CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CITY OF STAMFORD *v.* ISMAT RAHMAN ET AL.
(AC 40883)

Alvord, Elgo and Bright, Js.

Syllabus

The plaintiff city sought to foreclose a blight lien on certain real property owned by the defendant R. In October, 2007, R executed a promissory note in the amount of $624,000 in favor of the predecessor of the defendant W Co., which was secured by a mortgage on the subject property that was recorded in the city land records. Approximately six months later, R executed a promissory note in the amount of $417,000 in favor of the predecessor of the defendant B Co., which was secured by a second mortgage on the subject property that was recorded in the city land records. Less than one month later, R executed a promissory note in the amount of $500,000 in favor of the defendant J Co., which was secured by a third mortgage on the subject property that was recorded in the city land records. At the closings of the two subsequent mortgages, R presented a fraudulent satisfaction of mortgage document that he had forged, which purported to release W Co.'s mortgage on the property. The satisfaction was not recorded in the city land records. Following the commencement of the foreclose action, all of the defendants, including R and W Co., were defaulted for failure to either appear or plead. Thereafter, the trial court rendered a judgment of foreclosure by sale, the property was sold and the remaining proceeds of the sale, approximately $348,097, were paid to the court clerk. B Co. subsequently filed a motion for a supplemental judgment requesting that the trial court disperse the remaining proceeds to it, arguing that W Co. had been defaulted and had not filed an affidavit of debt by which the court could determine what, if any, amount remained owed to it. B Co. further argued that W Co. had commenced and later withdrew a prior foreclosure proceeding

related to the subject property, in which B Co.'s predecessor appeared and asserted a special defense that W Co. had received payment in full and that the W Co. mortgage had been released by the satisfaction. The trial court rejected the motion for a supplemental judgment, stating that it needed verification of the release of the W Co. mortgage. Thereafter, B Co. filed a motion for reconsideration, in which it acknowledged that the satisfaction was never recorded in the land records but that, if the court denied its motion, the proceeds from the sale would be held indefinitely by the court, without any indication that any moneys were owed under the W Co. mortgage. The trial court reconsidered its decision and granted B Co.'s motion for a supplemental judgment, ordering the court clerk to disburse the remaining sale proceeds to B Co. More than three years later, counsel for W Co. filed an appearance, a motion to open the supplemental judgment and a motion for a supplemental judgment, arguing that the supplemental judgment had been procured by R's fraud in forging the satisfaction and that such fraud provided the court with authority to open the judgment after the four month limitation period set forth in the statute (§ 52-212a) that governs the opening of civil judgments. The trial court, applying the factors set forth in *Varley* v. *Varley* (180 Conn. 1), granted the motion to open the supplemental judgment, concluding that W Co. had sufficiently established fraud to invoke the fraud exception to the four month limitation in § 52-212a. The court then granted W Co.'s motion for a supplemental judgment and ordered B Co. to pay the subject proceeds to the court clerk and ordered the clerk to pay the proceeds to W Co. On B Co.'s appeal to this court, *held*:

1. The trial court erred in opening the supplemental judgment beyond the four month limitation period on the basis of fraud because its finding that W Co. satisfied the second *Varley* factor requiring diligence in trying to discover and expose the fraud was clearly erroneous: that court's finding that W Co. had proven diligence was improperly supported by its finding that W Co., as the holder of the first mortgage on the property, had no reason to be aware of the recordation of any subsequent mortgages, W Co. having been in the best position to discover R's fraud in forging and presenting the fraudulent satisfaction, which occurred in 2008, but having failed to exercise any diligence in attempting to do so for more than nine years, as the trial court took judicial notice of two foreclosure actions instituted by W Co. or its predecessor with respect to the subject property, during the second action, which was commenced in 2009, B Co.'s predecessor had filed a special defense alleging that the W Co.'s note had been paid off and attached the satisfaction in support thereof, and, therefore, as of 2009, W Co. was aware of the existence of the satisfaction purporting to release its mortgage on the property, yet it did nothing to investigate the validity of the satisfaction for eight years; moreover, the trial court erred in determining, in support of its finding of diligence, that W Co. was entitled to notice of the proceedings on B Co.'s motion for a supplemental judgment, despite its

default for failure to appear, as the relevant rule of practice (§ 10-12 [a]) does not require service of motions on nonappearing, defaulted parties; furthermore, W Co. failed to demonstrate how its access to information regarding the satisfaction was limited in any way during the present action, it would have received notice of B Co.'s motion for a supplemental judgment, to which the satisfaction was attached, and its subsequent motion for reconsideration, which informed the court that the satisfaction had not been recorded in the land records, if it had filed an appearance, and W Co.'s counsel conceded during oral argument before this court that W Co. discovered the fraud in 2017 upon a review of its own files, and, thus, its apparent failure to conduct such a review sooner repudiated any diligence in trying to uncover fraud.

2. The trial court lacked the authority to open the supplemental judgment more than four years after it was rendered, as the judgment was not obtained by any fraud on the part of B Co.: the only claimed fraudulent conduct was committed by R years prior to the present litigation during which he was defaulted and did not participate, and W Co. failed to provide any authority to support the conclusion that fraud committed by a defaulted party years prior to litigation can support the opening of a judgment following the expiration of the four month period; moreover, W Co. stipulated that both it and B Co. were unaware of any evidence that B Co. had acted fraudulently with regard to the supplemental judgment, and the circumstances surrounding the supplemental judgment belied the conclusion that it was obtained by fraud, as a review of the relevant procedural history indicated that the trial court apparently was persuaded by B Co.'s argument that the court should not hold the remaining sale proceeds indefinitely, given W Co.'s default and failure to file any claim to the remaining sale proceeds.

Argued October 23, 2018—officially released February 26, 2019

Procedural History

Action to foreclose a blight lien on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant et al. were defaulted for failure to appear and the defendant Countrywide Home Loans, Inc., et al. were defaulted for failure to plead; thereafter, the court, *Mintz*, *J.*, granted the plaintiff's motion for a judgment of foreclosure by sale and rendered judgment thereon; subsequently, Bank of America, N.A., was substituted as a defendant; thereafter, the court, *Truglia*, *J.*, rejected the motion for a supplemental judgment filed by the defendant Bank of America, N.A.; subsequently, the

court, *Truglia*, *J.*, granted the motion for reconsideration filed by the defendant Bank of America, N.A., granted the motion for a supplemental judgment and rendered a supplemental judgment for the defendant Bank of America, N.A.; thereafter, the court, *Tierney*, *J.*, granted the motions to open the supplemental judgment and for a supplemental judgment filed by the defendant Wells Fargo Bank, National Association, and rendered a supplemental judgment for the defendant Wells Fargo Bank, National Association, from which the defendant Bank of America, N.A., appealed to this court. *Reversed*; *judgment directed*.

Gerald L. Garlick, for the appellant (defendant Bank of America, N.A.).

Patrick T. Uiterwyk, for the appellee (defendant Wells Fargo Bank, National Association).

Opinion

ALVORD, J. The defendant Bank of America, N.A. (Bank of America), appeals from the judgment of the trial court opening the supplemental judgment that had been rendered in its favor and, thereafter, rendering a supplemental judgment in favor of the defendant Wells Fargo Bank, National Association (Wells Fargo), in the amount of $348,097.16.[1] On appeal, Bank of America claims that the court erred in granting Wells Fargo's motion to open the supplemental judgment more than four months after it was rendered on the basis of fraud committed by a homeowner in securing multiple mortgages years before this action to foreclose a blight lien commenced. We agree that the court erred and reverse the judgment of the trial court.[2]

[1] The plaintiff, the city of Stamford, also named as defendants in this action Ismat Rahman; JPMorgan Chase Bank, National Association; Fidelity National Title Group, Successor in Interest to Chicago Title Insurance Company; Countrywide Home Loans Servicing, LP; and Countrywide Home Loans, Inc., but they were defaulted for failure to appear or plead.

[2] Because we reverse the judgment of the court on the basis that it abused its discretion in opening the supplemental judgment, we need not address Bank of America's claim that the trial court committed plain error.

The following facts, as found by the trial court or as stipulated to by the parties,[3] and procedural history are relevant to this appeal. On October 29, 2007, the defendant Ismat Rahman acquired title to property located at 150 Doolittle Road in Stamford for a purchase price of $780,000. He executed a promissory note in favor of World Savings Bank, in the principal amount of $624,000. To secure the note, Rahman executed a mortgage in favor of World Savings Bank (Wells Fargo mortgage),[4] which was recorded in the Stamford land records in volume 9187 at page 347.

Approximately six months later, on April 8, 2008, Rahman executed a promissory note in favor of Countrywide Home Loans Servicing, LP, in the principal amount of $417,000, which note was secured with a mortgage on the property (Bank of America mortgage).[5] The Bank of America mortgage was recorded in volume 9318 at page 259 of the Stamford land records. Less than one month later, on May 2, 2008, Rahman executed a promissory note in favor of Washington Mutual Bank in the principal amount of $500,000, which note was secured with a mortgage on the property (JPMorgan Chase mortgage).[6] The JPMorgan Chase mortgage was recorded in volume 9346 at page 260 of the Stamford land records.

At the closing of the Bank of America mortgage, Rahman presented a document titled "Satisfaction of Mortgage" purportedly executed by Mortgage Electronic Registrations System, Inc., as nominee for World Savings Bank (satisfaction). The satisfaction was fraudulent and was never recorded on the Stamford land

[3] On August 28, 2017, the parties filed a stipulation of facts, which was accepted by the court.

[4] World Savings Bank was acquired by, and changed its name to, Wachovia Mortgage, FSB, which, later in 2009, merged with and became Wells Fargo.

[5] In July, 2008, Countrywide Home Loans Servicing, LP, was acquired by Bank of America.

[6] In 2008, Washington Mutual Bank was acquired by the defendant JPMorgan Chase Bank, National Association.

records. Rahman also presented the satisfaction at the closing of the JPMorgan Chase mortgage.

The defendant JPMorgan Chase Bank, National Association, filed a claim against its title insurance policy issued by the defendant Chicago Title Insurance Company, now known as Fidelity National Title Group, arising out of Rahman's presentation of the fraudulent satisfaction at the time of acquiring the JPMorgan Chase mortgage. Chicago Title Insurance Company, in turn, instituted a fraud action against Rahman and, on March 17, 2011, obtained judgment in its favor in the amount of $627,730.67 plus 6 percent per annum postjudgment interest. See *Chicago Title Ins. Co.* v. *Rahman*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-5013365-S (March 17, 2011). A judgment lien was recorded in the Stamford land records at volume 10193 at page 257 as to the property. Bank of America was neither a party to, nor had any knowledge of, the fraud action against Rahman.

Prior to this foreclosure action, three other foreclosure actions were commenced with respect to the property. The first was commenced on November 4, 2008, by Wells Fargo's predecessor, which withdrew the action on March 4, 2010. See *Wachovia Mortgage, FSB* v. *Rahman*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-08-5009298-S. The second was commenced on January 13, 2009, by JPMorgan Chase Bank, National Association, and was dismissed by the court on October 8, 2010, pursuant to Practice Book § 14-3, governing dismissal for lack of diligence. See *JPMorgan Chase Bank, National Assn.* v. *Rahman*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-5010015-S (October 8, 2010). Wells Fargo's predecessor also commenced a third foreclosure action in 2009. Bank of America appeared in that action and filed an answer and special defense, dated

May 5, 2010, based on the satisfaction, which it attached to its pleading.[7]

On August 14, 2012, the plaintiff commenced the present action by way of a one count complaint seeking foreclosure of a blight lien held by the plaintiff and recorded in the Stamford land records. The complaint also named other defendants, including Wells Fargo, and alleged that these defendants may claim an interest in the property. See footnote 1 of this opinion. On October 23, 2012, the plaintiff filed a motion for default against Wells Fargo for failure to appear, which was granted by the clerk of the court on November 7, 2012. On February 19, 2013, the court rendered judgment of foreclosure by sale. The court found the total debt and attorney's fees due the plaintiff to be $28,618.75 and the fair market value of the property to be $410,000. The court set a sale date for May 4, 2013, and the property was sold for $400,000. On July 29, 2013, the plaintiff filed a motion for determination of priorities and supplemental judgment and subsequently filed a revised motion, which the court granted.[8] The remaining proceeds from the sale, in the amount of $348,097.16, were paid to the clerk of the court.

On February 6, 2014, Bank of America filed a motion for a supplemental judgment in which it claimed that the amount owed to it exceeded the remaining sale proceeds. It therefore requested a supplemental judgment disbursing the remaining sale proceeds to it. Bank of America argued that Wells Fargo had been defaulted

[7] The trial court also noted that Bank of America's predecessor had commenced a foreclosure action, which was dismissed in 2009. The court stated that Bank of America admitted in its complaint in that action that the Wells Fargo mortgage had priority over the Bank of America mortgage.

[8] Bank of America filed a memorandum of law in support of the plaintiff's motion and attached to it the satisfaction. The court, in its order granting the plaintiff's motion for a supplemental judgment, directed Bank of America to file a separate motion for a supplemental judgment, which it filed on February 6, 2014.

for failure to appear and had not filed an affidavit of debt by which the court could determine what, if any, amount remained owed to Wells Fargo. It further argued that Wells Fargo had commenced a prior foreclosure proceeding, in which Bank of America appeared and asserted a special defense, that Wells Fargo had received payment in full and that the Wells Fargo mortgage had been released by the satisfaction. Bank of America argued that after it filed a request for production seeking documents related to payment and release of the Wells Fargo mortgage, Wells Fargo withdrew its prior foreclosure complaint without having produced any such documents.

The court rejected Bank of America's motion for a supplemental judgment, stating that it needed "verification of release of the Wells Fargo mortgage that was filed on the land records prior to [the Bank of America mortgage]." On April 1, 2014, Bank of America filed a motion for reconsideration, in which it acknowledged that the satisfaction was never recorded on the land records. It argued, however, that in the event the court were to deny Bank of America's motion, "the net proceeds from the sale of this property will be held indefinitely by the court, without any indication that any money is still owed under the Wells Fargo mortgage." On April 17, 2014, the court reconsidered its decision and granted Bank of America's motion for a supplemental judgment, ordering the clerk of the court, following the expiration of the twenty day appeal period, to disburse to Bank of America $348,097.16, the amount of the sale proceeds remaining with the clerk.

More than three years later, on June 2, 2017, counsel for Wells Fargo filed an appearance and a motion to open the supplemental judgment, arguing that the judgment had been procured by fraud or mutual mistake. Wells Fargo contended that Rahman's fraud in forging the satisfaction provided the court with authority to

open the judgment after the four month period set forth in General Statutes § 52-212a. Wells Fargo did not contend that Bank of America, itself, had engaged in fraud but, rather, claimed that Bank of America had "unknowingly perpetuated [Rahman's] conduct when seeking the supplemental judgment." Wells Fargo requested that the supplemental judgment be opened and the remaining proceeds from the foreclosure sale be paid to Wells Fargo. Bank of America filed an objection, in which it argued, inter alia, that the supplemental judgment had not been procured by fraud because the court had been made aware that the satisfaction was never recorded and, thus, that Wells Fargo's mortgage had not been released from the land records.

On August 30, 2017, Bank of America and Wells Fargo appeared before the court for a hearing on the motion to open.[9] The parties subsequently submitted supplemental briefing concerning the legal standard applicable to a motion to open a judgment on the basis of fraud.[10] On September 22, 2017, the court issued a memorandum of decision in which it granted Wells Fargo's motion to open the supplemental judgment and its motion for a supplemental judgment.

[9] Both parties declined the opportunity to offer evidence during the hearing and presented oral argument only.

[10] Specifically, the parties were directed to address the following cases, *Varley* v. *Varley*, 180 Conn. 1, 3–4, 428 A.2d 317 (1980), and *Turner* v. *Commissioner of Correction*, 163 Conn. App. 556, 564, 134 A.3d 1253, cert. denied, 323 Conn. 909, 149 A.3d 980 (2016). *Turner*, quoting *Varley*, provides: "The question presented by a charge of fraud is whether a judgment that is fair on its face should be examined in its underpinnings concerning the very matters it purports to resolve. Such relief will only be granted if the unsuccessful party is not barred by any of the following restrictions: (1) There must have been no laches or unreasonable delay by the injured party after the fraud was discovered . . . (2) There must have been diligence in the original action, that is, diligence in trying to discover and expose the fraud . . . (3) There must be clear proof of the perjury or fraud . . . [and] (4) There must be a substantial likelihood that the result of the new trial will be different." (Internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, supra, 564.

The court first found that Wells Fargo sufficiently had established fraud to invoke the exception to the four month limitation on opening or setting aside a judgment pursuant to § 52-212a. Applying the factors set forth in *Varley* v. *Varley*, 180 Conn. 1, 3–4, 428 A.2d 317 (1980); see footnote 10 of this opinion; the court found that there was no laches or unreasonable delay on the part of Wells Fargo. The court stated: "Due to the massive and continuing fraud perpetrated on three separate banks, that had the banks scrambling to protect their own interests, it is understandable to this court that considerable delay and confusion presented itself before [Wells Fargo] had a full understanding of all the facts." It further concluded that there was no indication of prejudice to Bank of America as a result of the delay.

Turning to the second *Varley* factor of diligence in trying to discover the fraud, the court found that Wells Fargo, as the holder of the first mortgage on the property, had no reason to be aware of the recordation of any mortgages executed and recorded thereafter. It further concluded that Wells Fargo, having been defaulted for failure to appear, had not received notice of the motion for a supplemental judgment or the motion for reconsideration. Concluding that "[t]he supplemental judgment is a separate statutory proceeding and equity requires notice to all encumbrancers even if defaulted in the first part of the foreclosure action," the court determined that the "failure of notice itself should open the judgment."

The court then found that Wells Fargo had established the third and fourth *Varley* factors. As to the third factor of clear proof of the fraud, the court found that Rahman's presentation of the forged satisfaction at the time of the closing of the Bank of America and JPMorgan Chase mortgages, which was confirmed by the civil judgment obtained by Chicago Title Insurance

Company, satisfied this factor. Lastly, as to the fourth factor, the court determined that the Wells Fargo mortgage was first in time and, therefore, had priority over the Bank of America mortgage, such that there was a substantial likelihood that the result of a new trial would be different. Having concluded that Wells Fargo established all four *Varley* factors, the court granted its motion to open the supplement judgment. The court then granted Wells Fargo's motion for a supplemental judgment and ordered Bank of America to pay $348,097.16 to the clerk of the court and further ordered the clerk of the court to pay that sum to Wells Fargo. This appeal followed.

We first set forth the applicable legal principles. Section 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ." "Courts have interpreted the phrase, [u]nless otherwise provided by law, as preserving the common-law authority of a court to open a judgment after the four month period. . . . It is well established that [c]ourts have intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate [or open] any judgment obtained by fraud, duress or mutual mistake." (Citation omitted; internal quotation marks omitted.) *Simmons* v. *Weiss*, 176 Conn. App. 94, 99, 168 A.3d 617 (2017).

"The party claiming fraud has the burden of proof." *Terry* v. *Terry*, 102 Conn. App. 215, 223, 925 A.2d 375, cert. denied, 284 Conn. 911, 931 A.2d 934 (2007). "Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed . . . .

The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 173 Conn. App. 755, 765, 164 A.3d 702, cert. denied, 327 Conn. 906, 170 A.3d 2 (2017).

"For claims of fraud brought in a civil action, our Supreme Court has established the criteria necessary for a party to overcome the statutory time limitation governing a motion to open and set aside judgment. . . . To have a judgment set aside on the basis of fraud which occurred during the course of the trial upon a subject on which both parties presented evidence is especially difficult. . . . The question presented by a charge of fraud is whether a judgment that is fair on its face should be examined in its underpinnings concerning the very matters it purports to resolve. Such relief will only be granted if the unsuccessful party is not barred by any of the following restrictions: (1) There must have been no laches or unreasonable delay by the injured party after the fraud was discovered . . . (2) There must have been diligence in the original action, that is, diligence in trying to discover and expose the fraud[11] . . . (3) There must be clear proof of the perjury or fraud . . . [and] (4) There must be a substantial likelihood that the result of the new trial will be different."[12] (Footnote added; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 163 Conn.

[11] Our Supreme Court subsequently abandoned the diligence factor imposed by *Varley* in the marital litigation context. See *Billington* v. *Billington*, 220 Conn. 212, 222, 595 A.2d 1377 (1991).

[12] Our Supreme Court later modified the fourth factor: "[W]e disavow the phrasing employed in *Varley* and rephrase the fourth prong to require a movant to demonstrate a reasonable probability, rather than a substantial likelihood, that the result of a new trial will be different." *Duart* v. *Dept. of Correction*, 303 Conn. 479, 491, 34 A.3d 343 (2012).

App. 556, 564, 134 A.3d 1253, cert. denied, 323 Conn. 909, 149 A.3d 980 (2016). A party seeking to overcome the statutory limitation on opening a judgment must satisfy all four *Varley* factors. See id., 565 ("[b]ecause the petitioner cannot succeed on the first *Varley* factor, we need not consider the remaining factors").

I

We begin by addressing Bank of America's alternative claim that the court erred in opening the supplemental judgment because Wells Fargo failed to satisfy the *Varley* factors. Specifically, it argues that Wells Fargo failed to satisfy the second factor requiring diligence in trying to discover and expose the fraud. We agree.

We first note the general standard of review applicable to a motion to open a judgment.[13] "Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing [a motion] to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *Dougherty* v. *Dougherty*, 109 Conn. App. 33, 38–39, 950 A.2d 592 (2008).

In the context of a motion to open a judgment beyond the four month time limitation on the basis of fraud, a court's "determinations as to the elements of fraud are findings of fact that we will not disturb unless they are clearly erroneous." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 173 Conn. App. 766; see

[13] The parties dispute the applicable standard of review. Bank of America argues that the proper standard of review is plenary because the "court's decision was based solely on a stipulation of facts and the oral and written arguments of counsel." Wells Fargo maintains that the decision to grant a motion to open a judgment is within the trial court's discretion and that appellate review requires every reasonable presumption in favor of the court's action.

also *Cromwell Commons Associates* v. *Koziura*, 17 Conn. App. 13, 16–17, 549 A.2d 677 (1988) ("[t]he existence of fraud for purposes of opening and vacating a judgment is a question of fact"). The determination as to whether the moving party used diligence in seeking to discover the fraud is also a factual determination, which may be rejected only upon a determination that it is clearly erroneous. See *Jucker* v. *Jucker*, 190 Conn. 674, 679, 461 A.2d 1384 (1983) ("A factual finding may be rejected by this court only if it is clearly erroneous. . . . The evidence bearing on the factual [matter] of . . . the plaintiff's exercise of due diligence adequately support[s] the conclusions drawn by the court. It cannot be said, therefore, that the finding was as a matter of law unsupported by the record, incorrect, or otherwise mistaken. . . . This court may not substitute its own opinion . . . for the factual finding of the trial court." [Citations omitted; internal quotation marks omitted.]).

"When a party seeks to open and vacate a judgment based on new evidence allegedly showing the judgment is tainted by fraud, he must show, inter alia, that he was diligent during trial in trying to discover and expose the fraud . . . ." *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, 952 A.2d 1 (2008). In *Chapman Lumber, Inc.*, our Supreme Court considered an appeal challenging the trial court's refusal to conduct an evidentiary hearing in connection with the defendant attorney's motion to open the judgment rendered against him in an action arising out of allegedly improper conduct in connection with his representation of a remodeling contractor. Id., 72. In affirming the trial court's denial of the motion to open, our Supreme Court stated that the issues the defendant wanted to explore at the hearing "had occurred years before trial and were related to proceedings to which the defendant had complete access." Id., 108. Citing *Varley*, the court held that "the

defendant clearly had not exercised the requisite diligence in uncovering the purported malfeasance." Id.

In the present case, we are convinced that the trial court's finding that Wells Fargo had proven diligence is clearly erroneous. The court's determination improperly was supported by its finding that Wells Fargo, as the holder of the first mortgage on the property, had no reason to be aware of the recordation of any mortgages executed and recorded thereafter. The fraud of which Wells Fargo complained occurred in April and May, 2008, when Rahman, in what the trial court described as "blatant acts of forgery," presented the fraudulent satisfaction to two lenders in an effort to obtain multiple mortgages on the property. More than nine years later, on June 2, 2017, Wells Fargo filed a motion to open the supplemental judgment in this action. During that nine year period, Wells Fargo itself was in the best position to discover Rahman's fraud but failed to exercise any diligence in attempting to do so.

In fact, the trial court took judicial notice of not one, but two foreclosure actions instituted by Wells Fargo or its predecessor with respect to the property. In the second foreclosure action, commenced in October, 2009, Bank of America's predecessor had filed a special defense alleging that the Wells Fargo note had been paid off *and attached the satisfaction*. After the filing of the special defense and satisfaction, Wells Fargo withdrew its complaint.[14] Accordingly, as of 2009, Wells

[14] In the 2009 action, Bank of America's predecessor filed a motion for nonsuit on the basis of Wells Fargo's failure to respond to its requests for production. Although that motion was granted, a later motion for an extension of time to respond to the requests for production was also granted. In its motion for a supplemental judgment, Bank of America maintained that Wells Fargo never produced any documents in response to its requests for production, which it represented sought documentation regarding the Wells Fargo mortgage and payment and release of that mortgage. It is not clear from the file what documents were sought by the requests for production and whether Wells Fargo ever responded to the requests. It is clear, however, that Wells Fargo ultimately withdrew its complaint in that action.

Fargo was aware of the existence of the satisfaction purporting to release its mortgage on the property, yet it did nothing to investigate the validity of the satisfaction for *eight years*.

We also reject the determination underlying the court's finding of diligence that Wells Fargo was entitled to notice of the supplemental judgment proceedings despite its default for failure to appear "in the first part of the foreclosure action." Our rules of practice do not require service of motions on nonappearing, defaulted parties. See Practice Book § 10-12 (a) ("[i]t is the responsibility of counsel or a self-represented party filing the same *to serve on each other party who has appeared* one copy of every pleading subsequent to the original complaint, every written motion other than one in which an order is sought ex parte and every paper relating to discovery, request, demand, claim, notice or similar paper" [emphasis added]).[15]

Moreover, Wells Fargo did not demonstrate how its access to information regarding the satisfaction was limited in any way during the present action. In fact, during the hearing on the motion to open, Wells Fargo declined to offer any evidence at all beyond the stipulation.[16] Had it appeared in the present action, it would

[15] In its motion for default for failure to appear, the plaintiff's counsel certified that a copy of the motion was delivered to Wells Fargo, and the notice granting the motion for default indicates that Wells Fargo was provided notice of that order. See Practice Book § 10-12 (b) ("[i]t shall be the responsibility of counsel or a self-represented party at the time of filing a motion for default for failure to appear to serve the party sought to be defaulted with a copy of the motion").

Practice Book § 10-12 (c) requires that "[a]ny pleading asserting new or additional claims for relief against parties who have not appeared or who have been defaulted shall be served on such parties." Wells Fargo has not provided us with any authority, and we are aware of no such authority, that such a rule requires service on a defaulted party of a motion for a supplemental judgment.

[16] With respect to why Wells Fargo failed to respond to the complaint in this action, its counsel stated during the hearing on the motion to open that "I know that we've tried to figure out with Wells Fargo to determine why—who did—why didn't they respond to the original complaint. And this hap-

have received notice of the supplemental judgment proceedings, including Bank of America's motion for a supplemental judgment, to which it attached the satisfaction, and its subsequent motion for reconsideration, which informed the court that the satisfaction had not been recorded on the land records.

Lastly, we note that counsel for Wells Fargo conceded during oral argument before this court that Wells Fargo discovered the fraud in 2017 upon a review of its own files. Wells Fargo's apparent failure to conduct such a review sooner, either by its predecessor during the pendency of the two foreclosure actions it initiated or during the course of the present action, repudiates any diligence in trying to uncover fraud. Accordingly, we conclude that the trial court's finding that Wells Fargo had satisfied *Varley*'s second factor of "diligence in the original action, that is, diligence in trying to discover and expose the fraud," is clearly erroneous.[17] Because

pened so long ago that we've—they simply say we have no idea why we weren't involved earlier."

[17] In one paragraph of its appellate brief, Wells Fargo claims that the supplemental judgment was procured by mutual mistake, arguing that "at the very least, both Wells Fargo and Bank of America were deceived by . . . Rahman's fraudulent satisfaction . . . which Bank of America ultimately submitted to the court." Bank of America responds that there is no evidence to support the claim that the supplemental judgment was based on a mutual mistake and argues that Wells Fargo failed to raise its claim of mutual mistake in the trial court. Although the trial court recognized Wells Fargo's claim as one of both fraud and mutual mistake, it did not make any finding as to mutual mistake.

"A mutual mistake is one that is common to both parties and effects a result that neither intended." (Internal quotation marks omitted.) *Davis* v. *Hebert*, 105 Conn. App. 736, 741, 939 A.2d 625 (2008). "[A] unilateral mistake will not be sufficient to open the judgment." (Internal quotation marks omitted.) *Richards* v. *Richards*, 78 Conn. App. 734, 740, 829 A.2d 60, cert. denied, 266 Conn. 922, 835 A.2d 473 (2003). We agree with Bank of America that there was no evidence before the court to support a finding that the supplemental judgment was procured by mutual mistake. Wells Fargo, having been defaulted, did not participate in the supplemental judgment proceedings, during which it now claims mutual mistake. Moreover, Bank of America acknowledged in its motion for reconsideration that the satisfaction had never been recorded on the land records. Because there was no finding of mutual mistake and, indeed, no evidence in the record to support any such finding, we reject Wells Fargo's claim.

Wells Fargo failed to satisfy the second *Varley* factor,[18] the court erred in opening the supplemental judgment on the basis of fraud beyond the four month time limitation.

II

Bank of America also claims that the court erred in opening the supplemental judgment because the judgment was not procured by any fraud on its part. We agree.

The conclusion underlying the trial court's opening of the supplemental judgment, that the fraudulent action of a defaulted party prior to the litigation at issue satisfies the exception to the four month limitation for judgments obtained by fraud, is a question of law. "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts as they appear in the record." (Internal quotation marks omitted.) *Saggese* v. *Beazley Co. Realtors*, 155 Conn. App. 734, 751, 109 A.3d 1043 (2015); see also *Rome* v. *Album*, 73 Conn. App. 103, 108, 807 A.2d 1017 (2002) (plaintiff's challenge to court's general authority under § 52-212a to grant defendant's motion presents question of statutory construction over which review is plenary).

In response to Bank of America's claim of error, Wells Fargo has not provided this court with any authority to support the conclusion that fraud committed by a *defaulted* party years prior to litigation can support the opening of a judgment following the expiration of the four month period. Cf. *Grayson* v. *Grayson*, 4 Conn. App. 275, 296, 494 A.2d 576 (1985) ("[w]here . . . a

[18] Because we conclude that Wells Fargo failed to satisfy the second *Varley* factor, we need not consider the remaining factors. See *Turner* v. *Commissioner of Correction*, supra, 163 Conn. App. 565.

clear case is made under applicable law that a fraudulent and material misrepresentation *by one party* resulted in a substantial injustice to *the other party*, we must not hesitate to act" [emphasis added; internal quotation marks omitted]), appeal dismissed, 202 Conn. 221, 520 A.2d 225 (1987). Although not binding on this court, we find instructive rule 60 (b) of the Federal Rules of Civil Procedure, which provides in relevant part that "the court may relieve a party or its legal representative from a final judgment . . . for the following reasons . . . fraud . . . misrepresentation, or misconduct *by an opposing party* . . . ." (Emphasis added.) Under rule 60 (b) (3) of the Federal Rules of Civil Procedure, "the movant must show that such fraud prevented him or her from fully and fairly presenting his or her case, and that the fraud is attributable to the party or, at least, to counsel." (Internal quotation marks omitted.) *L.I. Head Start Child Development Services, Inc.* v. *Economic Opportunity Commission of Nassau County, Inc.*, 956 F. Supp. 2d 402, 410 (E.D.N.Y. 2013).

Although Rahman was named as a defendant in this action, he never appeared before the trial court and was defaulted for failure to appear on November 7, 2012. He did not oppose, nor did he participate in, the supplemental judgment proceedings. His fraudulent actions did not occur during the course of this action. Cf. *Turner* v. *Commissioner of Correction*, supra, 163 Conn. App. 564 ("[t]o have a judgment set aside on the basis of fraud *which occurred during the course of the trial* upon a subject on which both parties presented evidence is especially difficult" [emphasis added; internal quotation marks omitted]). Moreover, Wells Fargo stipulated that both it and Bank of America "are unaware of any evidence that Bank of America acted fraudulently with regard to the entry of the supplemental judgment in this action." See *Sousa* v. *Sousa*, supra, 173 Conn. App. 772 (recognizing that "the defendant's

failure to establish the plaintiff's knowledge of the alleged misrepresentation is dispositive of the defendant's fraud claim").

In fact, we note that the circumstances surrounding the supplemental judgment belie the conclusion that the supplemental judgment was "obtained by fraud." After initially rejecting Bank of America's motion for a supplemental judgment on the basis of its failure to provide verification of the release of the Wells Fargo mortgage, the court ultimately granted that motion after being informed by Bank of America in its motion for reconsideration that the satisfaction had never been recorded on the land records. The court apparently was persuaded by Bank of America's argument that the court should not hold the remaining sale proceeds indefinitely, given Wells Fargo's default and failure to file any claim to the sale proceeds.

Accordingly, we agree with Bank of America that the supplemental judgment was not "obtained by fraud," where the only claimed fraudulent conduct was committed by Rahman years prior to the present litigation during which he was defaulted and did not participate. Thus, the court lacked authority to open the supplemental judgment more than four months after it was rendered.

The judgment is reversed and the case is remanded with direction to deny the motion to open the supplemental judgment.

In this opinion the other judges concurred.

DE ANN MAURICE *v.* CHESTER HOUSING ASSOCIATES LIMITED PARTNERSHIP ET AL.
(AC 41741)

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

Syllabus

The plaintiff in error, W, a general and managing partner of the named defendant in the underlying action, brought this writ of error to challenge the trial court's imposition of sanctions against him for bad faith litigation misconduct. During the course of the underlying litigation, W sent an inappropriate e-mail of a harassing nature to R, counsel for the defendant in error. R reported the incident to the police, who warned W not to contact R again, and, for the next year, the underlying action proceeded toward trial. Immediately before opening statements were to begin, W, while standing outside the courtroom, made an inappropriate comment of a sexual nature about R that was loud enough to be heard by R and others present. Immediately thereafter, R made an oral motion for sanctions. Following a hearing, the court granted the motion, concluding that W's conduct was in bad faith and was intended to harass R in order to gain an advantage in the litigation, and awarded to the defendant in error attorney's fees in an undetermined amount, to be decided after a motion for attorney's fees was filed and a hearing held. On W's appeal to this court, *held*:

1. W could not prevail on his claim that the trial court exceeded the scope of its authority by awarding attorney's fees against him as a nonparty for his out-of-court conduct; it is well established that a trial court has the inherent authority to impose sanctions, including the award of attorney's fees, for both in-court and out-of-court conduct that abuses the judicial process, and although W was not a party to the underlying action, the trial court had the inherent power to sanction W for his bad faith litigation misconduct as a real party in interest, as W, being a general and managing partner of the named defendant in the underlying action, had a substantial interest in the outcome of the litigation and had substantially participated in the underlying proceedings, such that the award of attorney's fees against him for his out-of-court bad faith litigation misconduct was proper.
2. The trial court did not abuse its discretion in awarding attorney's fees as a sanction against W for his out-of-court conduct; contrary to W's claim, the trial court was not required to find that W's bad faith conduct had an effect on the outcome of the litigation in order to award attorney's fees, and given that W did not contest the court's factual finding that his conduct was intended to threaten, harass and intimidate R to gain an advantage in the litigation, that no exact award had yet been given

and that any such award may be appealed, it was not an abuse of discretion for the trial court to determine that an award of attorney's fees was an appropriate sanction against W in this case for W's bad faith litigation misconduct.

Argued November 26, 2018–officially released February 26, 2019

Procedural History

Writ of error from the order of the Superior Court in the judicial district of New London, *Vacchelli*, *J.*, granting the defendant's motion for sanctions, brought to the Supreme Court, which transferred the matter to this court. *Writ of error dismissed.*

Michael P. Carey, with whom, on the brief, was *Daniel L. King*, for the plaintiff in error (Douglas Williams).

Kelly E. Reardon, for the defendant in error (De Ann Maurice).

Opinion

LAVINE, J. The plaintiff in error, Douglas Williams, brings this writ of error after the trial court sanctioned him for bad faith litigation misconduct and determined that, following further proceedings, attorney's fees shall be awarded to the defendant in error, De Ann Maurice. In his writ, he claims that (1) the trial court acted outside of the scope of its authority and (2) even if the court had such authority, it abused its discretion by determining that an award of attorney's fees was an appropriate sanction against him for out-of-court conduct when he was not a party to the underlying matter. We dismiss the writ of error.

The following facts and procedural history are relevant to Williams' claims. The underlying action was a premises liability case brought in January, 2015, by the defendant in error against the defendants, Chester Housing Associates Limited Partnership (partnership), MJKH Property Services, LLC, and Something Natural, LLC, which resulted in a verdict for the defendants. Williams is a general partner and the managing partner

in the partnership but was not a defendant in the underlying matter. On January 15, 2016, at 11:02 p.m., Williams sent an inappropriate e-mail to the defendant in error's counsel, Kelly E. Reardon.[1] After receiving the e-mail, Reardon reported it to the police, who warned Williams not to contact Reardon again. For the next year, the litigation proceeded toward trial.

On April 27, 2017, while Reardon and others were standing in a hallway outside the courtroom immediately before opening statements were to begin, Williams stated to an unidentified individual, loud enough to be heard by those present, that he wanted Reardon to "sit on his fucking head." Shortly thereafter, Reardon reported to the court what had transpired and made an oral motion for sanctions. The court immediately held a hearing on the motion for sanctions,[2] which continued on May 3, 2017,[3] delaying the start of trial. On May 3, 2017, after the hearing, the court granted the motion and awarded the defendant in error attorney's

[1] The e-mail stated:

"Welcome to my web said the spider to the fly. Am I the fly or are you? I think I'm the fly. Fa[ir] enough! What would [you] like? What would you want me to do lie? I love women like you because you young girls have a direction that is 250% of what America is . . . about.

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

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

"Thank you.

"[B]eauty is in the eye of me, [o]h ya.

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

"Old Goat . . . ."

[2] The motion was not based on a claim of criminal or civil contempt.

[3] Williams was represented by counsel at the May 3, 2017 hearing.

fees in an undetermined amount, to be decided after a motion for attorney's fees was filed and a hearing held.[4]

In its oral decision, the trial court found that the purpose of Williams' e-mail "was obviously to threaten [Reardon], harass her, intimidate her, which the court believes was done for the purposes of getting some advantage in the case, to rattle her so that she'd do a poor job in representing her client, to scare her to get her to drop the case." As to the statement made in the hallway, the court found that "considering the context and the purpose, which was essentially a sexual harassment of [Reardon] to try to scare her and rattle her, and obviously had that exact effect because during the April 27 hearing when the motion was made, . . . Reardon was obviously very upset, almost in tears, and so he accomplished his purpose to try to knock her off her ability to proceed in the case, and to cause her distress for a litigation advantage." The court concluded that "these tactics were without any color of propriety and they were taken in bad faith . . . ." These factual findings are not contested.

On January 31, 2018, Williams filed a writ of error with our Supreme Court, which transferred it to this court on June 5, 2018.[5]

[4] We note that although the e-mail was brought up in the evidentiary hearing and discussed in the court's ruling, it was Williams' statement immediately outside of the courtroom that precipitated the motion for sanctions, not the e-mail, which was received more than a year beforehand.

[5] The writ of error was properly filed in the Supreme Court. See General Statutes § 51-199 (b) (10) (writs of error to be brought to Supreme Court); Practice Book § 72-1 (1) (a) (same). While the writ of error was pending before the Supreme Court, the defendant in error, De Ann Maurice, filed a motion to dismiss the writ, claiming that the Supreme Court lacked jurisdiction over it because the trial court did not render a final judgment when, on May 3, 2017, it ordered that Williams be sanctioned and that there be further proceedings to determine the amount of the concomitant award of attorney's fees. See Practice Book § 72-1 (a) (writ of error may be brought "from a final judgment of the [S]uperior [C]ourt"). The Supreme Court denied the motion to dismiss and subsequently transferred the writ of error to this court. See General Statutes § 51-199 (c) (Supreme Court may transfer cause from itself to Appellate Court).

I

Williams, asserting that his conduct did not occur in the courtroom itself or in the court's presence, first claims that the trial court exceeded the scope of its authority by awarding attorney's fees for out-of-court conduct by a nonparty. Specifically, he argues that the inherent power of the judiciary does not allow for the sanctioning of nonparties for out-of-court conduct. We disagree.

As a threshold matter, we address the standard of review. In the present case, the issue before us is whether the trial court properly determined that it had the inherent authority to impose sanctions for bad faith litigation misconduct against Williams. "Because this presents a question of law, our review is plenary." *Burton* v. *Mottolese*, 267 Conn. 1, 25, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004).

"It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice

On September 4, 2018, prior to oral argument of this case before this court, our Supreme Court released its decision in *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 191 A.3d 983 (2018). In *Ledyard*, the Supreme Court ruled that the Appellate Court wrongly dismissed, for lack of a final judgment, an appeal taken from a judgment that determined only that the defendant was liable for attorney's fees. The Supreme Court ruled that the trial court's determination that the defendant was liable for attorney's fees was an appealable final judgment, despite the fact that the amount of those fees had not yet been determined. The Supreme Court found that, in dismissing the appeal, the Appellate Court had wrongly relied on a footnote in *Paranteau* v. *DeVita*, 208 Conn. 515, 524 n.11, 544 A.2d 634 (1988), for the proposition that a trial court does not render a final judgment as to attorney's fees until it conclusively determines the amount of those fees. The Supreme Court held that the language in *Paranteau* applies only to "supplemental postjudgment awards of attorney's fees." *Ledyard* v. *WMS Gaming, Inc.*, supra, 90.

Here, the order that Williams be sanctioned and that he pay attorney's fees is a final judgment under *Ledyard*—notwithstanding the fact that the trial court has yet to determine the amount of those fees—because it does not constitute a supplemental postjudgment award of attorney's fees.

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

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

"Because of their very potency, inherent powers must be exercised with restraint and discretion. . . . A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. . . . [O]utright dismissal of a lawsuit . . . is a particularly severe sanction, yet is within the court's discretion. . . . Consequently, the less severe sanction of an assessment of attorney's fees is undoubtedly within a court's inherent power as well." (Citations omitted; internal quotation marks omitted.) *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43–45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991).

"As a substantive matter, [t]his state follows the general rule that, except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable

[attorney's] fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith." (Citations omitted; internal quotation marks omitted.) *Maris* v. *McGrath*, 269 Conn. 834, 844, 850 A.2d 133 (2004).

It is well settled that this bad faith exception applies both to counsel and parties. Id., 845. Williams argues that this exception, however, does not extend to nonparties under any circumstance. We are unpersuaded. Such a bright line approach that focuses only on the distinction between party and nonparty fails to take into account factual circumstances and situations in which a nonparty who has a close relationship with the litigation could, in bad faith, abuse the judicial process to the same degree and effect as a party and interfere with the orderly functioning of the court. Notably, the United States Supreme Court could have made such a bright line rule between parties and nonparties when it upheld sanctions against a person for his fraudulent and bad faith conduct before and after he became a party, but it chose not to do so.[6] See *Chambers* v. *NASCO, Inc.*, supra, 501 U.S. 36–37, 50–51 (order requiring sole shareholder of company operating television station to pay attorney's fees and expenses totaling almost $1 million upheld as inherent power of court). Yet, the inherent power of the judiciary is not absolute and is subject to limitations to protect against abuse

[6] Our Supreme Court also declined to make such a ruling in *Allstate Ins. Co.* v. *Mottolese*, 261 Conn. 521, 523–25, 803 A.2d 311 (2002), in which the plaintiff in error brought a writ of error after the court sanctioned the insurer of the defendant in the underlying motor vehicle action for not increasing its settlement offer in a pretrial conference. Although the case did not involve sanctions pursuant to the court's inherent powers, the plaintiff in error similarly claimed that "the trial court's order of sanctions against it [was] void because it [was] not a party to the underlying action . . . ." Id., 523. Our Supreme Court, however, did not rule that sanctions could not be levied against a nonparty and, instead, reversed the order of sanctions on another ground. Id.

or unduly harsh punishment. Id., 44–47. To that end, we find persuasive the reasoning in *Helmac Products Corp.* v. *Roth (Plastics) Corp.*, 150 F.R.D. 563 (E.D. Mich. 1993) (*Helmac*), and adopt the test articulated therein.

In *Helmac,* the federal district court considered whether sanctions were proper against a nonparty corporate officer who was responsible for the destruction of documents that were responsive to a discovery request. Id., 564. In analyzing the issue, the court noted that "in the absence of the bright-line party—non-party distinction . . . courts must adopt a new boundary to limit the imposition of sanctions." Id., 566. The court reasoned that "the Court's power to sanction cannot possibly extend to everyone who interferes with litigation before the court," otherwise "the power to sanction would be so wide that it would be unenforceable." Id., 567. The court found, however, that in certain situations, the courts "should also have the power to sanction [a] corporate officer." Id., 568.

The court stated that "[t]he reasons for doing so are plain: the individual [can be] as much involved in the litigation as any party would be, and his participation in [certain conduct can be] tantamount to a direct snubbing of the Court's authority by that individual. In some circumstances, a corporate entity may have depleted assets, and an individual may avoid the penalty for his actions by hiding behind the corporate veil. This avoidance is not warranted. Logically, it seems incongruous for the Court not to be able to impose a penalty upon the individual." Id. The court concluded that "a rigorous application of a two-part test will provide the least possible power adequate to the end proposed. . . . To be subject to the Court's inherent power to sanction, a non-party not subject to court order must (1) have a substantial interest in the outcome of the litigation and (2) substantially participate in the proceedings in which he interfered. This test . . . effectively limit[s] the scope of the Court's inherent power

to sanction to those individuals who were either (1) parties, (2) subject to a court order, or (3) real parties in interest."[7] (Citations omitted; internal quotation marks omitted.) Id.

Applying the *Helmac* test to the facts of the present case, we conclude that the court had the inherent power to sanction Williams for his bad faith litigation misconduct as a real party in interest. Williams is a general partner and the managing partner of the partnership and, thus, had a substantial interest in the outcome of the litigation and had substantially participated in the proceedings.[8] It follows, therefore, that the court had the inherent power to sanction him for out-of-court bad faith litigation misconduct and award attorney's fees, as the court's inherent power "reaches both conduct before the court and that beyond the court's confines," and "an assessment of attorney's fees is undoubtedly

[7] This test has been applied in cases such as *In re White*, United States District Court, Docket No. 2:07CV342 (MSD), 2013 WL 5295652, *70 (E.D. Va. September 13, 2013) (nonparty who filed motion to quash had sufficient interest and participation in litigation to be subject to court's inherent power; sanctions for blog postings, however, were unwarranted as postings were "protected speech, beyond the confines of the Court, that did not apparently interfere with the administration of justice"); *Adell Broadcasting Corp.* v. *Ehrlich*, Docket Nos. 299061 and 299966, 2012 WL 468258, *9–10 (Mich. App. February 14, 2012) (president and director of companies who filed complaint on their behalf had sufficient interest and participation in litigation to be subject to court's inherent power; court erred by imposing sanctions without giving notice and opportunity to be heard); and *In re VIII South Michigan Associates*, 175 B.R. 976, 984 (Bankr. N.D. Ill. 1994) (nonparty expert witness did not have substantial interest or participation in proceedings to be subject to court's inherent authority under *Helmac*).

[8] Williams was deposed twice, acted as the representative of the partnership throughout the legal proceedings, and sat at counsel table prior to the imposition of an additional sanction that required him to sit in the back of the courtroom. Notably, in the initial hearing on sanctions, the partnership's counsel acknowledged that Williams was a real party in interest, as he argued that Williams *was* a party. He stated: "[The plaintiff in error] is a party, Your Honor, and until this is resolved I—I don't think Your Honor can remove him from the courtroom where he has been—his business has been sued. He is a party. . . . [h]e's the sole representative of the party."

within a court's inherent power . . . ." *Chambers* v. *NASCO, Inc.*, supra, 501 U.S. 44–45. We, therefore, conclude that it is within the court's inherent authority to award attorney's fees against Williams for his out-of-court bad faith litigation misconduct.[9]

II

Williams' second claim is that even if the court's inherent powers include the imposition of a sanction on a nonparty for bad faith litigation misconduct, the trial court abused its discretion by authorizing an award of attorney's fees as a sanction against him for out-of-court conduct. Specifically, Williams argues that the sanction was an abuse of discretion, as there was no evidence or allegation that his conduct affected the outcome of the litigation.[10] We disagree.

"It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review

[9] This conclusion is further supported by *Corder* v. *Howard Johnson & Co.*, 53 F.3d 225, 232 (9th Cir. 1994), in which the United States Court of Appeals for the Ninth Circuit concluded that "a court may impose attorney's fees against a non-party as an exercise of the court's inherent power to impose sanctions to curb abusive litigation practices."

[10] Reardon first suggested a $10,000 fine against Williams at the April 27 hearing, which was followed by attorney Robert Reardon, who represented Kelly Reardon and the defendant in error at the May 3 hearing, urging that the court enter a default judgment against the defendant partnership on the issue of liability or impose a $50,000 fine. The trial court, noting that the proceeding was for litigation misconduct and doubting that it had the authority to issue a fine, decided that an award of attorney's fees was appropriate. In her June 1, 2017 motion for attorney's fees, the defendant in error requested fees in the amount of $37,051.50.

of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 815, 43 A.3d 567 (2012).

"[S]ubject to certain limitations, a trial court in this state has the inherent authority to impose sanctions . . . for a course of claimed dilatory, bad faith and harassing litigation conduct, even in the absence of a specific rule or order of the court that is claimed to have been violated. . . .

"It is generally accepted that the court has the inherent authority to assess attorney's fees when the . . . party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation. . . . Moreover, the trial court must make a specific finding as to whether counsel's [or a party's] conduct . . . constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers to impose attorney's fees for engaging in bad faith litigation practices." (Citations omitted; internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 844–45.

"[A] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle." *Berzins* v. *Berzins*, 306 Conn. 651, 662, 51 A.3d 941 (2012). "To ensure . . . that fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . ." (Internal quotation marks omitted.)

Maris v. *McGrath*, supra, 269 Conn. 845. Thus, "in order to impose sanctions pursuant to its inherent authority, the trial court must find *both* [1] that the litigant's claims were entirely without color *and* [2] that the litigant acted in bad faith." (Emphasis in original.) *Berzins* v. *Berzins*, supra, 663.

As an initial matter, we note that Williams does not contest the court's factual findings that his conduct was intended to "threaten [Reardon], harass her, intimidate her . . . for the purposes of getting some advantage in the case, to rattle her so that she'd do a poor job in representing her client . . . to cause her distress for a litigation advantage" and that "these tactics were without any color of propriety and they were taken in bad faith . . . ." Therefore, the question of whether Williams' conduct was properly deemed litigation misconduct is not before this court. Rather, Williams claims that the court abused its discretion by authorizing an award of attorney's fees against him and focuses his argument on the fact that he is a nonparty and was sanctioned for out-of-court conduct.

Williams appears to argue that the trial court's abuse of discretion lies in the absence of a finding of an *effect* on the outcome of litigation. In doing so, he misconstrues the findings needed for the bad faith exception to apply. Although the court must find that the sanctioned conduct was "entirely without color" and was done "for reasons of harassment or delay or for other improper purposes," it does not need to make a finding that the conduct had an effect on the outcome of the case. *Maris* v. *McGrath*, supra, 269 Conn. 845.

Williams also argues that the court abused its discretion by extending sanctions to cover his conduct when the court should only award such sanctions with restraint and discretion. He argues that "[s]anctions for

bad faith litigation have been consistently and historically applied based on meritless pleadings; [wilful] violations of court orders; and filings causing harassment or delay," and he attempts to distinguish his conduct by stating that "the specific focus for bad faith litigation is on litigation tactics," rather than out-of-court conduct. Although we agree that historically, bad faith litigation sanctions have been applied to situations that differ from the present case, this argument fails to take into account that the conduct under consideration here is highly atypical and flies in the face of "the decorum and respect inherent in the concept of courts and judicial proceedings." *Illinois* v. *Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).[11] Most detrimental to Williams' argument, however, is the fact that he does not raise as an issue the court's factual finding that his actions constituted bad faith litigation misconduct. As the court found that Williams' conduct was intended to harass Reardon in order to gain a litigation advantage, a finding that is left unchallenged by Williams, we see

[11] Although the United States Supreme Court in *Illinois* v. *Allen*, supra, 397 U.S. 343, held that a self-represented defendant's expulsion from a courtroom for disruptive conduct did not violate his constitutional rights, the reasoning of the Supreme Court as to the requisite decorum of judicial proceedings holds true here.

"It is essential to the proper administration of . . . justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with [improper conduct] must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." Id., 343. "[O]ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity." Id., 346.

With this same reasoning, Williams' argument that his conduct was protected by the first amendment to the United States constitution fails. See *United States* v. *Grace*, 461 U.S. 171, 178, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) (court building and grounds, excluding the public sidewalks, are nonpublic forums "not . . . traditionally held open for the use of the public for expressive activities" and restrictions must only be "reasonable in light of the use to which the building and grounds are dedicated").

no reason to conclude that a litigation sanction in the form of an award of attorney's fees was a manifest abuse of discretion. In the case of imposing attorney's fees for bad faith litigation misconduct, a court has the "inherent power to police itself, thus serving the dual purpose of vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his [or her] opponent's obstinacy." (Internal quotation marks omitted.) *Chambers* v. *NASCO, Inc.*, supra, 501 U.S. 46.

In that same vein, we emphasize that the court should indeed exercise restraint and discretion in awarding attorney's fees, given the potential for abuse when a court relies on its "inherent authority," carefully scrutinize the documentation submitted in support of the fee request, and award only reasonable attorney's fees directly resulting from the misconduct. See id., 44.[12]

"[The United States Supreme Court] has made clear that such a sanction [of attorney's fees pursuant to a court's inherent powers] must be compensatory rather than punitive in nature. . . . In other words, the fee award may go no further than to redress the wronged

[12] An award of attorney's fees should be awarded in proportion to the harm and additional expense that occurred as a result of the sanctioned conduct. In *Maris*, our Supreme Court upheld an award of attorney's fees in the amount of $15,218.86, against a party who, in bad faith, brought meritless claims and repeatedly gave false testimony, leading to the trial court's conclusion that there was only one good faith litigant. *Maris* v. *McGrath*, supra, 269 Conn. 842–43.

In *Chambers*, the United States Supreme Court upheld an award of attorney's fees and expenses totaling $996,644.65 as G. Russell Chambers, the sanctioned individual, not only sought to deprive the court of jurisdiction by conveying the properties at issue into a trust but "devise[d] a plan of obstruction, delay, harassment, and expense sufficient to reduce [his opponent] to a condition of exhausted compliance . . . ." *Chambers* v. *NASCO, Inc.*, supra, 501 U.S. 37–41.

In the present case, Williams' statement and conduct outside of the courtroom resulted in the additional expense of a two day hearing. We caution the court to limit an award to *reasonable* attorney's fees that is proportional to the harm and expense caused by Williams' actions.

party for losses sustained; it may not impose an additional amount as punishment for the sanctioned party's misbehavior. . . .

"That means, pretty much by definition, that the court can shift only those attorney's fees incurred because of the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong. So . . . a sanction counts as compensatory only if it is calibrate[d] to [the] damages caused by the bad-faith acts on which it is based. . . . A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. But if an award extends further than that—to fees that would have been incurred without the misconduct—then it crosses the boundary from compensation to punishment. Hence the need for a court, when using its inherent sanctioning authority (and civil procedures), to establish a causal link—between the litigant's misbehavior and legal fees paid by the opposing party.

"That kind of causal connection . . . is appropriately framed as a but-for test: The complaining party . . . may recover only the portion of his fees that he would not have paid but for the misconduct. . . .

"This but-for causation standard generally demands that a district court assess and allocate specific litigation expenses—yet still allows it to exercise discretion and judgment." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Goodyear Tire & Rubber Co.* v. *Haeger*, U.S. , 137 S. Ct. 1178, 1186–87, 197 L. Ed. 2d 585 (2017).

"The essential goal in making a remedial award is to do rough justice, not to achieve auditing perfection, and, thus, the award may be based on reasonable estimations of the harm caused and the trial court's own superior understanding of the litigation . . . . The trial court's discretion, however, is not limitless. If the court elects to provide a remedial award, then the value of the award may not exceed the *reasonable value* of the

injured party's losses. . . . Although a trial court may choose to award less under the circumstances of a particular case, a decision to order an award greater than the party's loss would exceed the award's remedial purpose." (Citations omitted; emphasis added; internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 104–105, 161 A.3d 1236 (2017).

Without a precise monetary award of attorney's fees to review, we cannot conclude that an award of *reasonable* attorney's fees would be an abuse of discretion.[13] An award of attorney's fees disproportionate to the harm caused by Williams' conduct, or based on excessive amounts of time expended on preparation or research, however, *would* abuse that discretion. Given that no exact award has yet been given and that any such award may be appealed, we conclude that the trial court did not abuse its discretion in determining that an award of attorney's fees is an appropriate sanction against Williams in this case.

The writ of error is dismissed.

In this opinion the other judges concurred.

TOWN OF CANTON *v.* CADLE PROPERTIES OF CONNECTICUT, INC.
(AC 40484)

Keller, Prescott and Pellegrino, Js.

Syllabus

The plaintiff town filed a petition for the appointment of a receiver of rents, alleging that the defendant had failed to pay real property taxes on certain of its property. After the trial court granted that motion, the intervening defendant, M Co., the current tenant of the subject property,

[13] We note that the record is bereft of any indication that Reardon was unable to take part in the trial. The record nonetheless reflects that Williams' statement did interfere with the trial and occasioned additional legal fees because it so upset Reardon and required an immediate judicial response and a hearing, which delayed the start of trial from April 27, 2017, until May 4, 2017.

filed a motion to remove the receiver, claiming, inter alia, that the receiver had exceeded its authority under statute (§ 12-163a) by serving it with a notice to quit and by bringing an action to collect back taxes and prior rents. M Co. appealed from the trial court's ruling denying its motion, and, following a remand, the receiver filed an interim accounting and moved the trial court to approve that accounting and its previous disbursal of funds. M Co. objected on the ground that the accounting submitted indicated that the receiver had failed to comply with the order of priorities for distributions under § 12-163a, which requires the receiver to pay the costs for utilities due on and after its appointment. The trial court approved an updated interim accounting and overruled M Co.'s objection, and M Co. appealed to this court. On appeal, M Co. claimed, inter alia, that a plain reading of § 12-163a does not limit the required, enumerated utility payments to those obligated to be paid by the owner of the property and, thus, that the trial court should not have approved the updated interim accounting because the receiver did not reimburse M Co. for its utility expenditures. *Held* that the trial court properly determined that, pursuant to § 12-163a, the receiver is mandated to pay only utility bills that are the obligation of the owner, not those incurred by tenants of the property: a literal adherence to the text of § 12-163a was unworkable in the present circumstances because an interpretation of the statute that relieves tenants of an obligation to pay for their own utility expenses and places the burden on the receiver appointed under § 12-163a will likely lead to considerably less money to satisfy delinquent taxes and, where necessary, the fees and costs of the receiver, thereby defeating the primary purpose of the receivership; moreover, where, as here, the plain meaning of the statutory text yields an unworkable result, courts may look for interpretive guidance to extratextual evidence, including the legislative history of § 12-163a, which indicated that it was enacted in order to give municipalities the same tools and authority to collect delinquent taxes that the legislature gave to utility companies pursuant to statute (§ 16-262f), and, thus, because, under § 16-262f, the legislature did not intend that a receiver acting on behalf of a utility pay utility expenses for which the owner had not been directly billed, it could be inferred that, in enacting § 12-163a, the legislature did not intend that a receiver acting on behalf of a municipality seeking delinquent taxes owed by the owner bore the burden of providing all of the occupants of the property with free utilities when, prior to the appointment of the receiver, those occupants had been paying their own utility bills; furthermore, common sense dictated that a statutory procedure designed to assist financially pressed municipalities with recoupment of delinquent taxes from property owners should not have its effectiveness diminished by an impractical interpretation that would give tenants the unexpected gift of free utilities by making a receiver responsible, not just for the owner's unpaid utility bills, but also for payment of each and every tenant's utility bills, and M Co.'s interpretation

of § 12-163a was further undermined by the fact that, in certain instances, it would jeopardize the receiver's ability to continue to collect any rental income at subject properties.

Argued November 13, 2018—officially released February 26, 2019

Procedural History

Petition for the appointment of a receiver of rents, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Graham*, *J.*; judgment granting the petition and appointing Boardwalk Realty Associates, LLC, as receiver of rents; thereafter, the court granted the receiver's motion to modify the order of appointment and granted the motion to intervene as a party defendant filed by M & S Associates, LLC; subsequently, the court denied the intervening defendant's motion to remove the receiver, and the intervening defendant appealed to this court, which reversed in part the trial court's judgment and remanded the case with direction to deny the receiver's motion to modify the receivership orders, and the plaintiff, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment in part and remanded the case to this court with direction to affirm the judgment of the trial court granting the receiver's motion for modification allowing the collection of back rent allegedly due; thereafter, the court, *Scholl*, *J.*, granted the receiver's motion to approve its interim accounting report and to disburse funds, and the intervening defendant appealed to this court. *Affirmed.*

Eric H. Rothauser, for the appellant (intervening defendant).

Logan A. Carducci, with whom were *Daniel J. Krisch* and, on the brief, *Kenneth R. Slater*, *Jr.*, for the appellee (plaintiff).

Opinion

KELLER, J. On April 26, 2011, the plaintiff, the town of Canton (town), filed a petition for an appointment of a receiver of rents after the named defendant, Cadle Properties of Connecticut, Inc. (Cadle), failed to pay

property taxes on real property it owns at 51 Albany Turnpike in Canton. The court granted the petition on June 20, 2011. In this appeal, the intervening defendant, M & S Associates, LLC, which currently occupies the subject property, appeals from the trial court's post-judgment order approving an interim accounting filed by the receiver of rents, Boardwalk Realty Associates, LLC (receiver).[1] The defendant claims that the trial court erred in granting the receiver's motion for approval of the interim accounting by misconstruing General Statutes § 12-163a[2] and finding that the receiver

[1] Both the named defendant, Cadle, which did not appear in the trial court, and the receiver are not participating in this appeal. This appeal addresses only the claim of error raised by M & S Associates, LLC, relating to the trial court's approval of the receiver's accounting. In this opinion, we refer to M & S Associates, LLC, as the defendant.

[2] General Statutes § 12-163a provides in pertinent part: "(a) Any municipality may petition the Superior Court or a judge thereof, for appointment of a receiver of the rents or payments for use and occupancy for any property for which the owner, agent, lessor or manager is delinquent in the payment of real property taxes. The court or judge shall forthwith issue an order to show cause why a receiver should not be appointed, which shall be served upon the owner, agent, lessor, manager, mortgagees, assignees of rent and other parties with an interest in the rents or payments for use and occupancy of the property in a manner most reasonably calculated to give notice to such owner, lessor, manager, mortgagees, assignees of rent and other parties with an interest in the rents or payments for use and occupancy of the property as determined by such court or judge, including, but not limited to, a posting of such order on the premises in question. A hearing shall be had on such order no later than seventy-two hours after its issuance or the first court day thereafter. The sole purpose of such a hearing shall be to determine whether there is an amount due and owing between the owner, agent, lessor or manager and the municipality. The court shall make a determination of any amount due and owing and any amount so determined shall constitute a lien upon the real property of such owner. A certificate of such amount may be recorded in the land records of the town in which such property is located describing the amount of the lien and the name of the party who owes the taxes. When the amount due and owing has been paid, the municipality shall issue a certificate discharging the lien and shall file the certificate in the land records of the town in which such lien was recorded. The receiver appointed by the court shall collect all rents or payments for use and occupancy forthcoming from the occupants of the building in question in place of the owner, agent, lessor or manager. The receiver shall make payments from such rents or payments for use and occupancy, first for taxes due on and after the date of his appointment and then for electric, gas, telephone, water or heating oil supplied on and after

is not required to pay, from the date of the receiver's appointment, the defendant's utility costs at the subject property. We disagree.

In a prior appeal, our Supreme Court set forth the following undisputed facts and procedural history, all of which are relevant to the present appeal:[3] "[Cadle] . . . is the owner of real property in Canton . . . . After Cadle effectively abandoned the property, which is . . . environmentally contaminated[4] . . . the town . . . filed a petition seeking the appointment of a receiver of rents pursuant to § 12-163a. The petition

such date. The owner, agent, lessor or manager shall be liable for such reasonable fees and costs determined by the court to be due the receiver, which fees and costs may be recovered from the rents or payments for use and occupancy under the control of the receiver, provided no such fees or costs shall be recovered until after payment for current taxes, electric, gas, telephone and water service and heating oil deliveries has been made. The owner, agent, lessor or manager shall be liable to the petitioner for reasonable attorney's fees and costs incurred by the petitioner, provided no such fees or costs shall be recovered until after payment for current taxes, electric, gas, telephone and water service and heating oil deliveries has been made and after payments of reasonable fees and costs to the receiver. Any moneys remaining thereafter shall be used to pay the delinquent real property taxes and any money remaining thereafter shall be paid to such parties as the court may direct after notice to the parties with an interest in the rent or payment for use and occupancy of the property and after a hearing. The court may order an accounting to be made at such times as it determines to be just, reasonable and necessary. . . ."

[3] In the defendant's prior appeal, our Supreme Court considered the issue of whether § 12-163a authorizes a receiver (1) to evict a tenant from the property in the event of a default; (2) to lease the property to a new tenant; and (3) to use legal process to collect back rent allegedly due. *Canton* v. *Cadle Properties of Connecticut, Inc.*, 316 Conn. 851, 853, 114 A.3d 1191 (2015). Our Supreme Court concluded that the statute does authorize a receiver to use legal process to collect back rent allegedly due prior to the date of the receiver's appointment, but that neither the eviction of a tenant nor the leasing of the property to a new tenant fall within the scope of a receiver's authority. Id.

[4] On December 4, 2000, in a related case, the trial court, *Rubinow, J.*, ordered Cadle to comply with a pollution abatement order of the Department of Environmental Protection to address contaminated soil and groundwater and assessed a civil penalty in the amount of $2,143,000 against Cadle. *Holbrook* v. *Cadle Properties of Connecticut, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-97-0567429-S (December 4, 2000) (29 Conn. L. Rptr. 167).

alleged that Cadle had failed to pay real property taxes due to the town in the amount of $362,788.59, plus interest and lien penalties, for a total amount due of $884,263.04.[5] The petition further alleged that, during all relevant periods, the property was occupied by a Volkswagen dealership owned by [the defendant], which had a legal obligation to pay rent to Cadle. The court, having found that Cadle owed the town taxes . . . granted the petition to appoint the receiver, and issued orders authorizing the receiver to collect all rents or use and occupancy payments due with respect to the property.

"After the receiver served the [defendant] with a notice to quit possession of the property on the ground of nonpayment of rent, the [defendant] filed a motion to intervene in the town's action against Cadle in order to challenge the receiver's authority to take legal action against it. Shortly thereafter, the receiver filed a motion to modify the receivership order to authorize it to pursue an eviction of the [defendant] in the event of nonpayment of rent, to lease the property to a new tenant, and to use all legal process to collect back rent. Prior to acting on the [defendant's] pending motion to intervene, the court granted the receiver's motion to modify without objection.

"Subsequently, the trial court granted the [defendant's] motion to intervene in the action. The [defendant] then filed a motion to remove the receiver, asserting, inter alia, that the receiver had exceeded its authority under § 12-163a by serving it with a notice to quit and by bringing an action to collect back taxes and prior rents. The court denied the motion for removal . . . ." (Footnotes added and omitted.) *Canton* v. *Cadle*

[5] The petition was filed on April 26, 2011. On May 12, 2017, the town filed a report with the trial court indicating that the amount of real estate taxes due and owing for the period from June 23, 2011, the date the receiver was appointed, to April 25, 2017, including interest and lien fees, was $208,731.43.

Properties of Connecticut, Inc., 316 Conn. 851, 854–55, 114 A.3d 1191 (2015). The defendant appealed from the court's denial of its motion for removal. As noted previously, the defendant, in part, prevailed in its appeal because our Supreme Court ruled that the receiver only had authority under the statute "to use legal process to collect past due rent . . . ." Id., 862. The case was remanded to this court with direction to affirm the trial court's judgment with respect to its conclusion that the receiver has the authority to use legal process to collect past due rent. Id., 853, 863.

On March 3, 2017, the receiver filed an interim accounting, and moved the trial court to approve said accounting and its previous disbursal of funds. In relevant part, the defendant objected on the ground that the accounting submitted indicated that the receiver had failed to comply with the order of priorities for distributions under § 12-163a, in that "[t]here is no indication in the accounting of any payments being applied to utilities supplied after the date of the receiver's appointment."[6]

On April 24 and May 15, 2017, the court held a hearing on both the receiver's motion to approve its interim

[6] The receiver also initiated an action against the defendant in the Housing Session of the Superior Court for the judicial district of Hartford. The receiver sought damages for past due rent and/or use and occupancy; the defendant filed a counterclaim asserting that the receiver had failed to comply with the order of disbursements in § 12-163a, essentially raising the same issue presented in this appeal. Both parties moved for summary judgment as to liability on the receiver's complaint. On June 11, 2018, the court, *Miller, J.*, granted the defendant's motion for summary judgment, denied the receiver's motion and rendered judgment in favor of the defendant. The court did not rule on the defendant's counterclaim alleging improper disbursement. See *Boardwalk Realty Associates, LLC* v. *M & S Gateway Associates, LLC*, Superior Court, judicial district of Hartford, Housing Session, Docket No. CV-11-0008219-S (June 11, 2018). The receiver filed an appeal (AC 41831), which currently is pending in this court. According to the preliminary statement of issues, the receiver claims that the court improperly concluded that the receiver could not collect rent or use and occupancy from the defendant.

accounting and the defendant's objection to it. During the April 24, 2017 hearing, the court requested that the receiver file a more detailed accounting of the fees and expenses that it claimed. The receiver complied by filing an updated accounting on May 12, 2017. The defendant argued to the court that § 12-163a (a) requires the receiver to pay the costs for utilities due on and after its appointment, notwithstanding the fact that the expired lease agreement between the defendant and Cadle had provided that the defendant would pay for the cost of its utilities or, in continuing to operate its automobile dealership, the defendant had been paying the utilities supplying service to the dealership after the lease expired. The defendant pointed to the language of § 12-163a, arguing that the statute clearly did not distinguish between the owner's and the tenants' utility obligations. Accordingly, the defendant asserted that it was the obligation of the receiver to reimburse it for approximately $25,000 that it had expended for utilities provided to the property since the date of the receiver's appointment.

The receiver responded that the defendant's interpretation of the statute was "tortured," and that it would permit the defendant to "continue to squat on the property and have its utilities reimbursed from a nonexistent rent stream back into its pocket."[7] The receiver further asserted that the intent of the statute was to pay utility bills owed to the enumerated utilities by the owner/landlord but not those owed by the tenants. It declared that the defendant's interpretation was "absurd" because it would result in unjustly rewarding

[7] The defendant conceded that after the appointment of the receiver, in response to the threat of eviction, it made, without prejudice, eight rental payments to the receiver totaling $64,000 between October, 2011, and April, 2012, but then ceased making rental payments after taking the position that it no longer owed rent to Cadle and, consequently, owed no rent to the receiver. The updated accounting indicates that the town had been paid $49,165 for back taxes and interest.

a non-rent-paying "squatter" that had continued to operate its business on the property and utilized utilities only for its own business functions. The receiver, as of the date of the hearing, was collecting no rental payments and had collected, since 2011, only a small amount of rent, resulting in a little less than $50,000 being remitted to the town for its taxes.

In an oral decision, the trial court approved the updated interim accounting and overruled the defendant's objection, concluding that § 12-163a only requires the receiver to pay those utility costs "for the common areas or the areas that are the responsibility of the owner . . . ." The court concluded there was no authority that required the receiver to reimburse tenants for utility costs that they were already obligated to pay.[8] This appeal followed.

Whether § 12-163a mandates that a receiver pay utility bills incurred by a tenant or former tenant occupying

[8] The defendant has relied on the court's oral ruling of May 15, 2017. The record does not contain a signed transcript of the court's decision, as required by Practice Book § 64-1 (a), and the defendant did not file a motion pursuant to § 64-1 (b) providing notice that the court had not filed a signed transcript of its oral decision. Nor did the defendant take any additional steps to obtain a decision in compliance with § 64-1 (a). In some cases in which the requirements of § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. Despite the absence of a signed transcript of the court's oral decision or a written memorandum of decision, however, our ability to review the claims raised in the present appeal is not hampered because we are able to readily identify a sufficient, concise statement of the court's findings in the transcript of the proceedings. See *State* v. *Brunette*, 92 Conn. App. 440, 446, 886 A.2d 427 (2005), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006). We note our concern, however, that the trial court's noncompliance with § 64-1 is a reoccurring issue in appeals involving oral decisions. See, e.g., *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 25 n.2, 191 A.3d 212 (2018); *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 789 n.7, 185 A.3d 643 (2018); *Rose B.* v. *Dawson*, 175 Conn. App. 800, 803–805, 169 A.3d 346 (2017); *Medeiros* v. *Medeiros*, 175 Conn. App. 174, 177 n.1, 167 A.3d 967 (2017); *State* v. *Chankar*, 173 Conn. App. 227, 234 n.7, 162 A.3d 756, cert. denied, 326 Conn. 914, 173 A.3d 390 (2017).

the property in question is an issue "of statutory construction subject to plenary review and well established principles." *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 316 Conn. 856. General Statutes § 1-2z instructs that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." See *Rainforest Cafe, Inc.* v. *Dept. of Revenue Services*, 293 Conn. 363, 372–81, 977 A.2d 650 (2009) (engaging in statutory analysis pursuant to § 1-2z).

Section 12-163a (a) mandates that a receiver of rents is to distribute funds collected from rental or use and occupancy payments in the following order of priority: (1) payment for taxes due on and after the date of its appointment; (2) payment for electric, gas, telephone, water or heating oil supplied on and after such date; (3) reasonable fees and costs determined by the court to be due the receiver; (4) reasonable attorney's fees and costs incurred by the petitioner; (5) delinquent taxes; and (6) amounts to such interested parties as the court may direct. See General Statutes § 12-163a (a).

The defendant claims that the court should not have approved the interim accounting because the receiver did not reimburse the defendant for its utility expenditures on behalf of its automobile dealership, which continues to operate on the property. It argues that a plain reading of the statute does not limit the required, enumerated utility payments to those obligated to be paid by the owner of the property, and that courts cannot add to and modify statutory language because they believe the legislature made drafting errors. The defendant notes that receivership statutes like § 12-163a,

which are sui generis, are to be strictly construed, as they are in derogation of the common law. See *Connecticut Light & Power Co.* v. *DaSilva*, 231 Conn. 441, 446, 650 A.2d 551 (1994) (in light of language, purpose and sui generis nature of General Statutes § 16-262f, trial court mistaken in assumption that appointment of rent receiver for protection of utility governed by wide-ranging equitable and discretionary principles of ordinary mortgage foreclosure proceedings); *Southern Connecticut Gas Co.* v. *Housing Authority*, 191 Conn. 514, 518–20, 468 A.2d 574 (1983) (utility rent receivership under § 16-262f is special statutory proceeding, not civil action, and proceeding is sui generis); *Canton* v. *Cadle Properties of Connecticut, Inc.*, 145 Conn. App. 438, 451, 77 A.3d 144 (2013) (§ 12-163a, like § 16-262f, is sui generis in derogation of common law), rev'd on other grounds, 316 Conn. 851, 114 A.3d 1191 (2015).

The town argues that the defendant's construction of § 12-163a yields an absurd or unworkable result. It argues that, if receivers must prioritize the tenant's utility bills in addition to the owner's outstanding utility obligations, tenants who, prior to the date of receivership, were responsible for their own utility bills will continue to occupy the property without being obligated to pay their utility bills. The town further argues that this absurd and unworkable result is particularly evident in the present case, in which the defendant already is occupying the property rent free and operating a business for profit. The town maintains that it defies common sense to conclude that the legislature created statutory rent receiverships for the purpose of relieving tenants of their prior obligation to pay their own utility expenses. After all, the town asserts, the statute exists to provide relief to municipalities by ameliorating an owner's delinquency for property taxes and, therefore, construing the language in a way that furthers this purpose is sensible.

We agree with the town that the facially plain and unambiguous language of the disputed portion of § 12-163a, which provides in relevant part that "[t]he receiver shall make payments from such rents or payments for use and occupancy . . . for electric, gas, telephone, water or heating oil supplied on and after [the date of its appointment]," leads to an unworkable result. This is because the plain statutory language appears to encompass not only the enumerated utilities the owner or landlord previously was obligated to pay at the time of the receiver's appointment, but all of the enumerated utilities serving the property, including those utilities that the tenants or other occupants of the property previously were obligated to pay.

A literal adherence to the text of the statute is unworkable in the present circumstances. An interpretation of the statute that relieves tenants of an obligation to pay for their own utility expenses and places the burden on the receiver appointed under § 12-163a will likely lead to considerably less money to satisfy the amount owed in unpaid property taxes and, where necessary, the fees and costs of the receiver, thereby defeating the primary purpose of the receivership. In addition, such an interpretation could create a situation where there may be insufficient funds collected by the receiver to commence paying all of the tenants' utility bills if the rents payable prior to the appointment of the receiver were never calculated to include payment for utilities provided to each and every rental unit. Such a scenario would create problems even for previously responsible tenants.

Because we have determined that the plain meaning of the statutory text yields an unworkable result, we may look for interpretive guidance to extratextual evidence, such as the legislative history and circumstances surrounding the enactment of § 12-163a, to the legislative policy it was designed to implement, and to its

relationship to existing legislation. "[U]nder § 1-2z, we are free to examine extratextual evidence of the meaning of a statute, including its legislative history, when application of the statute's plain and unambiguous language leads to an unworkable result. See General Statutes § 1-2z." (Footnote omitted.) *Rivers* v. *New Britain*, 288 Conn. 1, 18–19, 950 A.2d 1247 (2008).

Our Supreme Court's statutory analysis in *Rivers* is particularly instructive in the present case. In *Rivers*, our Supreme Court observed that our legislature has not defined the word "unworkable" as it is used in § 1-2z. Id., 17. In defining that term, our Supreme Court looked to the dictionary definition of "unworkable," and relied on the fact that "[t]he American Heritage Dictionary defines 'unworkable' as 'not capable of being put into practice successfully.' American Heritage Dictionary of the English Language (3d Ed. 1992)." (Footnote omitted.) *Rivers* v. *New Britain*, supra, 17–18.

The issue in *Rivers* was whether General Statutes § 7-163a, which was enacted to relieve municipalities of the responsibility to remove snow and ice on municipal sidewalks by permitting municipalities to adopt an ordinance that shifts that responsibility to "the owner or person in possession and control of land abutting a public sidewalk"; General Statutes § 7-163a (c) (1); should be interpreted such that it relieved municipalities that have passed such an ordinance from liability in situations in which the abutting landowner is the state. *Rivers* v. *New Britain*, supra, 288 Conn. 3. Our Supreme Court observed that, in enacting § 7-163a, the legislature did not waive the state's sovereign immunity from liability or suit, and that "§ 7-163a imposes no duty or liability on the state with respect to municipal sidewalks that abut state property." Id., 9. The court, mindful of the obvious public safety ramifications of its interpretation of the statute, concluded that "although the language of § 7-163a is facially plain and

unambiguous, its application yields an unworkable result when, as in the present case, the state is the abutting landowner because, under that factual scenario, neither the municipality nor the state has a duty to clear the sidewalk of ice and snow." Id.

Accordingly, our Supreme Court, after reviewing the legislative history of § 7-163a, exempted the state from the liability imposed by the facially plain and unambiguous statutory language in § 7-163a that allowed the city to shift responsibility to abutting landowners. Id., 12, 22–23. Our Supreme Court concluded that when the legislature referred to such owner or person in possession and control of the abutting land, it meant to permit the municipality to shift responsibility only to *private* abutting property owners or persons in possession and control. Id., 21–23.

In enacting § 12-163a, the legislature intended to assist municipalities in collecting delinquent taxes through rent receivers. The legislature also sought to give municipalities the same tools and authority to collect delinquent taxes that it gave to utility companies pursuant to § 16-262f. Because § 12-163a is modeled after § 16-262f, an examination of § 16-262f sheds light on the proper interpretation of § 12-163a.

Section 16-262f concerns petitions for receivership of rents and common expenses by electric distribution, gas and telephone companies. That statute states in relevant part: "(a) (1) Upon the default of the owner . . . of a residential dwelling who is *billed directly* by an electric distribution, gas or telephone company or by a municipal utility for electric or gas utility service furnished to such building, such company or municipal utility or electric supplier . . . may petition the Superior Court or a judge thereof, for appointment of a receiver of the rents or payments for use and occupancy or common expenses, as defined in section 47-202, for

any dwelling for which the owner . . . is in default. . . .'' (Emphasis added.) Section 16-262f is intended to address the owner's delinquencies with respect to utilities if the owner is directly billed for such expenses. It does not contemplate that once a receiver is appointed to collect rent or use and occupancy or common expenses normally paid to the owner, that the receiver also must pay the cost of utilities that, prior to its appointment, had been billed to the occupants of the subject premises because the owner had not defaulted on any obligation in connection with the occupants' personal utility bills. Our Supreme Court observed that the purpose of § 16-262f was to permit ''public service companies to petition for a statutory rent receivership under limited circumstances that are statutorily linked to the [General Statutes] § 16-262e (a) prohibition on the termination of utility services. Under § 16-262e (a), a service may not be terminated: (1) to a residential dwelling; (2) despite nonpayment of a delinquent account; (3) for service billed directly to the residential building's . . . owner . . . and (4) when it is impracticable for occupants of the building to receive service in their own name. Unable to terminate service to such a residential dwelling, public service companies are expressly instructed, by § 16-262e (a), to pursue the remedy provided in [§] 16-262f.'' (Footnote omitted; internal quotation marks omitted.) *Southern Connecticut Gas Co.* v. *Housing Authority*, supra, 191 Conn. 518–19.

In 1995, when § 12-163a was enacted, Representative Robert D. Godfrey, the sponsor of House Bill No. 5331, stated: ''You're hearing two bills of mine this morning . . . . What they have in common is they both enable municipalities to use tools that other entities already have at their disposal. . . . The second bill, 5331, which authorizes municipalities to petition for a

receiver of rents for the collection of delinquent property taxes . . . gives municipalities the same kind of power as we currently give to utilities, which can petition for receivership of rent for back payment of electric, water, power, whatever." Conn. Joint Standing Committee Hearings, Planning and Development, Pt. 1, 1995 Sess., pp. 49–50. Because, under § 16-262f, the legislature did not intend that a receiver acting on behalf of a utility pay utility expenses for which the owner had not been directly billed, we may infer that, in enacting § 12-163a, the legislature did not intend that a receiver acting on behalf of a municipality seeking delinquent taxes owed by the owner bore the burden of providing all of the occupants of the property with free utilities when, prior to the appointment of the receiver, those occupants had been paying their own utility bills. To interpret § 12-163a in the manner the defendant proposes would undermine the stated legislative purpose of giving municipalities the "same kind of power" that § 16-262f gave to utilities. Such an interpretation would result in a costly and unworkable mechanism for municipalities to use in collecting delinquent property taxes.

Moreover, common sense dictates that a statutory procedure designed to assist financially pressed municipalities with recoupment of delinquent taxes from property owners should not have its effectiveness diminished by an impractical interpretation that would give tenants the unexpected gift of free utilities by making a receiver responsible, not just for the owner's unpaid utility bills, but also for payment of each and every tenant's utility bills. Such an unworkable result would, in many instances, significantly undermine the intent of the legislature to assist municipalities in collecting taxes by reducing the amount of rent that could be applied by the receiver to payment of delinquent

taxes and reimbursement for the fees and costs necessarily expended in filing the petition.

The defendant's interpretation of § 12-163a is further undermined by the fact that, in many instances, it would jeopardize the receiver's ability to continue to collect any rental income at subject properties. We may infer that the legislature, in requiring that the receiver distribute funds for utility payments *before* distributing other payments, including those for delinquent taxes, sought to ensure that the utilities at a subject property that are the responsibility of the owner would continue to be supplied to the property during the time in which a receiver is collecting rents or payments for use and occupancy. It is reasonable to assume that, if an owner fails to pay real property taxes because it is insolvent, it may be unable to pay for utilities at its rental property that are its responsibility, such as utilities that supply and benefit common areas that are not within the control of its tenants. It is not difficult to imagine a situation in which a lack of utilities in such common areas of a rental property would create problems for tenants and, thus, that the lack of utilities that would be supplied by an owner would jeopardize the property's continued ability to generate any rental income. Thus, although the legislature had a valid reason for ensuring that an owner's utility payments are satisfied by the receiver, such statutory purpose does not apply to the expenses incurred by tenants.

In light of the foregoing, we conclude that the trial court properly determined that, pursuant to § 12-163a, the receiver is mandated to pay only utility bills that are the obligation of the owner, not those incurred by tenants of the subject property.

The judgment is affirmed.

In this opinion the other judges concurred.

KRZYSZTOF WOLYNIEC *v.* MARLENA WOLYNIEC
(AC 40292)
(AC 40436)

Lavine, Alvord and Moll, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgments of the trial court rendered on several postjudgment motions of the parties. The plaintiff claimed that the trial court improperly ordered that the defendant could continue to reside at a residence owned by the plaintiff in Darien until the plaintiff satisfied an arrearage in unallocated alimony and child support owed to the defendant, and failed to find that the defendant's motion for contempt concerning the arrearage was barred by the equitable doctrine of laches. *Held*:

1. The trial court did not abuse its discretion in permitting the defendant to remain in the Darien residence until ninety days following her receipt of payment in full of the support arrearage owed by the plaintiff; a stipulation incorporated into the parties' dissolution judgment set forth the plaintiff's family support obligations, which unambiguously linked the monetary and residential forms of family support, identified expressly the obligation to provide the Darien residence as alimony and provided that the defendant was relying on her use of the residence in accepting the agreed upon amount of unallocated alimony and child support, and, thus, the court did not err in fashioning its postjudgment remedial order permitting the defendant to remain in the Darien residence as a remedy for the harm caused by the plaintiff's noncompliance with the monetary unallocated alimony and child support provision, and the court's remedial order to effectuate the judgment of dissolution was supported by competent evidence, as the court credited the defendant's testimony that she did not have money to pay for another residence and that she would be able to move out of the Darien residence if the plaintiff paid the arrearage he owed.
2. The plaintiff could not prevail on his claim that the trial court erred in failing to find that the defendant should be barred by laches from recovering the support arrearage: no evidence was admitted from which that court could have found that the plaintiff was prejudiced by the defendant's delay in filing her motion for contempt approximately six years after the plaintiff began reducing his support payments, as the plaintiff's claims of prejudice were premised on an alleged oral agreement between the parties, pursuant to which the plaintiff claimed he took on substantial additional costs for the children's college expenses that he was not obligated to assume, and the plaintiff's assumption of discretionary precollege preparation activity fees for the parties' children pursuant to the alleged oral agreement, for which the defendant testified she also made payments at the insistence of the plaintiff, did

not establish prejudice, the plaintiff having presented no evidence that the assumption of the activity fees constituted a change in his position or that the defendant's delay in filing her contempt motion led him to assume such expenses; moreover, the plaintiff's missed opportunity to file a motion for modification with the court, which was occasioned by his own decision to engage in self-help by entering into the alleged oral agreement, did not establish prejudice, as the plaintiff decided to engage in self-help rather than seek the guidance of the court.

Argued December 11, 2018—officially released February 26, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Colin, J.*, granted in part and denied in part the defendant's motion for contempt; subsequently, the court granted in part and denied in part the plaintiff's motion to enforce the dissolution judgment; thereafter, the court denied the plaintiff's motion for contempt, and the plaintiff appealed to this court; subsequently, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed.*

Krzysztof Wolyniec, self-represented, with whom, on the brief, were *Tara C. Dugo* and *Norman A. Roberts, II*, for the appellant (plaintiff).

Opinion

ALVORD, J. In these consolidated appeals, the plaintiff, Krzysztof Wolyniec, appeals from the judgments of the trial court rendered on several postjudgment motions filed by him and the defendant, Marlena Wolyniec.[1] On appeal, the plaintiff claims that the court erred by (1) ordering that the defendant may continue to

[1] The defendant is not participating in these appeals. On May 21, 2018, this court ordered that the appeals would be considered on the basis of the plaintiff's brief and the record alone unless the defendant filed her brief on or before June 4, 2018, which she failed to do. Accordingly, on June 5, 2018, this court ordered that the consolidated appeals would be considered on the basis of the plaintiff's brief and the record alone.

reside at the plaintiff's Darien residence until he satisfies his acknowledged arrearage in unallocated alimony and child support,[2] and (2) failing to find that the defendant's motion for contempt as to the arrearage in unallocated alimony and child support was barred by the equitable doctrine of laches. We are not persuaded by either claim and, accordingly, affirm the judgments of the court.

The following facts and procedural history are relevant to our resolution of this appeal. The parties were married on July 3, 1993, and they have two children. On January 30, 2007, the court rendered judgment dissolving the parties' marriage. The judgment incorporated by reference the parties' stipulation of the same date (stipulation).

As to family support, the stipulation provided that the plaintiff, commencing February 1, 2007, was to pay to the defendant unallocated alimony and child support in the sum of $10,000 per month, until her death, remarriage, or until May 30, 2016, which date fell shortly after the parties' younger child reached the age of eighteen. The plaintiff also agreed to purchase a house in Darien (Darien residence) for the use of the defendant and the parties' two children.[3] The defendant agreed to vacate

[2] The plaintiff represented to this court during oral argument that, as of the date of argument, he had not paid any of the family support arrearage that he conceded he owed. When asked if he filed a motion to stay the court's order requiring that he begin paying the arrearage, the plaintiff stated that he had merely filed an appeal. Our case law is well established that filing an appeal from a family support order does not automatically stay the order. See *Schull* v. *Schull*, 163 Conn. App. 83, 99, 134 A.3d 686, cert. denied, 320 Conn. 930, 133 A.3d 461 (2016); Practice Book § 61-11 (c) (no automatic stay for orders of support in certain family matters).

[3] The stipulation's provisions regarding the residence are as follows: "11. The Husband has agreed to purchase a house for the benefit of the Wife and the two minor children. The house is to be in Darien, Connecticut or such other town as the parties may agree. The selection of the house shall be by the mutual consent of the parties and shall be made on or before April 1, 2007. The Wife and the minor children shall have exclusive right to occupy said house. The Purchase price of the house shall not be in excess of $900,000.00 unless the parties otherwise agree. The husband may finance the balance of the purchase in any way that he may elect. The title to the

the Darien residence on March 1, 2016, or six months following the date the residence no longer served as the primary residence of the defendant and a minor child, whichever shall occur first.[4] The parties agreed that the plaintiff's "obligation to pay for said house is in the nature of alimony and as such is modifiable." The parties further agreed that "[i]n accepting the amount

house shall be in the Husband's sole name. The Wife shall acquire no legal or equitable interest in said house. The Wife agrees to cooperate with any financing or refinancing that the husband may elect. The Wife shall sign any documents reasonably required for such financing or refinancing. The Husband shall be solely responsible for all costs associated with said mortgage or refinancing and shall indemnify and hold the Wife harmless from any liability associated with said mortgage, interest and real estate taxes. In accepting the amount of unallocated alimony and support as provided for herein, the Wife is relying upon the Husband's securing of this house for her use and the use of the children. Should the Wife not have the use of said home for herself and the children, such fact shall be deemed a substantial change in circumstances warranting modification of the unallocated alimony and support herein. The Husband's obligation to pay for said house is in the nature of alimony and as such is modifiable. Although in the nature of alimony, the husband's payments associated with the maintenance of said house are not taxable to the Wife and are not [deductible] by the Husband as alimony, although they may be [deductible] under other provisions of the [Internal Revenue Service] code, i.e. second home, investment property or tax payments made by the husband.

"12. The Wife shall be solely responsible for any and all utilities and ordinary maintenance and repair of the home. Ordinary maintenance or repair is defined as any maintenance which is not extraordinary. Extraordinary maintenance or repair is defined as any such expense which exceeds $750.00. The Husband shall pay extraordinary maintenance and repairs to the home. The Wife shall be responsible for all appliances in the home. The Wife shall not incur any [nonemergency] repair or maintenance expense without notifying the Husband in advance and securing his consent, which consent shall not be unreasonably withheld. The Wife shall not make any capital improvements to the home without the husband's expressed written approval.

"13. The Wife agrees to keep the home in good condition and return it to him in broom clean condition at the termination of her occupancy. The husband shall be entitled to enter the home, with reasonable advance notice to the Wife no less than four times a year to inspect the condition of the home.

"14. The Wife shall vacate the home on March 1, 2016, or six months following the date the home no longer serves as the primary residence of the Wife and a minor child, whichever event shall first occur."

[4] We note that the stipulation required the defendant to vacate the Darien residence *before* the younger child turned eighteen, as conceded by the plaintiff during oral argument before this court.

of unallocated alimony and support as provided for herein, the [defendant] is relying upon the [plaintiff's] securing of this house for her use and the use of the children. Should the [defendant] not have the use of said home for herself and the children, such fact shall be deemed a substantial change in circumstances warranting modification of the unallocated alimony and support herein."

As to the division of marital property, the stipulation provided that each party would retain the property appearing on their respective financial affidavits, the plaintiff would pay to the defendant the sum of $400,000, and the plaintiff would purchase a new Volvo automobile for the defendant.

On May 6, 2016, the defendant filed a motion for contempt, claiming that the plaintiff owed an unallocated alimony and child support arrearage of $202,146.25, and the plaintiff filed an objection. On June 13, 2016, the plaintiff filed a motion for contempt, arguing that the defendant wilfully remained in the Darien residence beyond March 1, 2016, in violation of the express terms of the stipulation incorporated into the dissolution judgment.[5] On the same day, he also filed a motion to enforce the judgment of dissolution; that motion asserted many of the same facts as his motion for contempt and requested that the court order the defendant to vacate the Darien residence.

[5] The plaintiff further claimed that the defendant had failed to pay him any rent on the Darien residence since March 1, 2016, and that her holding over at the residence prevented him from either renting the residence or moving into the residence himself. The plaintiff also argued that he was prevented from obtaining a home equity credit line until such time as he became an occupant of the residence. He sought, among other relief, an order requiring the defendant to vacate the Darien residence, to reimburse the plaintiff the fair market rental value of the residence for the period of March 1, 2016, through the date of her vacatur of the Darien residence, and to reimburse the plaintiff the sum he expended on his own rental from June 1, 2016 through August 31, 2016.

The court held an evidentiary hearing on the parties' motions on March 7, 2017. At the beginning of the hearing, the parties introduced into evidence an "agreement as to facts at hearing" (agreement). The parties recognized that the dissolution judgment required the plaintiff to pay the defendant $10,000 monthly in unallocated family support commencing in February, 2007, and ending in May, 2016. The parties further agreed that the "dissolution of marriage judgment was never modified by the court." According to the agreement, the plaintiff acknowledged that he owed $122,145.25 in family support arrearage. Attached to the agreement was a yearly summary of family support owed and paid. The parties further agreed that the "defendant was to vacate [the] plaintiff's residence in Darien on March 1, 2016, which she has not done. [The] [d]efendant currently resides in the Darien home." Lastly, the parties agreed that the defendant had paid for three years of tuition, room, and board at Emory University for the parties' older child.[6]

During the hearing,[7] the self-represented plaintiff sought to inquire of the defendant as to whether she was aware that the plaintiff's income had dropped substantially in 2010. In response to the objection of the defendant's counsel on grounds of relevance, the plaintiff represented to the court that the parties had reached, postjudgment, the following oral agreement: "[W]e agreed that I will lower the alimony payment for a period [un]til the older [child] goes to college and

[6] With respect to postsecondary education, the stipulation incorporated into the dissolution judgment stated: "The parties hereby ask the court to retain jurisdiction over the issue of post majority support pursuant to [General Statutes §] 46b-56c." Neither party sought court guidance as to their respective responsibilities for the children's college tuition payments.

[7] Although the court first heard evidence on the defendant's motion for contempt and then turned to the plaintiff's motions for contempt and to enforce the judgment, the court, after hearing no objections from the parties, indicated that it would consider all the evidence in connection with all three motions.

then I'll cover all the . . . college costs after the expiration of the agreement. And that was precipitated by the fact that my income dramatically dropped, and I was—otherwise I intended to file for modification." The plaintiff further inquired of the defendant whether it was true that the parties had entered into such an oral agreement in 2010, although he described the terms of the agreement differently, asking whether they had agreed that he would reduce the unallocated support until the older child entered college, at which time he would "return to paying—paying the full amount, and then after the conclusion of the divorce decree I will pay . . . for the last years of the older one's and the full . . . college cost of the younger one."

The defendant gave various answers to questions asking whether such an oral agreement existed, testifying: "[Y]ou have so many versions of all your agreements through our relationship that . . . I lost track with all your agreements"; "[i]t's difficult to sift through what you say to me. You were promising me lots of things through our . . . marriage and after divorce. I cannot say what is true, what is false"; "[i]t's difficult to say that this is agreement because all our relationship is like I do what you say"; and "[w]e agreed about lots of things that didn't come up as a true, so at the certain moment in my life I stopped paying attention what you say. I just do . . . what is necessary to survive for my kids and me until the moment that I can start working and be independent person, and for my kids to go to college and be independent. Until then—I cannot say that I agreed; you forced me to agree about lots of things."

The defendant testified at the hearing that she did not have much money left and did not have funds to pay for an apartment. She testified that she would be able to move out of the Darien residence if the plaintiff satisfied the support arrearage.

Following the hearing, on March 13, 2017, the court issued three orders. With respect to the defendant's motion for contempt, the court granted it in part and denied it in part. As to the plaintiff's claim of an oral agreement regarding his family support obligation, the court found that "[t]he credible evidence introduced at the hearing is insufficient for the court to find that such an agreement ever existed or, if it did exist, its specific terms." The fact that the defendant waited to file the motion for contempt, despite a period of the plaintiff's failing to pay the family support order in full, led the court to infer that the parties had some discussion that impacted the plaintiff's decision not to pay the full amount of support. Thus, the court found that the plaintiff's noncompliance was not wilful and that the defendant "failed to prove by clear and convincing evidence that the plaintiff wilfully and intentionally violated the alimony order." The court ordered the plaintiff to pay the undisputed family support arrearage of $122,145.25 in monthly installments of $10,000 beginning April 1, 2017. The order was made "without prejudice to either party's right to request a different payment schedule by filing an appropriate motion and current financial affidavits."[8]

The court then granted the plaintiff's motion to enforce the provisions of the judgment and denied his motion for contempt, finding that the plaintiff had failed to prove that the defendant wilfully and intentionally violated the dissolution judgment by failing to vacate the Darien residence by the date set forth in the parties' stipulation incorporated into the dissolution judgment. In denying the plaintiff's contempt motion, the court credited the defendant's testimony as to her financial

[8] The file reflects no request by the plaintiff to alter the monthly payment amount, and the plaintiff represented to this court during oral argument that he has not made any support arrearage payments pursuant to the court's March 13, 2017 order.

circumstances and noted that the plaintiff's failure to comply with the dissolution judgment's family support orders resulted in a substantial support arrearage. The court, to effectuate the judgment of dissolution, ordered that "the defendant shall vacate the premises within ninety days after she receives payment in full from the plaintiff in accordance with the court's ruling on [the defendant's motion for contempt]."[9]

On March 24, 2017, the plaintiff filed a motion to reargue his motion for contempt and to enforce the judgment. On April 3, 2017, while the plaintiff's motion to reargue was still pending, he filed an appeal from the court's ruling on the defendant's motion for contempt. After hearing argument on April 17, 2017, the court denied the motion to reargue on April 24, 2017. On May 12, 2017, the plaintiff filed a separate appeal from the court's rulings on his motions, including the motion to reargue. On February 20, 2018, this court granted the plaintiff's motion to consolidate the two appeals.

I

On appeal, the plaintiff first claims that the court erred in ordering that the defendant may continue to reside in the Darien residence until the plaintiff satisfies his unallocated alimony and child support arrearage. The plaintiff recognizes that the court has the authority to issue remedial orders but contends that the court's order "failed to take into account the defendant's use and occupancy of the Darien Residence." The plaintiff argues: "Without accounting for her use and occupancy of the Darien Residence and crediting the plaintiff with same, the trial court is no longer protecting the integrity of its original orders." Instead, he contends, the remedial support orders put him "in a far worse financial position" and awarded the defendant a windfall. We disagree.

[9] The court denied the plaintiff's additional requests for relief made in his motion to enforce the judgment.

We first set forth applicable principles of law and our standard of review. "In Connecticut, the general rule is that a court order must be followed until it has been modified or successfully challenged. . . . Our Supreme Court repeatedly has advised parties against engaging in self-help and has stressed that an order of the court must be obeyed until it has been modified or successfully challenged." (Citations omitted; internal quotation marks omitted.) *Culver* v. *Culver*, 127 Conn. App. 236, 242, 17 A.3d 1048, cert. denied, 301 Conn. 929, 23 A.3d 724 (2011); see also *O'Brien* v. *O'Brien*, 326 Conn. 81, 97, 161 A.3d 1236 (2017) ("[a] party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in 'self-help' by disobeying a court order to achieve the party's desired end"); *Becue* v. *Becue*, 185 Conn. App. 812, 827, A.3d (2018) ("[t]here can be no dispute, our law is quite clear: An order of the court must be obeyed until it has been modified or successfully challenged" [internal quotation marks omitted]).

Additionally, "[c]ourts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment. . . . This is so because [i]n a contempt proceeding, *even in the absence of a finding of contempt*, a trial court has broad discretion to make whole a party who has suffered as a result of another party's failure to comply with the court order." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Pressley* v. *Johnson*, 173 Conn. App. 402, 408, 162 A.3d 751 (2017). "[S]uch court action . . . must be supported by competent evidence." (Internal quotation marks omitted.) *Fuller* v. *Fuller*, 119 Conn. App. 105,

115, 987 A.2d 1040, cert. denied, 296 Conn. 904, 992 A.2d 329 (2010).

"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. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding on 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 in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[10] (Internal quotation marks omitted.) Id., 115–16.

In the present case, the court properly determined that it had the authority to fashion remedial family

[10] The plaintiff contends that the standard of review is plenary, arguing that "[w]hether the trial court has jurisdiction to allow the defendant to remain in the Darien residence is a question of law and is subject to plenary review." In support, he cites *Rathblott* v. *Rathblott*, 79 Conn. App. 812, 818, 822–23, 832 A.2d 90 (2003), a case in which this court determined that the trial court lacked authority to issue a postjudgment order that certain marital property, which the court had failed to assign at the time of the dissolution, be sold at auction.

In the argument section of his appellate brief, by contrast, the plaintiff recognizes the court's authority to issue remedial orders, and claims that the court "failed to take into account the defendant's use and occupancy of the Darien residence." Such a claim requires us to determine whether the trial court abused its discretion by permitting the defendant to remain in the Darien residence. See *Behrns* v. *Behrns*, 124 Conn. App. 794, 822, 6 A.3d 184 (2010) (noting that trial court had power to vindicate its prior judgment and concluding that court did not abuse its discretion in restricting the defendant's encumbrance of his assets without leave of court, where trial court believed such order was necessary to secure defendant's debt to plaintiff); see also *Gong* v. *Huang*, 129 Conn. App. 141, 154–55, 21 A.3d 474 (court properly exercised discretion in compensating defendant for plaintiff's violation of court order), cert. denied, 302 Conn. 907, 23 A.3d 1247 (2011).

support orders following the plaintiff's noncompliance with the stipulation incorporated into the dissolution judgment. See *O'Brien* v. *O'Brien*, supra, 326 Conn. 101. The stipulation set forth the plaintiff's family support obligations, which included both monetary and residential support. As to monetary support, the plaintiff was to pay the defendant $10,000 per month in unallocated alimony and child support. As additional alimony, the plaintiff was to provide residential support in the form of a residence in Darien for the use of the defendant and the parties' children. See *Carasso* v. *Carasso*, 80 Conn. App. 299, 310–11, 834 A.2d 793 (2003) (noting different aspects of alimony obligations, including money payments and obligations to provide insurance), cert. denied, 267 Conn. 913, 840 A.2d 1174 (2004).

In their stipulation, the parties unambiguously linked the monetary and residential forms of family support. In addition to identifying expressly the obligation to provide the Darien residence as alimony, the stipulation further stated that the defendant was relying on her use of the residence in accepting the agreed upon amount of unallocated alimony and child support. The parties agreed that if she were not to have use of the residence, it would constitute a substantial change in circumstances warranting modification of the monetary portion of the support award. Thus, according to the unambiguous terms of the stipulation, the defendant accepted the residential support at the cost of a reduction in monetary support. Given that the parties themselves had linked the two forms of support in their stipulation, the court did not err in fashioning its postjudgment remedial order permitting the defendant to remain in the Darien residence as a remedy for the harm caused by the plaintiff's noncompliance with the monetary unallocated alimony and child support provision.

Moreover, the court's remedial order to effectuate the judgment of dissolution was supported by competent evidence.[11] See *Clement* v. *Clement*, 34 Conn. App. 641, 646–48, 643 A.2d 874 (1994) ($29,500 award to preserve original judgment's integrity, where plaintiff had failed to make mortgage payments as ordered by trial court resulting in foreclosure and loss of family residence, was supported by undisputed evidence that plaintiff failed to comply with court order). In the present case, the court had undisputed evidence before it that the plaintiff, without seeking a modification of his court-ordered family support obligation, commenced, in 2010, a reduction in the amount of support payments and ultimately accrued an arrearage of $122,145.25. As he conceded during oral argument before this court, such action constituted a violation of the terms of the dissolution judgment.[12] In fashioning its order, the court

[11] In his brief, the plaintiff alternatively argues that the court's order permitting the defendant to remain in the Darien residence was erroneous because it was a punitive order, an alteration of a terminated alimony order, or a new alimony order issued postjudgment. Because we conclude that the order was of a remedial nature and that the court did not abuse its discretion in issuing such an order, we reject the plaintiff's alternative arguments.

The plaintiff also argues that "[a]ssuming, arguendo, the divorce judgment orders relating to the Darien residence are in the nature of property orders, the trial court does not have the jurisdiction to modify said orders." Given that the stipulation incorporated into the dissolution judgment expressly designated the plaintiff's obligation to purchase the Darien residence for the use of the defendant and the parties' children as alimony, we reject the premise of the plaintiff's argument.

[12] We further note that the plaintiff's resort to self-help in reducing his support payments rather than using the judicial process to seek a modification is inconsistent with public policy. "Both state and national policy has been, and continues to be, to ensure that all parents support their children and that children who do not live with their parents benefit from adequate and enforceable orders of child support. . . . Child support is now widely recognized as an essential component of an effective and comprehensive family income security strategy. . . . As with any income source, the effectiveness of child support in meeting the needs of children is, of necessity, increased when payments are made regularly and without interruption." (Internal quotation marks omitted.) *Kupersmith* v. *Kupersmith*, 146 Conn. App. 79, 92, 78 A.3d 860 (2013); see also *Sablosky* v. *Sablosky*, 258 Conn. 713, 721, 784 A.2d 890 (2001).

credited the competent evidence in the form of the defendant's testimony during the hearing that she did not have money to pay for an apartment and that she would be able to move out of the Darien residence if the plaintiff paid the support arrearage.[13]

Accordingly, we conclude that the court did not abuse its discretion in permitting the defendant to remain in the Darien residence until ninety days following her receipt of payment in full of the support arrearage.[14]

II

The plaintiff's second claim on appeal is that the court erred in failing to find that the defendant should be barred pursuant to the doctrine of laches from recovering the support arrearage owed by the plaintiff. Specifically, he argues that the court had before it evidence

[13] The plaintiff argues that the defendant had an obligation to pay the plaintiff a fair rental value in the form of use and occupancy of the Darien residence following March 1, 2016, and contends that the court erred in failing to account for and credit the plaintiff with her use and occupancy of the residence. We disagree. The court reasonably could have concluded that the defendant's inability to vacate the Darien residence on March 1, 2016, was the direct result of the plaintiff's noncompliance with the family support orders in the dissolution judgment. Therefore, the court's remedial order properly permitted her to remain in the residence in order to protect the integrity of the dissolution judgment.

[14] Given the defendant's history of failing to comply with the dissolution judgment, we also conclude that the court did not abuse its discretion in ordering the defendant to vacate the premises ninety days after the plaintiff pays her the arrearage he owes. As the plaintiff conceded during oral argument before this court, even after resuming what he described as full support payments in 2013, he did not make monthly payments of $10,000 as required by the stipulation incorporated into the dissolution judgment, but rather paid "varying amounts," which added up to the amounts reflected in the parties' agreement of facts entered into evidence during the hearing. Moreover, at the time of the defendant's filing of her motion for contempt in May, 2016, she alleged the plaintiff's arrearage amounted to $202,146.25. The parties agreed at the hearing that the plaintiff satisfied $80,000 of that arrearage in December, 2016, after the defendant had filed her motion for contempt. Finally, as noted in footnote 2 of this opinion, the plaintiff has not paid any amount of the court's remedial support order, which was not stayed.

of inexcusable delay, in that the plaintiff began reducing his support payments in 2010, and the defendant did not file a motion for contempt until 2016, after the plaintiff had served her with an eviction notice from the Darien residence. He further claims that the court heard evidence of prejudice to the plaintiff as a result of his reliance on an alleged oral agreement between the parties, in that he refrained from filing a motion for modification of the support orders and assumed additional costs for the children's precollege preparation activities, fees that he was not otherwise obligated to assume. We are not persuaded.

We begin by setting forth legal principles relevant to this claim. "Laches is an equitable defense that consists of two elements. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the defendant . . . as where, for example, the defendant is led to change his position with respect to the matter in question. . . . Thus, prejudicial delay is the principal element in establishing the defense of laches." (Citation omitted; internal quotation marks omitted.) *Cifaldi* v. *Cifaldi*, 118 Conn. App. 325, 334–35, 983 A.2d 293 (2009). "Thus, even if there was an inexcusable delay by the moving party, the court will not find that party guilty of laches if the prejudice to the opposing party was not the result of the moving party. . . . Moreover, [t]he burden is on the party alleging laches to establish that defense." (Citations omitted; internal quotation marks omitted.) *Carpender* v. *Sigel*, 142 Conn. App. 379, 387, 67 A.3d 1011 (2013). "The standard of review that governs appellate claims with respect to the law of laches is well established. A conclusion that a plaintiff has been guilty of laches is one of fact . . . . We must defer to the court's findings of fact unless they are clearly erroneous." (Internal quotation marks omitted.) *Cifaldi* v. *Cifaldi*, supra, 335.

In the present case, the plaintiff did not assert the defense of laches in his objection to the defendant's motion for contempt but did argue, during the hearing that was scheduled approximately nine months after the filing of that objection, that laches barred the defendant's recovery of the arrearage. Although the court recognized in its order that the defendant waited a long time to pursue her motion to collect the arrearage, it did not make this observation in connection with a discussion of the evidence supporting a defense of laches. Rather, the court inferred from the delay that "the parties did have some type of discussion that impacted the plaintiff's decision to not pay the full amount," which inference supported its finding that the plaintiff's noncompliance with the support order was not wilful. Although the court made no express findings of fact with respect to laches, it concluded that "the plaintiff failed to establish any credible defense that would excuse his payment of alimony and he is not, therefore, excused from fulfilling his court-ordered alimony obligation." Thus, we infer from the court's order requiring the plaintiff to pay the support arrearage that the plaintiff did not carry his burden to establish the elements of laches.

After examining the record in the present case, we conclude that no evidence was admitted from which the court could have found that the plaintiff was prejudiced by the defendant's delay in filing her motion for contempt. See *Carpender* v. *Sigel*, supra, 142 Conn. App. 386–87 (noting that trial court had made no factual findings with regard to legal conclusion of laches and reversing on basis that no evidence was presented to show prejudice or that delay in filing motion for contempt was inexcusable). Indeed, both of the plaintiff's claims of prejudice are premised on the alleged oral agreement. The court, however, found the evidence presented insufficient to find that any agreement existed, or if it did exist, its specific terms.

First, the plaintiff argues that he was "prejudiced by his reliance on the [oral] agreement," in that he "took on substantial additional costs for the children's college expenses that he was neither obligated to assume, nor which he would have voluntarily assumed, but for the [oral] agreement." Although the defendant acknowledged during the hearing that the plaintiff had paid for certain college preparatory courses, she also testified that she incurred similar expenses in near equal amounts. Specifically, she testified: "I think that we shared most of those expense[s] you are talking about, because for every your expense you made sure that I am paying . . . for something similar so . . . if it's not fifty/fifty then it would be definitely forty/sixty. I paid a lot of expense[s] for lots of tutoring, lots of courses. When [the older child] was preparing himself for college he was taking courses in Columbia. . . . He was going to Philadelphia. And you always made sure that each time you were contributing to those expenses . . . I would be paying about the same amount. . . . You . . . were very, very particular checking that I am fifty/fifty."

Thus, the plaintiff's assumption of discretionary pre-college preparation activity fees, for which the defendant testified she also made payments at the insistence of the plaintiff, cannot establish prejudice. The plaintiff presented no evidence that the parties' assumption of the activity fees constituted a change in his position or that the defendant's delay in filing her motion for contempt led him to assume such expenses. See *Carpender* v. *Sigel*, supra, 142 Conn. App. 387 (no evidence admitted on which court could have found plaintiff changed her position in reliance on the defendant's actions).

The plaintiff's second argument as to prejudice is that "had the parties not entered into the [oral] agreement, the plaintiff would have filed [a motion] for a modification of the alimony orders seven years prior."

As discussed more fully in part I of this opinion, our case law is clear: "[A]n order of the court must be obeyed until it has been modified or successfully challenged." (Internal quotation marks omitted.) *Culver* v. *Culver*, supra, 127 Conn. App. 242, 243 (court-ordered child support obligation was not modified by parties' subsequent oral agreement that was not made an order of the court); see also *Becue* v. *Becue*, supra, 185 Conn. App. 827 (defendant wilfully engaged in self-help by modifying court-ordered child support without permission of the court). The plaintiff's missed opportunity to file a motion for modification, which was occasioned by his own decision to engage in self-help by entering into an alleged oral agreement with the defendant, likewise cannot establish prejudice. Any conclusion to the contrary would condone the plaintiff's decision to engage in self-help rather than seek the guidance of the court.

The judgments are affirmed.

In this opinion the other judges concurred.

TAJAH S. MCCLAIN *v.* COMMISSIONER OF CORRECTION
(AC 40541)

Prescott, Bright and Bishop, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, murder with a firearm in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance and that he was actually innocent. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claim that his trial counsel provided ineffective assistance:

a. The habeas court properly determined that the petitioner failed to show that he was prejudiced by his trial counsel's failure to present a third-party culpability defense and to produce evidence that another individual, V, shot the victim; the petitioner failed to demonstrate that there was a reasonable probability that, but for counsel's failure to present a third-party culpability defense, the outcome of his trial would have been different, as the descriptions of the shooter more closely matched the physical features of the petitioner than those of V, testimony at the habeas trial connecting V to the shooting was unreliable, unclear, and, at most, raised a bare suspicion that V may have been involved in a shooting, and even if a social media post in which V purportedly referred to the shooting had been found and properly authenticated, it failed to constitute an admission by V sufficient to raise a reasonable doubt as to the petitioner's culpability.

b. The petitioner failed to show that he was prejudiced by his trial counsel's failure to present evidence of an initial segment of a video recorded police interview of a witness for the state, which the petitioner alleged had been redacted; the petitioner failed to present any evidence, apart from his own allegation that he had viewed an original video, that an initial portion of the video existed or that if it did exist it was not shown to the jury, and trial counsel's cross-examination of the witness and the detective who recorded the interview allowed the jury to weigh their credibility regarding the nature of the video without the presentation of the purported initial segment of the video.

2. The habeas court properly denied the petition for certification to appeal with respect to the petitioner's claim of actual innocence, the petitioner having failed to establish by clear and convincing evidence that he was innocent of the murder for which he was convicted and that no reasonable fact finder would find him guilty of the crime; although the testimony of B presented by the petitioner at the habeas trial was newly discovered evidence, B's testimony was insufficient to prove by clear and convincing evidence that the petitioner was actually innocent in light of the overwhelming evidence of the petitioner's identification as the shooter at the criminal trial and the habeas court's conclusion, after viewing both the petitioner and V, that the petitioner more closely resembled the description of the shooter, and even if the testimony of two other witnesses presented by the petitioner at the habeas trial constituted newly discovered evidence, such testimony was unreliable and did not constitute clear and convincing evidence of the petitioner's actual innocence.

Argued November 27, 2018–officially released February 26, 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.*

Jennifer B. Smith, assigned counsel, with whom, on the brief, was *Samuel A. Greenberg*, assigned counsel, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *C. Robert Satti, Jr.*, supervisory assistant state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

BISHOP, J. The petitioner, Tajah S. McClain, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly rejected (1) his claim that his trial counsel rendered ineffective assistance, and (2) his claim of actual innocence. We conclude that the court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of this appeal. After a jury trial, the petitioner was convicted of murder with a firearm in violation of General Statutes §§ 53a-54a (a) and 53-202k, assault in the first degree with a firearm in violation of General Statutes §§ 53a-59 (a) (5) and 53-202k, and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The petitioner received a total effective sentence of sixty-five years incarceration. This court's opinion in the petitioner's direct appeal;

see *State* v. *McClain*, 154 Conn. App. 281, 283–84, 105 A.3d 924 (2014), aff'd, 324 Conn. 802, 155 A.3d 209 (2017); sets forth the following facts: "On July 17, 2010, a group of more than ten people were drinking alcohol in the area known as 'the X,' located behind the Greene Homes Housing Complex in Bridgeport [Greene Homes]. Shortly before 5:22 a.m., the victim, Eldwin Barrios, was sitting on a crate when all of a sudden the [petitioner] and at least two other men jumped on him, and started punching and kicking him. The victim kept asking them why they were hitting him, but no one answered. The [petitioner] then was passed a chrome or silver handgun and he fired one shot, intended for the victim. The bullet, however, struck one of the other men in the back of the leg. The man who had just been shot yelled, 'you shot me, you shot me, why you shot me,' to which the [petitioner] replied, 'my bad.' As this was happening, the victim got up and tried to run away, but the [petitioner] fired several shots at him. Three of the [petitioner's] shots hit the victim—one in the leg, one in the arm, and one in the torso—at which point, the victim fell to the ground and died.

"The [petitioner] was arrested three days after the murder. Following a jury trial, the [petitioner] was convicted and sentenced to a total effective sentence of sixty-five years incarceration." (Footnote omitted.) This court affirmed the petitioner's conviction on direct appeal. Id., 283.[1] Thereafter, our Supreme Court affirmed this court's judgment. *State* v. *McClain*, 324 Conn. 802, 805, 155 A.3d 209 (2017).

On September 3, 2013, the petitioner, in a self-represented capacity, filed a petition for a writ of habeas corpus. On April 1, 2016, the petitioner, represented by

[1] In his direct appeal, the petitioner claimed "that the trial court (1) improperly limited his cross-examination of an eyewitness, and (2) committed plain error by not instructing the jury on the doctrine of consciousness of guilt." *State* v. *McClain*, supra, 154 Conn. App. 283.

counsel, filed the operative amended petition. In the amended petition, the petitioner alleged that (1) his constitutional right to the effective assistance of trial counsel was violated, (2) his right to due process was violated by the state's failure to disclose or otherwise correct false testimony, pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and (3) he was actually innocent. By memorandum of decision issued on May 11, 2017, the habeas court denied the amended petition, concluding that the petitioner did not meet his burden of proving a *Brady* violation, did not prove that he was prejudiced by his trial counsel's performance, and did not prove his actual innocence. The court thereafter denied the petition for certification to appeal from its decision. This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the applicable standard of review. "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, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . 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. . . . In 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 . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 161 Conn. App. 434, 442–43, 127 A.3d 1096 (2015).

"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.) *Mercado* v. *Commissioner of Correction*, 183 Conn. App. 556, 561, 193 A.3d 671, cert. denied, 330 Conn. 918, 193 A.3d 1211 (2018).

I

The petitioner first claims that the habeas court abused its discretion by denying his certification to appeal from its decision regarding the petitioner's claim of ineffective assistance of trial counsel. Specifically, the petitioner claims that his trial counsel rendered ineffective assistance by failing to present (1) a third-party culpability defense and (2) evidence of an initial segment of a video recorded police interview of a state's witness that the petitioner alleges exists. In response, the respondent, the Commissioner of Correction, argues, in relevant part, that the habeas court properly denied the petition for a writ of habeas corpus because the petitioner failed to establish that he was prejudiced by an alleged deficiency in his trial counsel's performance. We agree with the respondent.

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly,

[t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 849, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017).

"The petitioner's right to the effective assistance of counsel is assured by the sixth and fourteenth amendments to the federal constitution, and by article first, § 8, of the constitution of Connecticut. In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. Accordingly, a court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome

of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." (Internal quotation marks omitted.) *Weinberg* v. *Commissioner of Correction*, 112 Conn. App. 100, 106–107, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009).

Because the habeas court in the present case determined that the petitioner had not proven that he was prejudiced by the performance of his trial counsel without reaching the deficiency prong, "our focus on review is whether the court correctly determined the absence of prejudice." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, supra, 183 Conn. App. 565; see also *Weinberg* v. *Commissioner of Correction*, supra, 112 Conn. App. 108.

A

We first address the petitioner's argument that he was prejudiced by his trial counsel's failure to present a third-party culpability defense. Specifically, the petitioner argues that his trial counsel's failure to produce evidence that Carlos Vidal shot the victim constituted ineffective assistance of counsel.

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

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

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, [our Supreme Court has] stated: Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the [fact finder's] determination." (Citations omitted; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 609–610, 935 A.2d 975 (2007); see also *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 564, A.3d (2019).

The following additional facts are relevant to this claim. During the habeas trial, Donald J. Cretella, Jr., the petitioner's trial counsel, testified that he recalled seeing a police investigative report about the shooting that described an individual speaking with the police and referencing a man named Carlos Vidal. The habeas court subsequently admitted that report as an exhibit

for the purpose of showing what may have been available to Cretella at the time of trial. The petitioner's habeas counsel then asked Cretella to read the following portion of the report that was relevant to his testimony: "Jesenia Rhodes called me then came in to talk. She stated Fro's real name is Charlie or Carlos Vidal. He lives on Catherine [Street], he pulled a gun on a girl, she has a restraining order against him, [and] he lives at his aunt's house at 104 Catherine [Street] which is across the street from his girlfriend's house . . . . His mother is [Eleanor] and she lives at 59 Edwin. Jesenia on [July 19, 2010] went on Fro's MySpace account[2] . . . and found a picture of a tombstone that stated 'this is where niggas go when they fuck with me 1986.' This concern[ed] Jesenia because [the victim's] birth year is 1986. Jesenia took a picture of the tombstone before Fro removed it from the account. Jesenia stated someone . . . saw Vidal at Wentfield Park getting out of a rental car with a gun. . . . Before she left I showed her a picture of . . . Vidal [date of birth March 23, 1986,] and she stated that was Fro." (Footnote added.)

Cretella did not recall having a conversation with the petitioner about the report. He also did not investigate the information it contained because his strategy was to present an alibi defense, and, at the time, he believed

[2] "MySpace is a social networking website where members can create profiles and interact with other members. Anyone with Internet access can go onto the MySpace website and view content which is open to the general public such as a music area, video section, and members' profiles which are not set as private. However, to create a profile, upload and display photographs, communicate with persons on the site, write blogs, and/or utilize other services or applications on the MySpace website, one must be a member. Anyone can become a member of MySpace at no charge so long as they meet a minimum age requirement and register. . . . To establish a profile, a user needs only a valid email account. . . . Generally, a user creates a profile by filling out a series of virtual forms eliciting a broad range of personal data, culminating in a multimedia collage that serves as one's digital face in cyberspace." (Citation omitted; internal quotation marks omitted.) *State* v. *Devalda*, 306 Conn. 494, 511 n.19, 50 A.3d 882 (2012).

that the third-party culpability defense was weak. Sergeant John Losak, the Bridgeport police officer who authored the report, testified at the habeas trial that Rhodes had provided him with information regarding the MySpace post but indicated that there was nothing in the post that was exculpatory for the petitioner. Losak further recalled that the information compiled over the course of the investigation did not suggest that there was more than one suspect at the scene of the shooting.

The petitioner's habeas counsel also presented the testimonies of Silas Cox, a purported eyewitness to the shooting, Madeline Griffin, Vidal's aunt, and Shemayah Ben-Israel, an inmate who had shared a holding cell with Vidal in 2014. Cox testified that he was present at a section of the Greene Homes commonly referred to as the "X" in 2010 when the shooting occurred, and that he saw "a Spanish looking guy with a gun shoot and then run away." Cox described the shooter as having white skin and braided hair, not a shaved head as the petitioner had at the time of the shooting. During cross-examination, Cox described his extensive criminal record and acknowledged he had been in jail from February to November, 2010, which period encompasses the July, 2010 date of the shooting. Cox later backtracked from this acknowledgment and stated that he did not recall the exact dates that he had been incarcerated in 2010 because he had "an extensive history of coming back and forth to jail . . . ."

Griffin testified that the victim had robbed her, and that when she told Vidal that the victim had robbed her, he began waving a silver gun around. Griffin stated that this encounter happened before a 2010 car accident in which she had been involved. Griffin further testified that her sister, Eleanor, who is also Vidal's mother, had told her that someone named "Boo" had called Eleanor's house asking for Vidal to meet him in the

Greene Homes with the victim, and that "it had to do with a gun." Griffin also stated that Eleanor had asked her if Vidal could stay at her house because he had been shot. Griffin's statements regarding what Eleanor had said to her were admitted at the habeas trial, over hearsay objections, for the purpose of showing what information may have been available to Cretella at the time of the criminal trial. Griffin provided more information about her 2010 accident during cross-examination, stating that she had been involved in a car accident in June, 2010, and that, as a consequence, she had developed memory problems. She also stated that she had been diagnosed with mental health issues, including schizophrenia, for which she takes medication.

Ben-Israel testified that while he was in a holding cell in MacDougall-Walker Correctional Institution with Vidal in 2014, they had a conversation during which Vidal expressed his concern that "a warrant was going to pop up for his arrest . . . for that incident that happened in the [Greene Homes]." Ben-Israel also testified that Vidal had been talking about the petitioner, and that Vidal had told him that "he was supposed to turn himself in, but . . . he wasn't going to turn himself in for nobody. And that is pretty much what he said. He said fuck—he said fuck [the petitioner], basically." Ben-Israel further stated that he had been familiar with the case because he had seen a post that Vidal had made on Facebook in which he bragged "about what was done in the [Greene Homes]."[3] During cross-examination, Ben-Israel acknowledged that he was serving a twelve year sentence for robbery and that he had a previous criminal record under a different name. He

[3] "Facebook is a social networking website that allows private individuals to upload photographs and enter personal information and commentary on a password protected profile." (Internal quotation marks omitted.) *State* v. *Kukucka*, 181 Conn. App. 329, 334 n.3, 186 A.3d 1171, cert. denied, 329 Conn. 905, 184 A.3d 1216 (2018).

also acknowledged that the Facebook post by Vidal that he allegedly saw did not indicate that Vidal had killed the victim.

The petitioner also testified at the habeas trial. He stated that the only discussion he had with Cretella about Vidal was regarding Rhodes' reference to Vidal in Losak's report. The petitioner recalled that when he asked Cretella about sequestering Rhodes, Cretella cut him off and told him not to worry about her.

The habeas court explicitly addressed the MySpace post and Ben-Israel's testimony in rejecting the petitioner's claim that Cretella failed to investigate or present a third-party culpability defense. The court determined that it was unclear whether Cretella successfully could have authenticated the MySpace post as having been authored by Vidal. The court concluded that, even if the post had been admitted into evidence, it failed "to comprise a clear admission by Vidal that *he*, and not the petitioner, shot the victim"; (emphasis in original); and noted that "it was the petitioner, and not Vidal, whose appearance more closely resembled the shooter's description [given] by most witnesses."

After reviewing the record, we agree with the habeas court's conclusion that, despite the evidence presented, the petitioner failed to demonstrate that there was a reasonable probability that, but for the trial counsel's failure to present a third-party culpability defense, the outcome of his trial would have been different. We agree that even if a third-party culpability defense had been asserted at the petitioner's trial, the purported MySpace post, assuming that it was found and properly authenticated, would have failed to constitute an admission by Vidal sufficient to raise a reasonable doubt of the petitioner's culpability.[4] Sergeant Losak confirmed

[4] For a third-party culpability defense to succeed, a defendant need only present evidence that creates a reasonable doubt as to whether the defendant committed the offense. See *State* v. *Arroyo*, supra, 284 Conn. 609–610 ("evidence that establishes a direct connection between a third party and the

that he had been made aware of the post, but testified that the investigation of the shooting did not corroborate the information that the post allegedly contained. Moreover, we agree with the court's determination that, because Ben-Israel's testimony concerned a 2014 conversation he had with Vidal "that first came to light about one month before the habeas trial in 2017 . . . Cretella could hardly be faulted for not premising a third-party [culpability] defense on an event which had not yet occurred at the time of the petitioner's criminal trial in 2012."

Additionally, although the court did not specifically discuss the testimony of Cox and Griffin, the court reasonably could have concluded that their testimony did not help the petitioner because it was unclear whether Cox was in prison at the time of the shooting, and because Griffin's memory and mental health issues raise questions as to the reliability of her testimony. Additionally, the testimony of Cox and Griffin did not directly connect Vidal to the shooting in the present case but, rather, at the most, raised a bare suspicion that he may have been involved in a shooting. See *State* v. *Arroyo*, supra, 284 Conn. 609–610. Finally, as we will discuss further in part II of this opinion, the court found that the evidence at both the criminal and habeas trials provided descriptions of the shooter that more closely matched the physical features of the petitioner than those of Vidal.

Accordingly, the habeas court correctly determined that the petitioner was not prejudiced by Cretella's

charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense").

In the present case, although the habeas court may have overstated the quality of evidence adequate to sustain a third-party culpability defense in concluding that the MySpace post would have failed to constitute a "clear admission" by Vidal of his culpability, the record provides ample support for the court's conclusion that such a defense would not have been successful in raising a reasonable doubt as to the petitioner's culpability in this case.

alleged failure to investigate and present a third-party culpability defense.

B

The petitioner next argues that he was prejudiced by his trial counsel's failure to present evidence of an initial segment of a video recorded police interview of Eduardo Martorony, a witness for the state. The petitioner alleges that an initial portion of the video in which Detective Harold Dimbo intentionally left Martorony alone in the interview room had been redacted. We are not persuaded.

The following additional facts are relevant to this claim. Cretalla testified during the habeas trial that he recalled that, during the petitioner's criminal trial, the police video of Martorony was played to corroborate Martorony's trial testimony. During Cretella's testimony before the habeas court, the video was played to show what information had been available to Cretella. The video began by showing Martorony sitting alone in an interview room looking through police materials. Cretella recalled this initial portion of the video but did not recall whether that initial portion was played for the jury at the criminal trial or whether redactions were made to the first part of the video. Cretella did recall that redactions were made to the latter part of the video and that there was a portion of the video showing Martorony sitting alone in the room for a longer period of time than shown in the recording entered into evidence. He testified, however, that this portion may have occurred later in the interview.

Cretella additionally testified that he thought Martorony's review of the police material during the video could have suggested that he saw information that would have helped him testify about something he actually may not have witnessed. Cretella stated that he cross-examined Martorony regarding the material left

in the interview room and that, although he also cross-examined Dimbo about Martorony's interview, he did not recall whether he specifically asked Dimbo about the material left in the room because he did not want to walk into a "potential trap" by asking questions with potential answers he did not know. Finally, Cretella testified that, in his experience as an attorney, having viewed "hundreds" of police interviews, it is not uncommon for the videos of such interviews to start before the interviewer has entered the room.

Dimbo, who interviewed Martorony during the video, testified that he had met with Martorony before the interview to discuss the case. Dimbo stated that, at this initial meeting, Martorony had provided him with information about the shooting on his own accord. Specifically, Dimbo recalled that Martorony told him that he had witnessed a shooting and provided him with the nicknames of those involved. Dimbo then stated that, after hearing those nicknames, he suspected that the petitioner was the shooter. Dimbo also testified that the material Martorony was seen examining in the video contained only a photograph of the victim, Dimbo's notes from his previous discussion with Martorony, and a photo array. He stated, as well, that apart from the photo array, everything included in the material was information that had been provided directly to him by Martorony. Dimbo further testified that Martorony was left alone in the interview room before the recording began because he needed to leave the room to turn on the video recorder.

The petitioner testified that he had viewed an original video in which Dimbo had left Martorony alone in the interview room because he said he had forgotten something, and the petitioner contended that during his criminal trial, he wanted Cretella to question Dimbo about why he subsequently did not return to the room with anything.

In assessing the petitioner's claim that Cretella failed to present the alleged initial segment of the video recorded police interview, the habeas court determined that the allegation that the video had been redacted was "simply unproven speculation." The court concluded that no credible evidence supported the petitioner's suggestion that the recording began earlier than shown to the jury simply because it abruptly started with Martorony reviewing police material.

On the basis of our review of the record, we conclude that the habeas court reasonably determined that the petitioner offered insufficient evidence to support his allegation that an initial segment of the video existed or that, even if it existed, it was not shown to the jury. No evidence of an initial portion of the video was presented at the habeas trial apart from the petitioner's allegation that he had viewed an "original video." Moreover, the court found that Cretella's cross-examination of both Martorony and Detective Dimbo at the petitioner's criminal trial "decidedly put before the jury the possibility that Martorony previewed police documents, photographs, and/or notes and simply repeated information that he believed the police wanted to hear." Accordingly, we agree with the habeas court's assessment that because the jury was able to weigh Martorony and Dimbo's credibility regarding the nature of the video without the presentation of any purported initial segment of the video, no prejudice resulted from Cretella's alleged failure to present additional evidence regarding the nature of the video.

The record demonstrates that, even if Cretella had provided deficient performance regarding the third-party culpability defense or the purported missing portion of the video, the petitioner's ineffective assistance claims do not involve issues that are debatable among jurists of reason with respect to the prejudice prong of the *Strickland* test. We conclude, therefore, that the

habeas court did not abuse its discretion in denying the petition for certification to appeal from that court's determination that the petitioner failed to prove that he was prejudiced by the ineffective assistance of counsel at his criminal trial.

II

The petitioner also claims that the court abused its discretion in denying his petition for certification to appeal with respect to his claim of actual innocence. We are not persuaded.

We begin by setting forth the relevant legal principles that govern our analysis. "[T]he proper standard for evaluating a freestanding claim of actual innocence, like that of the petitioner, is twofold. First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime. . . .

"Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. . . . Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime. . . . Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime even though it is unknown who committed the crime, that a third party committed the crime or that no crime actually occurred." (Citation omitted; internal quotation marks omitted.) *Carmon* v. *Commissioner*

of Correction, 178 Conn. App. 356, 371, 175 A.3d 60 (2017), cert. denied, 328 Conn. 913, 180 A.3d 961 (2018).

This court has held that "[a] claim of actual innocence must be based on newly discovered evidence. . . . This evidentiary burden is satisfied if a petitioner can demonstrate, by a preponderance of the evidence, that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence." (Internal quotation marks omitted.) *Ampero* v. *Commissioner of Correction*, 171 Conn. App. 670, 687, 157 A.3d 1192, cert. denied, 327 Conn. 953, 171 A.3d 453 (2017).

The following additional facts are relevant to this claim. During the habeas trial, the petitioner described Vidal as a light-skinned African American, approximately five feet, seven to eight inches tall, and with cornbraids. The petitioner additionally testified that he himself, as opposed to Vidal, never had cornbraids. Vidal also appeared with his counsel during the habeas trial through a video conference and, through his counsel, invoked his right against self-incrimination. When the petitioner's counsel indicated his desire to put Vidal's skin color, hairstyle, and other physical characteristics into the record, the court responded: "Well I can—certainly I can see Mr. Vidal presently, so I can take—my observations are certainly evidence in the case of how he appears. And with that, I don't think you can ask him how his hair was, etc." The court then asked Vidal if he would be willing to answer questions about his height and weight, and although his counsel did not agree to permit him to do so, Vidal did stand up and turn to the side when the court requested that he do so.

In its memorandum of decision, the habeas court first indicated that "[t]he newly discovered evidence

proffered by the petitioner" was the testimony of Ben-Israel. The court then found "that the petitioner . . . failed to satisfy his burden of proving, by clear and convincing evidence, affirmatively that [he] did not murder the victim." The court determined that "[a] combination of credible, newly discovered evidence with that previously produced at the petitioner's criminal trial show[ed] that the more accurate and persuasive description of the shooter more closely matched the physical features of the petitioner than those of Vidal." The court stated that it had "viewed Vidal's complexion and other physical characteristics personally." The court also noted that, during the criminal trial, it was established that three persons who knew the petitioner on the day of the shooting identified him as the gunman: (1) Kyle Mason, the other individual who was shot and who provided a recorded statement to police on the day of the incident; (2) Henry Brandon, who saw the petitioner receive a silver pistol from one of his companions and fire the shot that struck Mason; and (3) Martorony, who was speaking with the victim just as the assailants approached to attack and "identified the petitioner as the person who employed a chrome-colored, semi-automatic pistol to shoot the victim." The court concluded that, given the inculpatory evidence against the petitioner, "vague boasts [allegedly] by Vidal of some nonspecific involvement in the victim's demise falls far short of clear and convincing evidence of the petitioner's innocence."

On appeal, the petitioner argues that (1) Ben-Israel's testimony was newly discovered evidence that could not have been discovered prior to, or during, the petitioner's criminal trial despite the exercise of due diligence, and (2) the testimony of Cox and Griffin also could be considered newly discovered evidence provided that this court determines that the exercise of

due diligence would not have unearthed their testimony. The respondent argues that the petitioner's claim should "be rejected because the habeas court acted well within its role as fact finder in concluding that the proffered evidence was insufficient to meet the 'extraordinarily high' burden of proving the petitioner's actual innocence by clear and convincing evidence."

Because it is clear that Ben-Israel's testimony, which came to light one month before the 2017 habeas trial, could not have been discovered prior to the petitioner's 2012 criminal trial through due diligence, we agree with the habeas court that the testimony constitutes newly discovered evidence. We also agree with the habeas court that such testimony fails to establish clearly and convincingly that the petitioner is actually innocent.

In his testimony during the habeas trial, Ben-Israel stated that Vidal told him about the shooting in the Greene Homes, but also stated that he knew about the shooting apart from his conversation with Vidal. Moreover, Ben-Israel repeatedly stated that the social media post by Vidal that he allegedly saw was on Facebook, not MySpace, and that the post did not indicate that Vidal, and not the petitioner, had killed the victim. Ben-Israel's testimony was not only contradictory to the inculpatory evidence presented against the petitioner, but it also failed to unequivocally undermine such evidence. See *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 560, 22 A.3d 1196 (2011) ("[T]he clear and convincing evidence standard should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory. . . . We equated the clear and convincing burden with an extraordinarily high and truly persuasive [demonstration] of actual innocence . . . ." [Citation omitted; internal quotation marks omitted.]). The habeas court considered the overwhelming evidence of the petitioner's identification as the shooter at the criminal trial with its own viewing of the petitioner and Vidal during the habeas trial, and reasonably

concluded that the petitioner, not Vidal, more closely resembled the shooter identified by eyewitnesses. As such, we conclude that, in light of the evidence presented at the habeas trial, Ben-Israel's testimony did not support the petitioner's actual innocence claim.

We next turn to the petitioner's argument, which was not raised during the habeas trial, that the testimony of Cox and Griffin could be newly discovered evidence.[5] In his brief before this court, the petitioner merely restates the relevant portions of Cox and Griffin's testimony without offering an argument or legal authority as to how such testimony could be considered newly discovered.

Even assuming, arguendo, that the testimony of Cox and Griffin could be considered newly discovered, we conclude that such testimony, when weighed against the other evidence presented against the petitioner at the habeas trial, did not constitute affirmative proof of the petitioner's innocence. "To disturb a long settled and properly obtained judgment of conviction, and thus put the state to the task of reproving its case many years later, the petitioners must affirmatively demonstrate that they are *in fact* innocent." (Emphasis in

[5] We may properly review the petitioner's argument that the testimony of Cox and Griffin could be considered newly discovered evidence because it is derived from the petitioner's actual innocence claim. See *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 635 n.7, 126 A.3d 558 (2015) ("[w]e may . . . review legal arguments that differ from those raised before the trial court if they are subsumed within or intertwined with arguments related to the legal claim raised at trial" [internal quotation marks omitted]); see also *State* v. *Fernando A.*, 294 Conn. 1, 31 n.26, 981 A.2d 427 (2009) ("[although we are mindful that] the plaintiff did not [previously] raise . . . all of the theories that he raises in his writ . . . those theories are related to a single legal claim, and . . . there is substantial overlap between these theories under the case law" [internal quotation marks omitted]); *Rowe* v. *Superior Court*, 289 Conn. 649, 663, 960 A.2d 256 (2008) (same).

In the present case, the petitioner's argument regarding the testimony of Cox and Griffin is subsumed within his actual innocence claim raised before the habeas court. As such, we may review this argument.

original.) *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 567. As previously discussed in part I A of this opinion, the testimony of Cox and Griffin was unreliable and did not constitute clear and convincing evidence of the petitioner's actual innocence. *Carmon* v. *Commissioner of Correction*, supra, 178 Conn. App. 371 ("the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence . . . he is actually innocent of the crime of which he stands convicted" [internal quotation marks omitted]); see also *Turner* v. *Commonwealth*, 56 Va. App. 391, 411, 694 S.E.2d 251 (2010) ("the petitioner has not met his burden . . . because . . . relief [on a petition for a writ of actual innocence is available] only to those individuals who can establish that they did not, as a matter of fact, commit the crime for which they were convicted and not to those who merely produce evidence contrary to the evidence presented at their criminal trial" [internal quotation marks omitted]), aff'd, 282 Va. 227, 717 S.E.2d 111 (2011). On the basis of our own review, we conclude that the habeas court properly found that the petitioner had not established by clear and convincing evidence that he is innocent of the murder for which he was convicted, and the petitioner failed to establish that no reasonable fact finder would find him guilty of the crime.

On the basis of the foregoing, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal. We are not persuaded that the issues, as presented by the petitioner, are debatable among jurists of reason, that they reasonably could be resolved differently, or that they raise questions deserving further appellate scrutiny.

The appeal is dismissed.

In this opinion the other judges concurred.

WILFREDO QUINONES *v.* R. W. THOMPSON COMPANY, INC.
(AC 38256)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff, who was injured while he was employed by the defendant company, appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner denying the plaintiff's motion to preclude the defendant from contesting the extent of the plaintiff's injuries. The defendant did not contest the plaintiff's claim for certain workers' compensation benefits by filing a form 43, as required by statute ([Rev. to 2009] § 31-294c). Nevertheless, the defendant later filed a form 36 seeking to discontinue the benefits it was paying the plaintiff, which was approved without objection. The plaintiff thereafter filed his motion to preclude and, after conducting a formal hearing but before ruling on that motion, the commissioner, T, died, and the case was assigned to a substitute commissioner, D. The parties sent letters to the Workers' Compensation Commission after they were informed that they could have a hearing de novo or request the commission to assign a substitute commissioner to decide the case upon review of the original record. The plaintiff objected to a trial de novo and claimed that a decision should be rendered upon review of the record, and the defendant had no objection to a decision rendered based upon a review of the record. Thereafter, the plaintiff filed an objection to D's order scheduling a formal hearing in order to open the record for articulation of the parties' positions and arguments, which D denied. Subsequently, D held a formal hearing, at which time he recalled the plaintiff for further questioning, and later issued a decision denying the plaintiff's motion to preclude. The plaintiff appealed to the board, which affirmed the denial of his motion to preclude. On appeal to this court, the plaintiff claimed, inter alia, that the board improperly found there was no error when D rejected an alleged stipulation that the case be decided on the original record. *Held*:

1. The plaintiff could not prevail on his claim that because the parties stipulated that the case would be decided on the original record before T, D improperly opened the record, ignored the stipulation and conducted a hearing de novo: D's opening of the record solely in order to question the plaintiff regarding payments that he received from the defendant was not a hearing de novo, and the board did not clearly err in finding that the letters that the parties sent separately to the commission did not constitute a contract between the parties that could be considered a stipulation, as there was no firm understanding between the parties nor a quid pro quo, and the letters were merely a statement by the parties of their respective positions at that time; moreover, even if a

stipulation existed between the parties, it would not have prohibited D from opening the record, as D recalled the plaintiff as a witness so that he could hear evidence he believed was essential to a proper evaluation of the case, and it was fully within D's power and authority, as a commissioner, to do so; accordingly, the board correctly determined that it was not improper for D to have opened the record.

2. The plaintiff could not prevail on his claim that the board improperly affirmed the denial of his motion to preclude, which was based on his claim that the defendant, by failing to file a form 43 to contest the compensability of the plaintiff's claim for benefits, failed to comply with § 31-294c and was, therefore, precluded from contesting the compensability or extent of the plaintiff's claimed injury; the defendant had no duty to file a form 43, as the compensability of the plaintiff's claim was not and had never been contested, the plaintiff timely received benefits until the commission approved a timely filed form 36, and there was no reason for the defendant to contest the extent of the plaintiff's injury until obtaining the information alleged in the form 36, namely, that the plaintiff was able to return to work.

Argued December 4, 2018—officially released February 26, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Sixth District denying the plaintiff's motion to preclude the defendant from contesting the extent of the plaintiff's injury and denying the plaintiff's motion to correct, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellant (plaintiff).

Nicholas C. Varunes, with whom was *Christopher Young*, for the appellee (defendant).

Opinion

LAVINE, J. The plaintiff, Wilfredo Quinones, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Sixth District, Stephen B. Delaney, denying the plaintiff's motion to preclude the defendant, R. W. Thompson Co., Inc., from contesting

the extent of the plaintiff's injury. On appeal, the plaintiff claims that the board improperly (1) found there was no error when the commissioner rejected an alleged stipulation that the case be decided on the original record and (2) affirmed the denial of the plaintiff's motion to preclude despite the defendant's failure to file a form 43. We affirm the decision of the board.

The following facts and procedural history are relevant to our resolution of this appeal. On March 16, 2010, during the course of his employment with the defendant, the plaintiff sustained compensable injuries when the deck of a road paving machine fell on him. He began to receive workers' compensation benefits on March 23, 2010. Although the plaintiff timely filed a form 30C[1] claiming benefits on October 25, 2010, he refiled a form 30C on February 10, 2011, because he lost the return receipts from the postal service related to his first filing. The defendant did not contest the plaintiff's claim by filing a form 43[2] and began paying the plaintiff weekly indemnity payments in the amount of $328.58 from March 23, 2010, until November 8, 2011. On October 17, 2011, the defendant, however, sought to discontinue the benefits it was paying the plaintiff by filing a form 36,[3] alleging that the plaintiff was able

[1] "A form 30C is the document prescribed by the [W]orkers' [C]ompensation [C]ommission to be used when filing a notice of claim pursuant to the [Workers' Compensation Act]." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.3, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

[2] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 828 n.2, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

[3] "A form 36 is the official document an employer must file when seeking to discontinue an employee's benefits." *Laliberte* v. *United Security, Inc.*, 261 Conn. 181, 184 n.6, 801 A.2d 783 (2002).

to return to work.[4] The form 36 was approved without objection on November 2, 2011. Consequently, the plaintiff received no more compensation benefit payments after November 8, 2011. On February 29, 2012, the plaintiff filed a motion to preclude the defendant from denying him further compensation benefits. Commissioner Clifton Thompson conducted a formal hearing on April 18, 2012. After the hearing, but before the parties submitted posttrial briefs, Commissioner Thompson died, and the case was assigned to Commissioner Delaney.[5]

When the Workers' Compensation Commission (commission) contacted the parties regarding the former commissioner's death, the parties were told that they could have a hearing de novo or request the commission to assign a substitute commissioner to decide the case on the basis of a review of the transcript, exhibits, and as of yet unfiled briefs. The plaintiff objected to a trial de novo in a letter dated May 24, 2012, and stated that a decision should be rendered upon review of the record.[6] The defendant, in a letter dated May 24, 2012, stated that it "[had] no objection to [the] matter [being] reassigned to a new commissioner for a finding on the

[4] The defendant sought to discontinue the compensation benefits it was paying the plaintiff on the basis of surveillance video obtained by its compensation insurance carrier, which showed that the plaintiff had the capacity to work.

[5] Hereinafter, we refer to Commissioner Thompson as the former commissioner and Commissioner Delaney as the commissioner.

[6] The plaintiff's letter stated in relevant part: "This letter serves to memorialize our conversation that we had on May 24, 2012 . . . . It is [the plaintiff's] position that this matter is purely procedural, and does not involve credibility issues per se. The trial transcript is fifteen pages long and there are a total of four exhibits in the record. The record thus speaks for itself. The [plaintiff] objects to any trial de novo as it is unnecessary. The parties were given their fair and full opportunity to present evidence and argue their respective positions at the [f]ormal [h]earing. The [plaintiff's] brief is virtually complete . . . . More importantly, a trial de novo will cause an unreasonable delay in these proceedings. The [plaintiff] is currently without any benefits and is in acute financial distress. Thus, time is of the essence. Another commissioner should be selected to review the entire record and render a decision."

papers based on the April 18, 2012 formal hearing transcript and the briefs submitted by the parties."

On August 31, 2012, the commissioner scheduled a formal hearing to open the record for articulation of the parties' positions and arguments. On September 7, 2012, the plaintiff filed an objection to the commissioner's order to open the formal hearing. At a formal hearing on October 1, 2012, the commissioner heard the plaintiff's objection, and ruled that he had the authority to open the record and was recalling the plaintiff for further questioning. The plaintiff thereafter filed an appeal to the board on October 19, 2012, challenging the right of the commissioner to open the record and take further evidence. The board issued a decision on January 16, 2014, concluding that the matter was not ripe for review. On May 15, 2014, the commissioner held a formal hearing. On July 11, 2014, he issued his decision denying the plaintiff's motion to preclude. The plaintiff appealed to the board, arguing that the commissioner improperly opened the record in contravention of the parties' stipulation and denied his motion to preclude. On July 29, 2015, the board found that there was no stipulation between the parties, and even if there was a stipulation, the commissioner had the authority to open the record. The board affirmed his denial of the motion to preclude. This appeal followed.

As a threshold matter, we set forth the standard of review. "It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the board]. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny. . . . Where . . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to

review the administrative decision." (Citations omitted; internal quotation marks omitted.) *Day* v. *Middletown*, 59 Conn. App. 816, 819, 757 A.2d 1267, cert. denied, 254 Conn. 945, 762 A.2d 900 (2000). "We [accord] deference to . . . a time-tested agency interpretation of a statute, but only when the agency has consistently followed its construction over a long period of time, the statutory language is ambiguous, and the agency's interpretation is reasonable." *State Medical Society* v. *Board of Examiners in Podiatry*, 208 Conn. 709, 719, 546 A.2d 830 (1988).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [we] first . . . consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .

"Moreover, [i]n applying these general principles, we are mindful that the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.] indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for

workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *Kinsey* v. *World PAC*, 152 Conn. App. 116, 124, 98 A.3d 66 (2014).

"The powers and duties of workers' compensation commissioners are conferred upon them for the purposes of carrying out the stated provisions of the [act]. . . . It is well settled that the commissioner's jurisdiction is confined by the . . . act and limited by its provisions." (Citations omitted; internal quotation marks omitted.) *Tufaro* v. *Pepperidge Farm, Inc.*, 24 Conn. App. 234, 236, 587 A.2d 1044 (1991).

I

The plaintiff first claims that the commissioner improperly opened the record. Specifically, he argues that he and the defendant stipulated that the case would be decided on the record before the former commissioner, and that the commissioner improperly ignored that stipulation and conducted a hearing de novo. We disagree.

As an initial matter, we reject the plaintiff's characterization that the commissioner's opening of the record was a hearing de novo. After the matter was assigned to him, the commissioner reviewed the record and concluded that there was not enough evidence for him to make a decision. He stated that the record consisted of "a very short transcript [of the April 18, 2012 formal hearing], very short direct and [cross-examination] of the [plaintiff], and [that he had] a lot of questions [for]

the [plaintiff]."[7] As a result, he opened the record in order to question the plaintiff. At the hearing on May 15, 2014, the commissioner questioned the plaintiff solely about the payments he received. The plaintiff was unable to answer the commissioner's questions, even when shown his testimony from the October 1, 2012 hearing. The commissioner then asked counsel whether they could provide the information he requested concerning what payments the plaintiff received. Surprisingly, the plaintiff's counsel did not respond. The defendant's counsel offered a history of the benefits the defendant had paid the plaintiff. The commissioner accepted the history into evidence, which indicated that the plaintiff received weekly payments in the amount of $328.58, for a total of $28,257.88, as well as payment of medical bills totaling $66,996.09, for an overall total of $95,253.97.[8]

We also reject the plaintiff's characterization of the May 24, 2012 letters the parties sent separately to the commission as a stipulation. "[A stipulation] may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court of

[7] The record discloses that direct examination of the plaintiff was very short in the April 18, 2012 formal hearing and did not include questions regarding benefit payments. Furthermore, the plaintiff objected to cross-examination questions about compensation as being outside of the scope of direct. As a result, the record of the payments received by the plaintiff was limited. The plaintiff, in his posttrial brief, even notes that he "did not confirm whether the [defendant] timely commenced [with] payments within the meaning of [General Statutes § 31-294c (b)]."

[8] The plaintiff additionally argues that the commissioner's opening the record is fundamentally unfair, as the evidence of payments that was introduced "cure[d] the deficiencies in the defendant's case alerted to him by [the] plaintiff's counsel." We disagree. We do not view the commissioner's taking steps necessary to determine whether payments commenced in accordance with General Statutes § 31-294c (b) to be fundamentally unfair to the plaintiff, who received significant timely benefits until the approval of a form 36 and has disingenuously attempted to keep evidence of such payments from being considered.

competent jurisdiction. . . . [It is] the result of a contract and its embodiment in a form which places it and the matters covered by it beyond further controversy. . . . The essence of the [stipulation] is that the parties to the litigation have voluntarily entered into an agreement setting their dispute or disputes at rest and that, upon this agreement, the court has [rendered] judgment conforming to the terms of the agreement." (Internal quotation marks omitted.) *Portfolio Recovery Associates, LLC* v. *Healy*, 158 Conn. App. 113, 118, 118 A.3d 637 (2015).

"Absent a clearly expressed intention of the parties, the construction of a stipulation is a question of fact committed to the sound discretion of the trial court. . . . Unless the language is so clear as to render its interpretation a matter of law, the question of the parties' intent in entering into a stipulation is a question of fact that is subject to the 'clearly erroneous' scope of review." (Citations omitted.) *Rosenfield* v. *Metals Selling Corp.*, 229 Conn. 771, 780, 643 A.2d 1253 (1994).

In its opinion affirming the denial of the motion to preclude, the board stated that its "examination of the documentary evidence . . . which purportedly serves as a 'stipulation' reveals that the May 24, 2012 correspondence from [the plaintiff's] counsel to the commission was primarily a position statement reflecting [the plaintiff's] objection to a trial de novo, while correspondence to the commission from [the defendant's] counsel of the same date indicates that the [defendant] '[had] no objection to [the] matter [being] reassigned to a new commissioner for a finding on the papers based on the April 18, 2012 formal hearing transcript and the briefs submitted by the parties.' . . . [N]either of these documents rises to a level of a 'stipulation,' and the evidentiary record contains no other document which even remotely resembles a stipulation." The board also concluded that even if there had been a stipulation, the commissioner would not have been bound by its terms in light of the powers entrusted to him by statute.

Upon review of the evidence, we conclude that the board did not clearly err in finding that the May 24, 2012 letters did not constitute a contract between the parties that could be considered a stipulation. There was no firm understanding between the parties nor a quid pro quo, just a statement by the parties of their respective positions at that time. We also agree with the board that, even if a stipulation existed between the parties, such a stipulation would not prohibit the commissioner from opening the record.

"[U]pon the death, disability or resignation of a judge[9] . . . during the pendency of a trial or hearing to the court, a successor judge should take the following steps pursuant to the authority granted by [General Statutes] § 51-183f: (1) become familiar with the entire existing record, including, but not necessarily limited to, transcripts of all testimony and all documentary evidence previously admitted; (2) determine, on the basis of such record and any further proceedings as the court deems necessary, whether the matter may be completed without prejudice to the parties; (3) if the court finds that the matter may not be completed without prejudice to the parties it should declare a mistrial, but if the court finds that the matter may be completed without prejudice to the parties then; (4) upon request of any party, or *upon the court's own request, recall any witness whose testimony is material and disputed and who is available to testify without due burden*; (5) take any other steps reasonably necessary to complete the proceedings; and (6) render a decision based on the successor judge's own findings of fact and conclusions of law." (Emphasis added; footnote added.) *Stevens* v. *Hartford Accident & Indemnity Co.*, 29 Conn. App. 378, 386, 615 A.2d 507 (1992).

[9] These principles have been applied to workers' compensation commissioners, as well as to judges. See *Schick* v. *Windsor Airmotive Division/Barnes Group, Inc.*, 34 Conn. App. 673, 675–77, 643 A.2d 286 (1994).

"Although . . . a successor judge [has the power] to make his or her findings of fact based solely on transcribed testimony and exhibits, no Connecticut court has . . . defined the power of litigants to stipulate to such a procedure, thereby circumventing the procedures required under § 51-183f. Although ordinarily stipulations of the parties are adopted, the court may disapprove the parties' agreement when it finds reason. . . . A stipulation, however, is not necessarily binding on the court and, under the circumstances of a particular case, the court may be justified in disregarding it." (Citations omitted.) *Gorelick* v. *Montanaro*, 94 Conn. App. 14, 22 n.14, 891 A.2d 41 (2006). "We are mindful that a judge is not a mere umpire . . . but a minister of justice, and it follows that an agreement is not necessarily binding on the court and may justifiably be disregarded in a particular case." *Central Connecticut Teachers Federal Credit Union* v. *Grant*, 27 Conn. App. 435, 438, 606 A.2d 729 (1992).

In the present case, the commissioner recalled the plaintiff as a witness so that he could hear evidence he believed essential to a proper evaluation of the case, that is, evidence of what payments had been made to the plaintiff. The plaintiff's testimony was material as to whether the defendant met the requirements of General Statutes (Rev. to 2009) § 31-294c.[10] It was fully within the commissioner's power and authority to do so. See General Statutes § 31-278 ("[e]ach commissioner shall . . . have power to summon and examine under oath such witnesses, and may direct the production of . . . such . . . records . . . in relation to any matter at issue as he may find proper"); General Statutes § 31-282 ("[i]f any compensation commissioner dies before the final settlement of any matter in which he had been acting in his official capacity, his successor in office

[10] Hereinafter, all references to § 31-294c in this opinion are to the 2009 revision of the statute.

may continue such matter to its completion"); and General Statutes § 31-298 ("[T]he commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter."); see also *Delgaizo* v. *Veeder-Root, Inc.*, 133 Conn. 664, 667–68, 54 A.2d 262 (1947) ("The commissioner is not bound by common law or statutory rules of evidence or procedure. He may make inquiry in the manner best calculated to do so to ascertain the rights of the parties and to carry out the spirit of the act through oral testimony or written or printed records. . . . He may require the production of records . . . ." [Citation omitted.]). The plaintiff did not provide, nor have we found, any support for the notion that a stipulation—assuming one in fact existed—between parties that was not approved by the commissioner could limit the commissioner's power. See *Gorelick* v. *Montanaro*, supra, 94 Conn. App. 22 n.14. We, therefore, conclude that the board correctly determined that it was not improper for the commissioner to have opened the record.

II

The plaintiff's second claim is that the board improperly affirmed the denial of his motion to preclude, as the defendant failed to file a form 43. Specifically, the plaintiff argues that by failing to file a form 43 to contest the compensability of his original claim, the defendant failed to comply with § 31-294c[11] and is, therefore, precluded from contesting the compensability or extent of

[11] General Statutes § 31-294c (b) provides in relevant part: "Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the

the plaintiff's claimed injury. We disagree and conclude that, given the circumstances, the board properly concluded that the defendant had no duty to file a form 43.

"In deciding a motion to preclude, the commissioner must engage [in] a two part inquiry. First, he must determine whether the employee's notice of claim is adequate on its face. See General Statutes § 31-294c (a). Second, he must decide whether the employer failed to comply with § 31-294c either by filing a notice to contest the claim or by commencing payment on that claim within twenty-eight days of the notice of claim. See General Statutes § 31-294c (b). If the notice of claim is adequate but the employer fails to comply with the statute, then the motion to preclude must be granted." *Callender* v. *Reflexite Corp.*, 137 Conn. App. 324, 338, 49 A.3d 211, cert. granted, 307 Conn. 915, 54 A.3d 179 (2012) (appeal withdrawn September 25, 2013).

" 'The first two sentences of § 31-294c (b) address the procedure that an employer must follow if it wants to contest liability to pay compensation . . . . The statute prescribes therein that, within twenty-eight days of receiving a notice of claim, the employer must file a notice stating that it contests the claimant's right to compensation and setting forth the specific ground on which compensation is contested. The third sentence:

chairman of the Workers' Compensation Commission stating that the right to compensation is contested . . . . If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim . . . . Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death."

(1) provides that an employer who fails to file a timely notice contesting liability must commence payment of compensation for the alleged injury within that same twenty-eight day period; and (2) grants the employer who timely commences payment a one year period in which to "contest the employee's right to receive compensation on any grounds or the extent of his disability"; but (3) relieves the employer of the obligation to commence payment within the twenty-eight day period if the notice of claim does not, inter alia, include a warning that "the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day." . . . The fourth sentence provides for reimbursement to an employer who timely pays and thereafter prevails in contesting compensability. Finally, the fifth sentence sets forth the consequences to an employer who neither timely pays nor timely contests liability: "Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death." ' " (Citation omitted; emphasis omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, 145 Conn. App. 261, 269–70, 76 A.3d 657, cert. denied, 310 Conn. 935, 78 A.3d 859 (2013).

"Our Supreme Court, in discerning the legislative intent behind the notice requirement of General Statutes (Rev. to 1968) § 31-297 (b), now § 31-294c (b), explained that the statute is meant to ensure (1) that employers would bear the burden of investigating a

claim promptly and (2) that employees would be timely apprised of the specific reasons for the denial of their claim. . . . The court noted that the portion of the statute providing for a conclusive presumption of liability in the event of the employer's failure to provide timely notice was intended to correct some of the glaring inequities of the workers' compensation system, specifically, to remedy the disadvantaged position of the injured employee . . . ." (Internal quotation marks omitted.) *Lamar* v. *Boehringer Ingelheim Corp.*, 138 Conn. App. 826, 840, 54 A.3d 1040, cert. denied, 307 Conn. 943, 56 A.3d 951 (2012).

"The language of form 43 indicates that it is to be used by employers who are contesting their liability to pay alleged compensation benefits. The form does not include a space for those employers who initially accept liability but may later, after investigation, choose to contest the extent of the disability. This distinction is not a superficial one, as an employer who is contesting liability is distinguishable from one who solely contests the extent of the disability. . . .

"Although we have no doubt that employers may have previously used form 43 to disclaim only the extent of a disability and not liability, amending the form to suit their specific disclaimer needs, that procedure unfairly requires such employers either to amend the form or to state untruthfully their intention to contest liability in order to preserve their ability to later challenge the extent of disability. The legislature, however, designed preservation of such challenges by allowing an employer, *instead of filing a form 43*, to commence payment of compensation for the alleged injury within the twenty-eight day period; and granting the employer who timely commences payment a one year period in which to contest the employee's right to receive compensation on any grounds *or the extent of his disability* . . . ." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Dubrosky*

v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 271–73.

The commissioner found that while the defendant did not file a form 43, the plaintiff timely, within twenty-eight days, received benefits until the commission approved a form 36. In its decision, the board stated: "In light of the evidence presented, the . . . commissioner reasonably concluded that because the compensability of the claim was not and had never been contested, the [defendant was] never obligated to file a form 43." We agree.

In the present case, the defendant did not contest the liability of the plaintiff's injury and compensated him until the approval of a form 36. Additionally, there was no reason for the defendant to contest the extent of the plaintiff's injury until obtaining the information alleged in the form 36, which was filed less than a year after receiving the plaintiff's form 30C.[12] The plaintiff, therefore, was never in a disadvantaged position. "It is well settled that notice provisions under the [act] should be strictly construed. . . . As this court has recognized, however, [o]ur requirement of strict compliance . . . has presumed the possibility of compliance." (Citation omitted; internal quotation marks omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, supra, 145 Conn. App. 274. Considering the facts of the present case, the board did not misapply the law to the subordinate facts or draw an unreasonable conclusion. Therefore, we agree with the decision of the board.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[12] Although, as the commissioner noted in his decision, the notice of approval of the form 36 was sent on November 2, 2011, which is outside of the one year "safe harbor provision," we note that the form was received by the commission on October 17, 2011. While the first form 30C the plaintiff filed was dated September 7, 2010, the form was received on October 25, 2010.

JOSEPH W. KAMINSKY JR. *v.* COMMISSIONER OF EMERGENCY SERVICES AND PUBLIC PROTECTION ET AL.

(AC 40546)

Sheldon, Keller and Moll, Js.

Syllabus

The plaintiff brought this action against the defendant Commissioner of Emergency Services and Public Protection, seeking a declaratory ruling that certain firearms were improperly seized and withheld from him by the defendant and, thus, that he was entitled to the return of those firearms. The plaintiff never obtained a certificate of possession or registered the three firearms at issue as assault weapons as required by Connecticut law, and the sole basis of the defendant's refusal to return the three firearms at issue was that they were never properly registered as assault weapons. The plaintiff claimed that because the subject firearms were manufactured prior to September 13, 1994, they were exempt from the registration requirement under statute (§ 53-202m). The trial court denied the plaintiff's request for a declaratory ruling and rendered judgment for the defendant, from which the plaintiff appealed to this court. On the basis of its interpretation of § 53-202m, the trial court had concluded that the plaintiff's firearms were not legally held by him because they were not exempt from the transfer or registration requirements for assault weapons. *Held* that the plaintiff's claim that the trial court erred in denying his request for a declaratory judgment was unavailing, the trial court having properly determined in a well reasoned memorandum of decision that the plaintiff was required to obtain a certificate of possession for certain of his assault weapons, which he failed to do, and, thus, that the guns at issue were contraband and not legally held by the plaintiff, who was not entitled to their return.

Argued December 3, 2018—officially released February 26, 2019

Procedural History

Action for a declaratory judgment to determine whether certain firearms were improperly seized and withheld from the plaintiff, and for other relief, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bright, J.*; judgment for the named defendant, from which the plaintiff appealed to this court. *Affirmed.*

Rachel M. Baird, for the appellant (plaintiff).

James Belforti, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Stephen R. Sarnoski*, assistant attorney general, for the appellee (named defendant Commissioner).

Opinion

SHELDON, J. The plaintiff, Joseph W. Kaminsky, Jr., appeals from the trial court's judgment, rendered after a trial without a jury, denying his request for a declaratory judgment holding that certain firearms were improperly seized and withheld from him by the defendant, the Commissioner of Emergency Services and Public Protection,[1] and thus that he is entitled to the return of those firearms.[2] On appeal, the plaintiff claims that the trial court erred in denying his request on the basis of its misinterpretation of the applicable statutory provisions. We affirm the judgment of the trial court.

The following procedural history and facts, as found by the trial court, are relevant to our disposition of this appeal. The plaintiff has been a collector and dealer of firearms licensed by the Bureau of Alcohol, Tobacco and Firearms (ATF) since 1988. While reviewing the plaintiff's application to renew his federal firearms license in 2011, the ATF discovered that he had a felony conviction in 1964 and, therefore, that he was ineligible

[1] The complaint named as an additional defendant the Chief of Coventry Police Department, Town of Coventry. The plaintiff withdrew the action as to that defendant. We refer to the Commissioner of Emergency Services and Public Protection as the defendant in this opinion.

[2] In particular, the plaintiff's petition requested that three of six firearms in the custody of the Connecticut State Police and twenty-four firearms of unknown location be returned to him. The trial court found that the plaintiff failed to prove the existence or location of the twenty-four firearms. The plaintiff does not address these firearms in his brief and, therefore, has abandoned any claim as to the twenty-four firearms on appeal. See *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 476, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

to have such a license or to possess any firearms. The ATF contacted the Connecticut State Police to alert them that the plaintiff was likely in illegal possession of firearms. In December, 2011, after being notified by state and local police that he was ineligible to possess any firearms, the plaintiff surrendered fifty-nine firearms to authorities. Three of those firearms, a B-West Arms AK-47-type rifle (AK-47), a Group Industries Uzi submachine gun (Uzi), and a SWD Cobray-11 submachine gun (M-11), are at issue in this appeal.

The firearms in question were all manufactured, and thereafter acquired by the plaintiff, prior to September 13, 1994. The plaintiff properly registered the Uzi and the M-11 as machine guns under both state and federal law, but he neglected to register the AK-47 as a machine gun. The plaintiff also never obtained a certificate of possession or registered the three firearms as assault weapons as required by Connecticut law. The Uzi and the M-11 each have a "selective-fire" mode that allows them to be fired in either automatic or semiautomatic mode, and the AK-47 firearm is explicitly listed under General Statutes § 53-202a as an assault weapon.

On August 6, 2014, the plaintiff brought an action pursuant to General Statutes § 52-291 seeking a declaratory ruling that the three firearms at issue had been improperly seized and withheld from him and that he was entitled to their return. The sole basis for the defendant's refusal to return the three firearms was that they were never properly registered as assault weapons pursuant to Connecticut law.[3] During the two day trial beginning on August 23, 2016, the plaintiff argued, in relevant part, that because the three firearms in question were manufactured prior to September 13, 1994, they are exempt from any registration requirement

[3] In 2013, the plaintiff received a full pardon from the 1964 conviction and had all of his federal, state, and local firearms licenses and permits reinstated, thus rendering him otherwise eligible to possess certain firearms.

under General Statutes § 53-202m. The defendant disagreed, arguing that the plain language of § 53-202m exempts only specific categories of assault weapons from the registration requirement and that the plaintiff's firearms did not qualify for such exemptions, thereby making their possession without registration illegal and subjecting them to seizure and destruction as contraband. The court agreed with the defendant and, thus, ruled that the plaintiff was not entitled to the declaratory relief he requested. This appeal followed.

The plaintiff claims on appeal that the trial court erred in its interpretation of § 53-202m by finding that only certain assault weapons manufactured prior to September 13, 1994, are exempt from registration thereunder. The plaintiff argues that No. 13-220 of the 2013 Public Acts (P.A. 13-220), as codified in the current revision of § 53-202m, is ambiguous because it refers to and incorporates by reference certain preexisting statutory provisions that were no longer in force and effect when the statute was enacted. Therefore, the plaintiff urges us to consider extratextual evidence in the form of an October 11, 2013 letter from Reuben Bradford, the former Commissioner of Emergency Services and Public Protection, declaring that it was the intent of the legislature in passing § 11 of P.A. 13-220 to exclude all assault weapons manufactured before September 13, 1994, from the statute's transfer restrictions and registration requirements. We disagree with the plaintiff's interpretation of the applicable statutory provisions.

"Statutory interpretation presents a question of law for the court. . . . Our review is, therefore, plenary." (Internal quotation marks omitted.) *Russo Roofing, Inc.* v. *Rottman*, 86 Conn. App. 767, 775, 863 A.2d 713 (2005). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the

statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 720, 6 A.3d 763 (2010).

We begin our analysis by setting forth the relevant statutory language. General Statutes § 53-202c criminalizes the possession of an assault weapon unless otherwise permitted by General Statutes §§ 53-202a through 53-202k and 53-202o. "[A]ny property, the possession of which is prohibited by any provision of the general statutes" is considered contraband under General Statutes § 54-36a (a).

Section 53-202c (c) exempts those individuals who, prior to July 1, 1994, lawfully possessed an assault weapon prior to October 1, 1993, from its prohibition against the possession of such weapons if the person otherwise complies with §§ 53-202a through 53-202k. To comply with General Statutes § 53-202d, any person who lawfully possesses an assault weapon must obtain a certificate of possession from the Department of Emergency Services and Public Protection. However, § 53-202m provides: "Notwithstanding any provision of the general statutes, sections 53-202a to 53-202*l*, inclusive, shall not be construed to limit the transfer or require the registration of an assault weapon as defined in subdivision (3) or (4) of subsection (a) of section 53-202a of the general statutes, revision of 1958, revised

to January 1, 2013, provided such firearm was legally manufactured prior to September 13, 1994."

We agree with the well reasoned decision of the trial court and thus adopt the following relevant portion of its memorandum of decision: "Section 53-202m, as amended, clearly limits the exemptions from transfer limitations and registration requirements to those assault weapons defined in subdivision (3) or (4) of subsection (a) of § 53-202a of the General Statutes, revision of 1958, revised to January 1, 2013. Based on this express language, one must look at the definitions of assault weapon in § 53-202a as that statute existed on January 1, 2013. Only those weapons that fall within subdivision (3) or (4) of subsection (a) are exempt from the registration requirement. Thus, the operative language is that adopted in Public Acts 2001, No. 130 § 1, the last revision of § 53-202a as of January 1, 2013. Under that statute, subdivision (3) of subsection (a) defines, in relevant part, an assault weapon as [a]ny semiautomatic firearm not listed in subdivision (1) of this subsection that meets the following criteria . . . . Thus, to fall within subdivision (3) or (4), the semiautomatic firearm, or part thereof, must not be listed in subdivision (1) of subsection (a).

"The problem for the plaintiff is that the Uzi, M-11, and AK-47 fall squarely within subdivision (1), which defines assault weapon as [a]ny selective-fire firearm capable of fully automatic, semiautomatic or burst fire at the option of the user or any of the following specified semiautomatic firearms . . . Avtomat Kalashnikov AK-47 type. P.A. 01-130. The Uzi and M-11 are selective-fire firearms capable of fully automatic or semiautomatic fire at the option of the user. The AK-47 is an AK-47 type firearm. Because these firearms are listed either by name or feature in subdivision (1), by definition they cannot fall under subdivisions (3) and (4). Consequently they are not entitled to the exemption from registration set forth in § 53-202m, as amended.

The fact that Commissioner Bradford reached a different conclusion does not change the court's analysis. An agency's interpretation is not entitled to deference if it is plainly inconsistent with the clear language of the statute. See *Med-Trans of Connecticut* v. *Dept. of Public Health & Addiction Services*, 242 Conn. 152, 168, 699 A.2d 142 (1997). That is the case here.

***

"The law is clear in that the plaintiff was required to obtain a certificate of possession for the Uzi, M-11, and AK-47 as assault weapons. The plaintiff failed to do so from 1993 when the requirement was first enacted until 2011 when the guns were seized from him. The guns were thus not legally held by the plaintiff. They are contraband and the plaintiff is not entitled to their return." (Citation omitted; internal quotation marks omitted.) It would serve no useful purpose for this court to engage in any additional discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgment is affirmed.

In this opinion the other judges concurred.

WILLIAM PATTY ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF WILTON ET AL.
(AC 40710)

Alvord, Bright and Bear, Js.

Syllabus

The plaintiffs appealed to the trial court from the decision by the defendant Planning and Zoning Commission of the Town of Wilton granting an application of the defendant W Co. for an amendment to an existing special permit and for site plan approval to allow the installation of an artificial turf field at a school. The trial court rendered judgment dismissing the appeal, from which the plaintiffs, on the granting of certification,

appealed to this court. They claimed that the trial court improperly concluded that the commission's approval did not include alleged trailers on the property that were prohibited by the zoning regulations. *Held* that the plaintiffs having failed to raise their claim regarding the legality of the alleged trailers before the commission, this court declined to review the claim; because the plaintiffs failed to set forth their claim that certain storage containers shown on a site plan submitted by W Co. were trailers prohibited by the zoning regulations until their appeal to the trial court, the commission, which was in the best position to interpret its own regulations, was never provided with an opportunity to evaluate the claim.

Argued November 14, 2018—officially released February 26, 2019

Procedural History

Appeal from the decision of the named defendant granting the application of the defendant Wilton Youth Football, Inc., for an amendment to an existing special permit and for site plan approval to allow the installation of an artificial turf field at a school, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Jacobs*, *J.*; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Paul A. Sobel, for the appellants (plaintiffs).

Matthew C. Mason, for the appellee (defendant Wilton Youth Football, Inc.).

Barbara M. Schellenberg, for the appellees (named defendant et al.).

Opinion

ALVORD, J. The plaintiffs, William Patty and Eliot Patty, appeal from the judgment of the trial court dismissing their appeal from the decision of the defendant Planning and Zoning Commission of the Town of Wilton (commission), granting the application of the defendant Wilton Youth Football, Inc.,[1] for an amendment to an

[1] We refer to Wilton Youth Football, Inc., as the defendant in this opinion.

existing special permit and for site plan approval to allow the installation of an artificial turf field at the Middlebrook School in Wilton.[2] On appeal, the plaintiffs claim that the court improperly concluded that the commission's approval did not include prohibited trailers on the property. Specifically, the plaintiffs claim that the only evidence in the record before the commission was that the defendant's application included trailers that were prohibited by § 29-4.C.9 of the Wilton Zoning Regulations (regulations). Our review of the record reveals that the plaintiffs failed to raise this claim before the commission, and, accordingly, we decline to review it.

The following facts and procedural history are relevant to this appeal. Middlebrook School is located at 131 School Road and is situated in an R-2A district. Schools are allowed in this district by special permit. The school property includes an athletic field, which is used for sports and other activities. On May 6, 2015, the defendant filed an application with the commission[3] to amend the existing special permit for Middlebrook School "to allow the renovation of the existing natural grass field to an artificial turf field . . . ." The defendant's application also provided for the relocation of existing field lighting and for the installation of new field lighting.

The commission held a public hearing on the defendant's application that commenced on June 22, 2015, and was further continued to July 13, July 27, and September 15, 2015. The plaintiffs, owners of abutting property, were represented by counsel at the hearing and vigorously opposed the application. Several other individuals attended the hearing, some speaking in favor of the proposal and others speaking against it. Numerous exhibits were submitted to the commission.

[2] The town of Wilton (town) is the owner of the subject property and was also named as a defendant in this action.

[3] The town, as the owner of the subject property, provided written authorization for the defendant to file the subject application with the commission.

After the public hearing was closed, the commission discussed the application on September 15, September 28, and October 13, 2015, as evidenced by the transcripts filed with this court. On October 13, 2015, the commission approved "the installation of an artificial turf field at Middlebrook School," subject to certain enumerated conditions, but denied "the relocation, placement or replacement of new or existing permanent and/or temporary lighting on the field site."

The plaintiffs appealed to the Superior Court, challenging the defendant's standing to file the application with the commission[4] and claiming that the commission's approval allowed for the relocation and continued use of outdoor storage trailers that are prohibited by the regulations. The plaintiffs filed their prehearing brief in support of their appeal on September 16, 2016, in which they argued, inter alia, that the commission's approval encompassed the defendant's use of prohibited storage trailers. The defendant's response in its prehearing brief filed on November 10, 2016, which was adopted by the commission and the town, was as follows: "Based on our review of the record, the *legality* of the existing storage containers on the [p]roperty was not raised before the [commission], only that they were unsightly, would have to be relocated as part of the project, and the [commission] [s]taff [r]eport suggested consideration of a more 'permanent solution.' " (Emphasis in original.) Additionally, the defendant stated that various submissions to the commission indicate that the alleged "trailers" were identified as "storage containers." Further, the defendant argued that the containers did not fall within the definition of "trailer" set forth in § 29-2.B.166 of the regulations.

In their reply brief filed on November 18, 2016, the plaintiffs argued that the commission's staff report

[4] The standing issue was adjudicated in favor of the defendant by the trial court, and that issue is not before this court.

referred to the containers as "storage trailers" and that the defendant's response to the staff report likewise described the containers as "trailers." The plaintiffs did not respond to the defendant's statement that the issue of the legality of the containers on the property had not been raised before the commission.

The trial court held a hearing on December 20, 2016.[5] On April 18, 2017, the court issued its memorandum of decision dismissing the plaintiff's administrative appeal. In its decision, the court noted that it had heard the testimony of witnesses and the arguments of counsel and that it had reviewed the trial exhibits and the record before the commission. After concluding that the defendant had standing to file the subject application with the commission, the court next addressed the issue regarding the alleged prohibited trailers. The court determined that (1) the comment in the commission's staff report about "trailers" addressed "their appearance and location" on the property, (2) the staff "did not raise the issue of whether [the containers] were prohibited" by the regulations, (3) the defendant's site layout plan "depicts and labels" the alleged trailers as "four storage containers," (4) the plaintiffs' counsel did not mention that the alleged trailers violated the regulations at the June 22, 2015 public hearing or in the letter he submitted to the commission in opposition to the defendant's application, and (5) no evidence was submitted to the commission to show that the containers were "vehicles," which is part of the definition of "trailers" set forth in the regulations.[6] The court then

[5] This court has not been provided with a transcript of the hearing before the trial court.

[6] Section 29-2.B.166 of the regulations provides: "TRAILER: Any vehicle which is, has been, or may be mounted on wheels designed to be towed or propelled by another vehicle which is self-propelled, and may or may not be equipped with sleeping or cooking accommodations, or afford traveling accommodations, or for the transportation of goods, wares or merchandise."

concluded that the commission's approval of the defendant's application "does not include the approval of prohibited trailers upon the subject property." The plaintiffs filed the present appeal after this court granted their petition for certification to appeal.

In their appellate brief, the plaintiffs argue that the only evidence before the commission was that the containers were prohibited trailers. In response, the defendant, the commission, and the town, in their appellate brief, argue that this court should not consider the plaintiffs' claim about the legality of the alleged trailers because that issue was never raised before and addressed by the commission. Our review of the record reveals that the plaintiffs failed to raise this claim before the commission.[7] Therefore, we decline to review it.

"Our Supreme Court has previously held that [a] party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board. We have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial. . . . *Dragan* v. *Connecticut Medical Examining Board*, 223 Conn. 618, 632, 613 A.2d 739 (1992) . . . . Furthermore, [t]o allow a court to set aside an agency's determination upon a ground not theretofore presented . . . deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." (Citation omitted;

[7] During the four days of the public hearing on the subject application, the only mention of "trailers" was made by the defendant's counsel when he responded to the comments in the staff report. He indicated that the "trailers," which "store playing equipment," had to be relocated to accommodate "the grading for the field." At no point was the legality of the containers discussed at the public hearing or during the three days of deliberations by the commission when reviewing the defendant's application. Further, the commission's approval, with conditions, does not mention the containers.

internal quotation marks omitted.) *Ogden* v. *Zoning Board of Appeals*, 157 Conn. App. 656, 665, 117 A.3d 986, cert. denied, 319 Conn. 927, 125 A.3d 202 (2015).

The plaintiffs first raised this claim before the trial court. In his appellate brief and during oral argument before this court, the plaintiffs' counsel admitted that "the existence of the trailers issue was not known to the undersigned until reviewing the record in preparation of the appeal."[8] This claim should have been raised before the commission, so that it could determine whether the existing storage containers[9] on the property were prohibited trailers, as that term is defined in its regulations, and whether their relocation as proposed in the defendant's application would violate those regulations. "A local board or commission is in the most advantageous position to interpret its own regulations and apply them to the situations before it." (Internal quotation marks omitted.) *Doyen* v. *Zoning Board of Appeals*, 67 Conn. App. 597, 603, 789 A.2d 478, cert. denied, 260 Conn. 901, 793 A.2d 1088 (2002).

In the present case, the plaintiffs failed to set forth their claim that the storage containers shown on the defendant's plan were trailers prohibited by the regulations until their appeal to the trial court. As a result, the commission was never provided with an opportunity to evaluate this claim. Accordingly, we decline to review it.

The judgment is affirmed.

In this opinion the other judges concurred.

[8] The same attorney represented the plaintiffs before the commission, the Superior Court, and this court, and, accordingly, he had all of the information he needed to challenge the containers as trailers at the time of the public hearing.

[9] There is no dispute that the containers were already on the property; the only issue before the commission regarding those containers was their relocation. If, indeed, the containers were trailers, as defined in the regulations, and their presence on the property was in violation of the regulations, an enforcement action by the zoning authority would have been an appropriate remedy.