the [Workers'] Compensation Laws of the State of Connecticut . . . [t]he Age Discrimination in Employment Act of 1967, 29 U.S.C. [§] 621 et seq. [ADEA] . . . [and] [a]ny other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance."[2] The settlement agreement also provided in relevant part: "[The plaintiff] represent[s] that [the plaintiff has] been advised that [the plaintiff] should consult and acknowledge[s] that [the plaintiff has] consulted a private attorney with respect to [the settlement agreement] and [has] been given an adequate opportunity to discuss all aspects of [the settlement agreement] with counsel of [the plaintiff's] choosing. [The plaintiff] agree[s] that [the plaintiff has] had twenty-one (21) days to consider this agreement. . . . [The plaintiff] further understand[s] that this settlement agreement is contingent upon approval of [the stipulation] attached as

[2] The settlement agreement provided that various other claims, demands, and causes of action were "remise[d], release[d] and forever discharge[d]," which, for purposes of our disposition of this appeal, we need not set forth in toto.

Exhibit A hereto. . . . [The plaintiff] further understands that for a period of seven (7) days following the execution of this agreement, he may revoke this [a]greement. This [a]greement shall not become effective or enforceable until the revocation period has expired." The plaintiff had not seen the stipulation or the settlement agreement prior to the morning of September 30, 2015. Nevertheless, he signed both documents.[3]

That same morning, Commissioner Jack R. Goldberg canvassed the plaintiff with regard to the stipulation. As part of the canvass, Commissioner Goldberg reviewed with the plaintiff forms entitled "Stipulation and What It Means"[4] and "Stipulation Questionnaire."[5] Commissioner Goldberg then approved the stipulation after

[3] The plaintiff represents that he reviewed the stipulation and the settlement agreement for approximately twenty to thirty minutes with Miller prior to signing the documents. The stipulation was signed by the plaintiff, the defendants' counsel, and Miller, acting as a witness. The settlement agreement was signed by the plaintiff, Miller in his capacity as the police union representative, and Meghan A. Woods, a member of the Connecticut bar, acting as a witness. Neither the defendants' counsel nor any other representative of the defendants signed the settlement agreement.

[4] "In order to assist trial commissioners in assessing the merits of a proposed settlement and 'assuring that a claimant comprehends the nature and scope of a stipulation' . . . the Workers' Compensation Commission . . . 'has promulgated a form entitled "Stipulation and What It Means" that enumerates the consequences of a stipulation from a claimant's point of view. The form explains to the claimant that the stipulation is a final settlement, that rights to future medical, disability and loss of income benefits may be lost by accepting the stipulation, and that one's right to a formal hearing is also waived by settling the case. The form also directs the claimant to ask any questions he or she may have about the stipulation and its effects. Before a claimant may agree to a stipulation, a commissioner must canvass the claimant to insure that he has considered these issues and still wants to settle his case.' " (Citation omitted.) *Leonetti* v. *MacDermid, Inc.*, No. 5623, CRB 5-11-1, 2012 WL 1451552, *4–5 (March 19, 2012), aff'd, 310 Conn. 195, 76 A.3d 168 (2013). In the present case, the "Stipulation and What It Means" form was signed by the plaintiff, the defendants' counsel, and Commissioner Goldberg.

[5] The "Stipulation Questionnaire" form contained fifteen numbered questions requesting information that, according to the form, was necessary for the approval of the stipulation. The "Stipulation Questionnaire" form was signed by the defendants' counsel, as the person completing the form, and Commissioner Goldberg.

determining that the plaintiff had executed the stipulation knowingly and voluntarily. None of the parties asked Commissioner Goldberg to review or sign the settlement agreement, and at no point did Commissioner Goldberg examine or sign the settlement agreement.

On October 1, 2015, a representative of CIRMA, the third-party administrator for the city, mailed to the plaintiff a settlement check in the amount of $22,500. On or about October 7, 2015, the plaintiff brought the check to his police union office, signifying his rejection of the settlement agreement. On or about October 14, 2015, the police union returned the check to the plaintiff. On or about October 19, 2015, the plaintiff mailed the check to CIRMA with a note requesting that CIRMA accept the returned check. Following these events, the commission held informal hearings on January 15 and March 15, 2016, which resulted in "no resolution of the issues" among the parties. Thereafter, the commission held a formal hearing on March 31, 2016, during which the parties agreed that the plaintiff would file a motion to open the stipulation and the defendants would file a response thereto.

On May 6, 2016, the plaintiff, who was represented by counsel at the time, filed a motion to open, with an accompanying memorandum of law, seeking to open the stipulation (motion to open).[6] The plaintiff asserted that, prior to September 30, 2015, the parties had agreed to settle only the plaintiff's workers' compensation claims in exchange for the sum of $22,500, and that the settlement agreement constituted a unilateral expansion of the parties' agreement by the defendants. The plaintiff argued that he did not knowingly and voluntarily execute the settlement agreement, citing factors used in analyzing waivers of ADEA claims on the

[6] The motion was captioned improperly as a motion to "reopen" the stipulation. "We note that because the decision had never been opened, the appropriate term is a motion to open." *Rodriguez* v. *State*, 76 Conn. App. 614, 617 n.5, 820 A.2d 1097 (2003).

basis that the terms of the settlement agreement required him to waive causes of action arising under the ADEA. The plaintiff further argued that the stipulation was nugatory on the ground that his execution of the settlement agreement was not knowing and voluntary; however, the plaintiff expressly stated that he was not challenging the canvass conducted by Commissioner Goldberg that preceded the approval of the stipulation. In addition, the plaintiff contended that the commissioner had subject matter jurisdiction to open the stipulation pursuant to General Statutes § 31-315.[7] On July 18, 2016, the defendants filed an objection and an accompanying memorandum of law, arguing, inter alia, that the plaintiff failed to establish any cognizable ground upon which the commissioner could open the stipulation and that the commissioner lacked subject matter jurisdiction to interpret the terms of the settlement agreement, which, the defendants contended, was a separately executed agreement independent of the stipulation.

On October 11, 2016, Commissioner Nancy E. Salerno issued a decision, captioned "finding and dismissal,"

[7] General Statutes § 31-315 provides: "Any award of, or voluntary agreement concerning, compensation made under the provisions of this chapter or any transfer of liability for a claim to the Second Injury Fund under the provisions of section 31-349 shall be subject to modification in accordance with the procedure for original determinations, upon the request of either party or, in the case of a transfer under section 31-349, upon request of the custodian of the Second Injury Fund, whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

denying the motion to open. After setting forth a recitation of the parties' respective positions and her findings of fact, Commissioner Salerno concluded that opening the stipulation was not warranted because the plaintiff failed to offer any evidence of fraud, misrepresentation, accident, or mistake, and the plaintiff did not contest the adequacy of Commissioner Goldberg's canvass concerning the stipulation. In addition, Commissioner Salerno concluded that Commissioner Goldberg approved the stipulation without taking into consideration the settlement agreement, and that, in accordance with our Supreme Court's holding in *Stickney* v. *Sunlight Construction, Inc.*, 248 Conn. 754, 730 A.2d 630 (1999), the commission lacked subject matter jurisdiction to interpret the terms of the settlement agreement. Thereafter, the plaintiff filed a petition for review with the board.

On appeal to the board, the plaintiff, through counsel, asserted that the commissioner erred in denying the motion to open,[8] contending that the stipulation was nugatory on the basis that Commissioner Goldberg did not review the settlement agreement and canvass the plaintiff as to whether he voluntarily and knowingly assented to the terms of the settlement agreement. The plaintiff relied primarily on the board's decision in *Leonetti* v. *MacDermid, Inc.*, No. 5623, CRB 5-11-1, 2012 WL 141552 (March 19, 2012), aff'd, 310 Conn. 195, 76 A.3d 168 (2013), in support of his argument. In addition, the plaintiff contended that the commissioner erred in concluding that she lacked subject matter jurisdiction to interpret the terms of the settlement agreement. In response, the defendants argued, inter alia, that the commissioner correctly concluded that the plaintiff

[8] The plaintiff did not file a motion to correct challenging any of the commissioner's findings. See *Melendez* v. *Fresh Start General Remodeling & Contracting, LLC*, 180 Conn. App. 355, 367, 183 A.3d 670 (2018) ("[a] party seeking to challenge a finding of the commissioner as incorrect or incomplete must first do so by filing a motion to correct the challenged findings").

failed to demonstrate any proper ground upon which to open the stipulation and that the commissioner lacked subject matter jurisdiction to interpret the terms of the settlement agreement.

On September 11, 2017, the board rendered its decision affirming the commissioner's denial of the motion to open. The board summarized the plaintiff's claim to be that Commissioner Goldberg erred in not examining whether the settlement agreement offered the plaintiff any consideration for withdrawing any claims that he may have had unrelated to the act. The board determined that the parties had agreed that the plaintiff would receive $22,500 as reasonable consideration for the withdrawal of his workers' compensation claims, the plaintiff was canvassed by Commissioner Goldberg with respect to the stipulation, and no mistake was made warranting the opening of the stipulation given that the plaintiff had received the consideration specified in the stipulation. Additionally, relying on *Stickney*, the board concluded that "[t]o the extent there was a failure to achieve a meeting of the minds relative to the issues in the settlement agreement which were beyond the jurisdiction of this commission, the [plaintiff] would need . . . to seek redress in a forum which has jurisdiction to consider such a dispute."[9] This appeal followed. Additional facts will be set forth as necessary.

[9] Notwithstanding its decision affirming the commissioner's denial of the motion to open, the board noted that it had "some concerns relative to the practice of pursuing 'global settlements' between claimants and respondents at stipulation hearings before [workers' compensation] commissioners. A proper regard for equitable conduct would suggest that all proposed settlement documents be circulated in advance of such hearings so that the claimant may have a reasonable opportunity to fully apprise himself of the terms and conditions of all agreements sought by the respondents. The commission cannot address disputes outside its statutory ambit, but [the commission] can seek to minimize the likelihood of such disputes by directing parties to avoid 'settling on the courthouse steps' and to provide all anticipated documentation to claimants well in advance of stipulation-approval hearings."

We share the board's concern regarding the manner in which a purported global settlement was reached between the plaintiff and the defendants

We begin by setting forth the relevant standard of review and principles of law governing our resolution of this appeal. "The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . The commissioner is the sole trier of fact and [t]he conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . The review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is [obligated] to hear the appeal on the record and not retry the facts. . . . On appeal, the board must determine whether there is any evidence in the record to support the commissioner's [decision]. . . . Our scope of review of [the] actions of the [board] is [similarly] . . . limited. . . . [However] [t]he decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts which are admitted or undisputed." (Citation omitted; internal quotation marks omitted.) *Rodriguez* v. *State*, 76 Conn. App. 614, 621–22, 820 A.2d 1097 (2003).

"Long ago, we said that the jurisdiction of the [workers' compensation] commissioners is confined by the [a]ct and limited by its provisions. Unless the [a]ct gives the [c]ommissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct. . . . While it is correct that the act provides for proceedings that were designed to facilitate a speedy, efficient and inexpensive disposition of matters covered by the act . . . the charter for doing so is the act itself.

during the morning of the stipulation hearing. We are particularly troubled by the acknowledgement of the defendants' counsel during oral argument before this court that he presented a copy of the settlement agreement to the plaintiff *for the first time* on the morning of the stipulation hearing with the expectation that the plaintiff would sign the settlement agreement, notwithstanding that the settlement agreement contained a provision explicitly stating that the plaintiff had been given twenty-one days to consider it.

The authority given by the legislature is carefully circumscribed and jurisdiction under the act is clearly defined and limited to what are clearly the legislative concerns in this remedial statute. . . . A commissioner may exercise jurisdiction to hear a claim only under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Because of the statutory nature of our workers' compensation system, policy determinations as to what injuries are compensable and what jurisdictional limitations apply thereto are for the legislature, not the judiciary or the board, to make." (Internal quotation marks omitted.) *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 216–17, 76 A.3d 168 (2013).

Our Supreme Court previously has defined the term "stipulation" as follows: "A stipulation is a compromise and release type of settlement similar to settlements in civil personal injury cases where a claim is settled with a lump sum payment accompanied by a release of the adverse party from further liability." (Internal quotation marks omitted.) Id., 198 n.2. "Although the [act] does not explicitly provide for [stipulated settlement agreements], we have consistently upheld the ability to compromise a compensation claim as inherent in the power to make a voluntary agreement regarding compensation. . . . [O]nce an agreement is reached, [General Statutes § 31-296[10] provides that] a commissioner may approve the agreement if it conforms in every regard

[10] "General Statutes § 31-296 (a) provides in relevant part: 'If an employer and an injured employee . . . at a date not earlier than the expiration of the waiting period, reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it. A copy of the agreement, with a statement of the commissioner's approval, shall be delivered to each of the parties and thereafter it shall be as binding upon both parties as an award by the commissioner. . . .'" *Snyder* v. *Gladeview Health Care Center*, 149 Conn. App. 725, 730 n.2, 90 A.3d 278, cert. denied, 312 Conn. 918, 94 A.3d 642 (2014).

to the provisions of [the act]. . . . Approval of . . . a stipulation by [a] commissioner is not an automatic process. It is his [or her] function and duty to examine all the facts with care before entering an award, and this is particularly true when the stipulation presented provides for a complete release of all claims under the act. . . . Once approved, an Award by Stipulation is a binding award which, on its terms, bars a further claim for compensation unless [§] 31-315, which allows for modification, is satisfied." (Footnote in original; internal quotation marks omitted.) *Snyder* v. *Gladeview Health Care Center*, 149 Conn. App. 725, 729–30, 90 A.3d 278, cert. denied, 312 Conn. 918, 94 A.3d 642 (2014).

"Our Supreme Court has stated that [a]lthough the commission may modify awards under certain circumstances, its power to do so is strictly limited by statute. . . . Section 31-315 allows the commission to modify an award in three situations. First, modification is permitted where the incapacity of an injured employee has increased, decreased or ceased, or . . . the measure of dependence on account of which the compensation is paid has changed . . . . Second, the award may be modified when changed conditions of fact have arisen which necessitate a change of [the award]. . . . Third, [t]he commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. This provision extends the commission's power to open and modify judgments to cases of accident . . . to mistakes of fact . . . and to fraud . . . but not to mistakes of law. . . . This provision, however, does not independently confer authority to modify awards for reasons not otherwise enumerated in § 31-315." (Internal quotation marks omitted.) *Rodriguez* v. *State*, supra, 76 Conn. App. 622.

On appeal, the plaintiff, who is representing himself, sets forth an assortment of claims contesting the propriety of the board's decision affirming the commissioner's denial of the motion to open. As a preliminary matter,

we note that the plaintiff raises various claims in his appellate briefs that, on the basis of our review of the record before us, were not presented to the commission during the underlying proceedings. For instance, he asserts that the defendants' counsel failed to abide by a "stipulation approval procedure," the stipulation contained a number of errors, and there is cause to open the stipulation because it contained "broad and confusing language," it was "poorly negotiated," and certain documents were not submitted to the commission for review. "We acknowledge that the plaintiff is a self-represented party and that it is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . The courts adhere to this rule to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience . . . . This rule of construction has limits, however. Although we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Traylor* v. *State*, 332 Conn. 789, 806, 213 A.3d 467 (2019). "As a general matter, we do not decide issues raised for the first time on appeal." *Jones* v. *Connecticut Children's Medical Center Faculty Practice Plan*, 131 Conn. App. 415, 432, 28 A.3d 347 (2011). Accordingly, we decline to review the merits of the plaintiff's claims that he is raising for the first time on appeal. See id., 432–33 (declining to review claim that plaintiff did not raise before either Workers' Compensation Commissioner or board).

We construe the crux of the plaintiff's preserved appellate claims to be that the board and the commissioner erroneously concluded that the commission lacked subject matter jurisdiction to consider the

terms of the settlement agreement. More specifically, it appears from a close review of the motion to open that the plaintiff's chief concern regarding the settlement agreement is his relinquishment of any rights that he may have had to bring causes of action against the defendants unrelated to his workers' compensation claims, such as causes of action arising out of the ADEA. For the reasons that follow, we conclude that the board did not err in affirming the commissioner's denial of the motion to open.

Our analysis begins with an overview of our Supreme Court's decision in *Stickney* v. *Sunlight Construction, Inc.*, supra, 248 Conn. 754, upon which the commissioner and the board relied in concluding that the commission lacked subject matter jurisdiction to interpret the terms of the settlement agreement. In *Stickney*, the court held that a Workers' Compensation Commissioner lacked subject matter jurisdiction to entertain an insurer's motion to open and modify a voluntary agreement for the purpose of substituting a different insurer as the entity responsible for payment of an injured employee's workers' compensation benefits. Id., 757–59. The court determined that, pursuant to the plain language of General Statutes (Rev. to 1985) § 31-278,[11] a "commissioner's subject matter jurisdiction is limited to adjudicating claims arising under the act, that is, claims by an injured employee seeking compensation from his [or her] employer for injuries arising out of and in the course of employment." Id., 762. The court

[11] General Statutes (Rev. to 1985) § 31-278 provided in relevant part: "[E]ach commissioner shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of [the act]. . . . [Each commissioner] shall have jurisdiction of all claims and questions arising . . . under [the act] . . . ." (Internal quotation marks omitted.) *Stickney* v. *Sunlight Construction, Inc.*, supra, 248 Conn. 762. General Statutes § 31-278 now provides in relevant part: "[Each commissioner] . . . shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of [the act]. Each commissioner shall hear all claims and questions arising under [the act] . . . ."

then observed that the insurer's motion to open "differ[ed] from the traditional claim to be adjudicated under the act . . . because the issue underlying [the insurer's] motion [was] an insurance coverage issue, requiring the evaluation of insurance policies and the application of contract law. Put more generally, resolving the central issue in the motion require[d] application of laws other than the provisions of the act. Thus, although the injured employee's original claim 'arose under the act,' the question [the court had to] address in [the] appeal [was] whether the motion to open, itself, [was] beyond the jurisdictional bounds circumscribed by the explicit enabling legislation of the act." Id., 762–63. The court concluded that none of the statutory provisions of the act cited by the insurer conferred subject matter jurisdiction on the Workers' Compensation Commissioner to determine the coverage question at issue and that the insurer's claim had to be resolved in another forum. Id., 768–69.

We next turn to our Supreme Court's decision in *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 195. In *Leonetti*, the principal issue before the court was whether the board properly affirmed a Workers' Compensation Commissioner's refusal to approve as a valid stipulation a termination agreement executed by a claimant and his employer. Id., 198–99. Article II of the termination agreement provided in relevant part that the claimant agreed to release the employer from a variety of claims, including workers' compensation claims arising out of, relating to, or connected to, inter alia, the claimant's employment with the employer or the termination of that employment. Id., 199–200. Article III of the termination agreement provided in relevant part that, as consideration, the claimant, inter alia, would be paid twenty-seven weeks of "severance pay" predicated on the claimant's base salary, totaling $70,228.51, and that the claimant understood that the consideration would serve as "*all* that [the claimant]

[was] entitled to receive from [the employer]." (Emphasis in original; internal quotation marks omitted.) Id., 200. The claimant initially hesitated to execute the termination agreement because he did not want to release the employer from liability for a preexisting workers' compensation claim; however, the claimant signed the agreement after having received a letter from the employer indicating that it would withdraw the severance pay offer if the claimant failed to sign the agreement within ten days. Id., 201. Subsequently, the commissioner held a formal hearing to determine the enforceability of the termination agreement's language regarding the release of the claimant's workers' compensation claim. Id., 202. The Workers' Compensation Commissioner (1) concluded that, without approval by a Workers' Compensation Commissioner, the termination agreement did not waive the parties' rights and obligations under the act, and (2) declined to approve the agreement as a full and final stipulation of the claimant's workers' compensation claim because, pursuant to the agreement, the claimant was not receiving any consideration for the release of his claim.[12] Id., 202–203.

The employer appealed to the board, which affirmed the ruling of the Workers' Compensation Commissioner. Id., 203. In its decision, the board also refused to address the enforceability of the termination agreement as a whole, determining that its jurisdiction extended only to the portion of the agreement concerning the claimant's workers' compensation claim. Id., 204. Specifically, the board stated: "Whether as a matter of law the contract as signed by the parties, apart from the references to the claimant's workers' compensation claim, is an enforceable termination agreement is a

[12] More specifically, the Workers' Compensation Commissioner determined that "the [termination agreement] and payment of $70,228.51 was based on the number of years [the claimant] worked for the [employer] and there was no money paid in [the] agreement for [the claimant's] workers' compensation claim." (Internal quotation marks omitted.) *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 202.

determination for another forum; [the board's] jurisdiction is limited to whether the document serves [as] an acceptable instrument for releasing the claimant's workers' compensation claim, and [the board] find[s] that the record clearly supports the . . . commissioner's decision that it does not." (Internal quotation marks omitted.) Id., 216.

On appeal, our Supreme Court affirmed the decision of the board, concluding that (1) the execution of the termination agreement had no effect on the claimant's workers' compensation claim unless and until it was approved by a Workers' Compensation Commissioner, and (2) the board properly affirmed the Workers' Compensation Commissioner's refusal to approve the agreement, to the extent that it implicated the claimant's workers' compensation claim, on the ground that the claimant was not given any compensation for settling his workers' compensation claim. Id., 207–208, 215. In addition, the court rejected the employer's argument that the Workers' Compensation Commissioner and the board, in deciding whether to enforce the termination agreement, improperly declined to consider alleged " 'deceitful' " conduct by the claimant. Id., 216. The court observed that neither its precedent nor the provisions of the act cited by the employer conferred subject matter jurisdiction on the commission "over the general enforceability of severance agreements." Id., 217; see also id., 217–20. The court then determined that the alleged misconduct by the claimant, if true, had no bearing on the issue of whether the termination agreement should have been approved as a stipulation with respect to the claimant's workers' compensation claim. Id., 220. As to the remainder of the termination agreement, the court concluded: "The commission is not competent to rule on the rights and obligations of the parties to a contract when those rights and obligations do not involve the issues that the legislature has authorized the commission to consider. . . . The enforceability of the remainder of the agreement is not a question

for the workers' compensation forum, and the [workers' compensation] commissioner and the board properly refused to decide that aspect of the dispute between the claimant and the [employer]." (Citations omitted.) Id., 220–21.

In the present case, the plaintiff agreed to be paid $22,500 in exchange for the settlement of his workers' compensation claims, he was canvassed, adequately by his own admission, with respect to the stipulation by Commissioner Goldberg, and thereafter the $22,500 sum was remitted to him. The plaintiff presented no claims in the motion to open challenging the integrity of the settlement of his workers' compensation claims; rather, the core issues for the plaintiff were his execution of the settlement agreement and the terms of the settlement agreement concerning the waiver of any rights he may have had unrelated to the act. Pursuant to *Stickney* and *Leonetti*, those issues are beyond the commission's jurisdiction, which is limited by statute to claims arising out of the act. As our Supreme Court explained in *Leonetti*, the commission cannot adjudicate the rights and obligations of parties with respect to contracts, or portions thereof, that have no nexus to the act. Accordingly, we reject the plaintiff's preserved appellate claims and conclude that the board and the commissioner correctly concluded that the commission lacked subject matter jurisdiction to entertain the issues raised by the plaintiff relating to the settlement agreement.[13]

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[13] We observe that the settlement agreement expressly provided that it encompassed, inter alia, causes of action under the "[Workers'] Compensation Laws of the State of Connecticut . . . ." To the extent that the terms of the settlement agreement implicated the act, the commission had subject matter jurisdiction to consider and interpret those portions of the settlement agreement. As we have explained in this opinion, however, the plaintiff's claims before the commission centered on the terms of the settlement

DAVID HAYWOOD *v.* COMMISSIONER OF CORRECTION
(AC 41677)

Keller, Bright and Flynn, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, felony murder and robbery in the first degree as an accessory, filed a second petition for a writ of habeas corpus, claiming that his prior habeas counsel, D, and his original appellate counsel, F, had provided ineffective assistance. The habeas court rendered judgment denying the habeas petition. Thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. On appeal, he claimed that the habeas court improperly concluded that he was not denied the effective assistance of counsel by D with respect to D's efforts to establish that F was ineffective. Although F, in a petition for certification to appeal to our Supreme Court, claimed that it was improper for this court in the petitioner's direct appeal to order that the trial court modify the petitioner's conviction of robbery in the first degree as an accessory to a conviction of accessory to attempt to commit robbery in the first degree, he failed to include a citation to *State* v. *Sanseverino* (287 Conn. 608) (*Sanseverino I*), in which our Supreme Court, after reversing the defendant's kidnapping conviction, noted the possibility that the state could ask the court to modify the defendant's conviction to the lesser included offense of unlawful restraint in the second degree. The petitioner also claimed that F was ineffective in failing, while the petition was pending in our Supreme Court, to file a motion for reconsideration in this court regarding the modification issue after our Supreme Court officially released its decision in *Sanseverino I*. He further claimed that D was deficient in the petitioner's first habeas trial because he failed to point out sufficiently F's errors, and because he failed to advance the legal analyses set forth in the concurring opinion by Chief Justice Rogers in *State* v. *Sanseverino* (291 Conn. 574) (*Sanseverino II*), which questioned the wisdom of allowing the modification of a defendant's conviction to a lesser included offense, where a jury instruction on the lesser included offense was not provided by the court, in future cases that do not share the unique circumstances of that case. Finally, he claimed that F was ineffective for failing to make the argument against modification of the petitioner's judgment based on his acquittal due to insufficient evidence and the lack of a jury instruction on the lesser included offense, similar to the way in which the appellate attorney had successfully raised a

agreement that were wholly unrelated to the act and, consequently, outside of the ambit of the commission's jurisdiction.

similar claim in *State* v. *LaFleur* (307 Conn. 115), which concluded that the facts and procedural history of that defendant's case were sufficiently different than those in *Sanseverino II* to preclude modification of the defendant's conviction of assault in the first degree to the lesser included offense of assault in the second degree. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal: in the petitioner's first habeas case, D did claim that F should have filed a motion for reconsideration with this court in the petitioner's direct appeal, the possible relevance of the *Sanseverino I*, *Sanseverino II*, and *LaFleur* cases was raised by D and considered by the habeas court, the petitioner's expert witness in the first habeas case testified concerning *Sanseverino II* and why he believed that it was relevant to the petitioner's case, and on appeal from the habeas court's decision in the first habeas case, the petitioner, in support of his claim that F was ineffective by not filing a motion for reconsideration with this court in the petitioner's direct appeal, fully addressed all three cases in his appellate brief to this court, which rejected the claim, and, thus, the petitioner could not establish prejudice with respect to that claim; moreover, the petitioner could not establish prejudice with respect to his claim that D provided ineffective assistance by failing to claim that F was ineffective on direct appeal when he did not rely on *Sanseverino I* in his petition for certification to appeal to our Supreme Court, as the petitioner could not establish that there was a reasonable probability that, if F had cited to *Sanseverino I* in his petition for certification to appeal to our Supreme Court, certification would have been granted and the outcome of his appeal would have been different, the petitioner having failed to establish that there was a reasonable likelihood that our Supreme Court was unaware or unmindful of its then very recent decision in *Sanseverino I* when it denied the petition for certification to appeal.

Argued October 9—officially released December 10, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *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.*

Vishal K. Garg, with whom, on the brief, were *Stephanie L. Evans*, assigned counsel, and *David Haywood*, self-represented, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Kevin T. Kane*, chief state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, J. In this habeas on a habeas,[1] the petitioner, David Haywood, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his second petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly concluded that he was not denied the effective assistance of previous habeas counsel, Attorney Mark Diamond, with respect to Attorney Diamond's efforts to establish the ineffective assistance of original appellate counsel, Attorney Glenn W. Falk.

The petitioner's claim relates to his dissatisfaction with how Attorney Falk challenged on appeal the petitioner's convictions for robbery in the first degree as an accessory and felony murder. See *State* v. *Haywood*, 109 Conn. App. 460, 464–66, 952 A.2d 84, cert. denied, 289 Conn. 928, 958 A.2d 161 (2008). After his criminal trial, the petitioner was convicted of participating in a robbery that led to the murder of the victim. Id., 464. In the direct appeal from the petitioner's judgment of conviction, Attorney Falk argued that the conviction could not stand because there was insufficient evidence of a completed robbery. Id. The state agreed that the evidence supported only an attempted robbery, but it

[1] A habeas on a habeas occurs when a petitioner files a subsequent petition for a writ of habeas corpus challenging the effectiveness of counsel in litigating a previous petition for a writ of habeas corpus that had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. See *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 550, 153 A.3d 1233 (2017).

argued that in finding the petitioner guilty of a completed robbery, the jury necessarily found the petitioner guilty of attempt to commit robbery. See id., 465–66. Because attempt to commit robbery is a felony that can be the basis of a felony murder conviction, the state asked that this court order the modification of the petitioner's conviction of robbery to attempt to commit robbery and that the felony murder conviction be affirmed. Id., 464–65. This court also addressed the claim that the judgment should not be modified because the jury in the petitioner's trial was never charged on the elements of attempt to commit robbery. Id., 466–67 n.3. This court agreed with the state and reversed only the robbery conviction and remanded the case to the trial court with direction to modify the judgment to reflect a conviction of attempt to commit robbery. Id., 464–66, 477.[2]

The petitioner argues in this appeal that Attorney Falk performed deficiently in the petitioner's direct appeal because, when he addressed in the petition for certification to appeal to our Supreme Court this court's decision that the petitioner's robbery conviction should be modified, he failed to include a citation to *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008) (*Sanseverino I*),[3] and failed, while the petition for certification was pending in our Supreme Court, to file a motion for reconsideration in this court regarding the

[2] Unrelated to any issue in this matter, this court in the petitioner's direct appeal also reversed the petitioner's conviction of conspiracy to commit robbery in the first degree and remanded the case for a new trial on that charge. *State* v. *Haywood*, supra, 109 Conn. App. 477. It appears that the state did not pursue further that charge on remand.

[3] *Sanseverino I* was overruled in part by *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008) (holding that proper remedy when kidnapping conviction is reversed is new trial and not judgment of acquittal), superseded in part after reconsideration en banc by *State* v. *Sanseverino*, 291 Conn. 574, 579, 969 A.2d 710 (2009) (ordering modification of defendant's conviction from kidnapping to unlawful restraint), and overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012).

modification issue after our Supreme Court officially released its decision in *Sanseverino I*. He further argues that Attorney Diamond performed deficiently in the petitioner's first habeas trial because he failed to point out sufficiently Attorney Falk's errors.

In *Sanseverino I*, our Supreme Court, after reversing the defendant's kidnapping conviction, noted, but did not address, the possibility that the state could ask the court to modify the defendant's conviction to the lesser included offense of unlawful restraint in the second degree. Id., 625–26 and n.16. According to the petitioner, in the present case, had Attorney Falk discussed the modification issue in light of the then recently decided *Sanseverino I*, there was a reasonable probability that this court would have reconsidered its decision ordering modification or that our Supreme Court would have granted his petition for certification and would have reversed the decision of this court.

The petitioner also argues in his main appellate brief: "[I]t is clearly debatable among jurists of reason whether the petitioner's prior habeas counsel was ineffective for failing to bring to the court's attention . . . the concurring opinion [by Chief Justice Rogers in *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009) (*Sanseverino II*)], and his appellate counsel for failing to make the argument against modification of [the petitioner's] judgment based on his acquittal due to insufficient evidence and the lack of a jury instruction on the lesser included offense, similar to the way in which the appellate attorney had successfully raised the claim in *State* v. *LaFleur*, 307 Conn. 115, 51 A.3d 1048 (2012)."[4]

[4] We note the following dates. Oral argument in the petitioner's direct appeal to this court was heard on April 14, 2008. *Sanseverino I* officially was released by our Supreme Court on July 1, 2008. This court officially released its decision in the petitioner's direct appeal on August 5, 2008, approximately one month after our Supreme Court released *Sanseverino I*. See *State* v. *Haywood*, supra, 109 Conn. App. 461. On August 19, 2008, our Supreme Court overruled in part *Sanseverino I* in *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008) ("we are persuaded that our conclusion

In *Sanseverino II*, our Supreme Court explicitly sanctioned the modification of the defendant's conviction to the lesser included offense of unlawful restraint in the second degree, even in the absence of a jury instruction on that lesser offense, "[u]nder the unique circumstances of [the] case . . . ." *Sanseverino II*, supra, 291 Conn. 595. In a concurring opinion, Chief Justice Rogers questioned the wisdom of allowing such modifications in future cases that involve different circumstances. Id., 598–604 (*Rogers*, *C. J.*, concurring).

In *LaFleur*, our Supreme Court concluded that the facts and the procedural history of the defendant's case were sufficiently different than those in *Sanseverino II* to preclude modification of the defendant's conviction of assault in the first degree to the lesser included offense of assault in the second degree. *State* v. *LaFleur*, supra, 307 Conn. 141–42, 151–54. Thus, the court ordered on remand a judgment of acquittal. Id., 154.

The petitioner essentially claims on appeal that although Attorney Falk argued in the petitioner's direct appeal that it was improper for this court to order that the trial court modify the petitioner's robbery conviction, his argument was deficient because it failed to point to the evolution of the issue which began in

that there should have been a judgment of acquittal [on the kidnapping charge] in *Sanseverino* [*I*] was incorrect, and that the proper remedy in that case should have been a new trial"). Our Supreme Court denied the petitioner's petition for certification to appeal from our decision in his direct appeal on September 25, 2008, approximately three months after the release of its decision in *Sanseverino I*; see *State* v. *Haywood*, 289 Conn. 928, 958 A.2d 161 (2008); and approximately one month after it specifically overruled *Sanseverino I*. See *State* v. *DeJesus*, supra, 437. We also note that *Sanseverino II*, supra, 291 Conn. 576, was officially released on May 19, 2009, and *State* v. *LaFleur*, supra, 307 Conn. 117, was officially released on September 28, 2012.

In a notice of supplemental authority filed with this court after briefing in the present appeal, the petitioner also directs us to the recent decision of our Supreme Court in *State* v. *Petion*, 332 Conn. 472, 498–507, 211 A.3d 991 (2019).

Sanseverino I, and failed to advance the legal analyses set forth in the concurring opinion by Chief Justice Rogers in *Sanseverino II* and the majority in *LaFleur*. He further argues that Attorney Diamond performed deficiently in the petitioner's first habeas case when he did not argue that Attorney Falk should have relied explicitly on the reasoning set forth in those cases. We disagree with the petitioner and dismiss the appeal.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 181 Conn. App. 572, 577–78, 187 A.3d 543, cert.

denied, 329 Conn. 909, 186 A.3d 13 (2018). For the petitioner to prevail on his claim of ineffective assistance of counsel, he must establish both that his counsel's performance was deficient and that he was prejudiced, meaning, there is a reasonable probability that, but for counsel's mistakes, the result of the proceeding would have been different. *Strickland* v. *Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Our standard of review as to whether Attorney Diamond's representation was inadequate is plenary, being a mixed question of law and fact. See *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 637, 153 A.3d 1264 (2017) ("[t]he application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice . . . is a mixed question of law and fact subject to . . . plenary review" [citation omitted]).

We first consider the petitioner's claim that Attorney Diamond provided ineffective assistance of counsel in the petitioner's first habeas trial because he did not argue that Attorney Falk should have filed a motion for reconsideration in the petitioner's direct appeal with this court citing to *Sanseverino I*, and setting forth the legal analysis that Chief Justice Rogers later employed in her concurring opinion in *Sanseverino II* and that the majority relied on in *LaFleur*. We conclude that this claim has no merit.

In the petitioner's first habeas case, Attorney Diamond, in fact, did claim that Attorney Falk should have filed a motion for reconsideration with this court in the petitioner's direct appeal. Furthermore, having reviewed the record from the first habeas case, we conclude that the possible relevance of *Sanseverino I*, *Sanseverino II*, and *LaFleur* was raised by Attorney Diamond and considered by the habeas court. In fact, in a supplemental letter to the habeas court, sent after he had filed a posttrial brief, Attorney Diamond alerted

the habeas court to the then newly released *LaFleur* case and argued in relevant part: "Had appellate counsel made the appropriate arguments on [the petitioner's] direct appeal, the Appellate Court would have not replaced the conviction for robbery . . . that it dismissed with one for attempted robbery . . . ." Additionally, in the first habeas case, the petitioner's expert witness, Attorney Del Atwell, testified concerning *Sanseverino II* and why he believed it was relevant to the petitioner's case.

Furthermore, on appeal from the habeas court's decision in the first habeas case; see *Haywood* v. *Commissioner of Correction*, 153 Conn. App. 651, 105 A.3d 238, cert. denied, 315 Conn. 908, 105 A.3d 235 (2014); the petitioner, in support of his claim that Attorney Falk had provided ineffective assistance of counsel by not filing a motion for reconsideration with this court in the petitioner's direct appeal, fully addressed *Sanseverino I*, *Sanseverino II*, and *LaFleur* in his appellate brief. Both the habeas court in the first habeas case and this court on appeal rejected the petitioner's claim. See id., 662, 665–67. Accordingly, the petitioner has not and cannot demonstrate any prejudice in this case.

We now consider the petitioner's claim that Attorney Diamond provided ineffective assistance of counsel by failing to argue that Attorney Falk provided ineffective assistance on direct appeal when he did not rely on *Sanseverino I* in his petition for certification to appeal to our Supreme Court. We agree with the habeas court and the respondent, the Commissioner of Correction, that the petitioner has failed to establish prejudice.[5]

[5] Although the petitioner had raised as an issue on appeal in his first habeas case the allegation that Attorney Falk had rendered ineffective assistance when he inadequately raised the issue of the judgment modification in his petition for certification to appeal to our Supreme Court, we declined to review the claim because it had not been addressed by the habeas court. See *Haywood* v. *Commissioner of Correction*, supra, 153 Conn. App. 653–54 n.1.

In determining whether Attorney Diamond provided ineffective assistance of counsel, we necessarily must consider whether it is reasonably likely that if Attorney Falk had cited to *Sanseverino I* in his petition for certification to appeal to our Supreme Court, the petition would have been granted and the outcome, different. See *Strickland* v. *Washington*, supra, 466 U.S. 694. We conclude that the petitioner cannot establish that there is a reasonable probability that certification would have been granted and that the outcome of his appeal would have been different because he cannot establish the likelihood that our Supreme Court was unaware, or unmindful, of its then very recent decision in *Sanseverino I* when it denied the petition for certification to appeal. See *Fiaschetti* v. *Nash Engineering Co.*, 47 Conn. App. 443, 450, 706 A.2d 476 (it is fair to presume court was aware of previous case law), cert. denied, 244 Conn. 906, 714 A.2d 1 (1998).

On July 1, 2008, our Supreme Court officially released its decision in *Sanseverino I*, supra, 287 Conn. 610. On August 5, 2008, this court officially released its decision in the petitioner's direct appeal. *State* v. *Haywood*, supra, 109 Conn. App. 461. Fourteen days later, on August 19, 2008, our Supreme Court released its decision in *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), specifically overruling in part *Sanseverino I*.[6] One week after our Supreme Court released its decision in *DeJesus*, Attorney Falk filed the petition for certification to appeal to our Supreme Court from our decision in the petitioner's direct appeal. On September 25, 2008, approximately one month after overruling in part *Sanseverino I* in *DeJesus*, our Supreme Court denied the petitioner's petition for certification to appeal. *State* v. *Haywood*, 289 Conn. 928, 958 A.2d 161 (2008). It strains credulity to believe that our Supreme Court would have forgotten about *Sanseverino I*, especially in light of *DeJesus*, such that it would have needed

[6] The petitioner does not cite to *DeJesus* in his main appellate or reply brief.

a specific reference to that case to appreciate fully a claim regarding an allegedly improper modification by the Appellate Court of a judgment of conviction. Accordingly, we are not persuaded that a citation to *Sanseverino I* likely would have resulted in the petition being granted and in a different outcome of the petitioner's direct appeal.

After a careful review of the record and the briefs, and after fully considering the oral arguments of the parties, we conclude that the petitioner failed to demonstrate that the habeas court abused its discretion in denying his petition for certification to appeal. The petitioner has not shown that the issues raised on appeal are debatable among jurists of reason, that they could be resolved in a different manner, or that they deserve encouragement to proceed further.

The appeal is dismissed.

In this opinion the other judges concurred.