IN RE COREY C., JR.*
(AC 43478)

Keller, Prescott and Pellegrino, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child. The father claimed, inter alia, that the court erred in concluding that he failed to achieve a sufficient degree of personal rehabilitation, as required by statute (§ 17a-112 (j) (3) (B) (i)), that would encourage the belief that, within a reasonable time, he could assume a responsible position in the child's life. He further claimed that the Department of Children and Families did not make reasonable efforts to reunify him with the child. The child previously had been adjudicated neglected, committed to the care and custody of the petitioner, the Commissioner of Children and Families, and, thereafter, placed with foster parents. During the neglect proceeding, the father was issued specific steps to take to bring about his reunification with the child. As part of its efforts to reunify the father with the child, the department referred the family to a therapeutic family time program to improve their parenting skills and ability to interact with each other and with the child. A worker with that program provided the parents with materials on the effects of thirdhand smoke and reviewed the materials with them in their weekly meetings in order to address the effects of the mother's heavy smoking on the child's asthmatic condition. The trial court found that the department had made reasonable efforts to reunify the child with the father but that he was unable or unwilling to benefit from those efforts. *Held*:

1. The evidence was sufficient to support the trial court's finding that, under the totality of the facts and circumstances, the department made reasonable efforts to reunify the respondent father with the child and that he was unable or unwilling to benefit from its reunification efforts:
   a. The department offered the parents adequate feedback with respect to their participation in the therapeutic family time program, as a worker assigned to the respondent's family provided feedback after each of nine weekly visits with the parents and the child and participated with a department social worker in two other meetings to review their progress with regard to parenting skills, and, contrary to the father's assertion, the parents were provided educational tools to help them stop smoking, which were reviewed with them, and were advised how their

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

smoking adversely affected the child's health, as it was explained to the father that the smell of smoke in clothes and hair could trigger the child's asthma, the father was told that the child's pediatrician had reported that thirdhand smoke from the parents' visits with the child was impacting the child's health, and the child's pulmonologist determined that thirdhand smoke from the parents' clothes and belongings aggravated the child's symptoms during a visit on the day that the parents told a therapeutic family time worker that they were quitting smoking; furthermore, the father admitted that he and the mother repeatedly were urged to stop smoking, the parents' several representations that they were attempting to quit or had quit smoking undermined the father's claim that the department should have recognized a need for further intervention, and, as there was no evidence that the father asked the department for smoking cessation services, his failure to request such services undermined his claim that those services were part of what the department should have provided as part of its reasonable efforts to reunify him with the child.

b. This court did not need to reach the merits of the respondent father's claim that the trial court improperly found that he was unable or unwilling to benefit from the department's reasonable efforts to reunify him with the child, as the trial court's finding that the department made reasonable efforts was sufficient to satisfy § 17a-112 (j).

2. The respondent father could not prevail on his claim that the evidence was insufficient to support the trial court's conclusion that he failed to rehabilitate himself, which was based on his assertion that the court's factual predicates for that conclusion were clearly erroneous: the court's subordinate factual findings were supported by the evidence and the rational inferences to be drawn therefrom, as the father's eight minute struggle to put the child in a car seat, which was observed by the psychologist who had evaluated him, and which is a basic parenting skill, raised concerns about and shed light on his ability to adequately care and provide for a child, the father was unable or unwilling to change the mother's smoking habits, as he was aware that he and the mother did not adhere to instructions about the dangers smoking posed to the child but failed to disclose that lack of compliance, the father had a sporadic history with individual counseling, as he discontinued his therapy for a significant period of time, despite its having been a requirement of the specific steps he was issued, the court made no suggestion that the father suffered from past mental health diagnoses and substance abuse at the time of the trial, the father had no clear parenting plan for the child if reunification were to occur, despite having discussed day care for the child while he was at work, as there was no evidence as to which day care the child would attend or who would pay for it or provide transportation, and the mother, who worked as a live-in companion, provided no clear idea about what her employment would consist of, the parents had a history of difficulties together and failed to complete couples counseling, their Facebook pages contained allegations of infidelity and discussion of potential separation, and department

workers witnessed several arguments between them, the evidence at trial that related to the mother and to the father's involvement with and knowledge of her significant parenting issues was relevant to whether he had rehabilitated, as he demonstrated poor judgment and undermined any prospect of the child's being reunified with him by failing to develop a plan to protect him from the mother's deficient parenting, and the parents' continued smoking or the father's tolerance of the mother's smoking created an unacceptably risky home environment for the child that was indicative of an inability to prioritize the child's needs.

3. The respondent father could not prevail on his claim that the trial court, in its adjudicatory findings, improperly compared his suitability as a parent, and that of the mother, to that of the foster parent; the court used the comparison between the foster parent and the father and the mother to highlight the child's emotional and developmental needs, as the majority of the court's comparison involved the mother, the court's reference to the lack of warmth the child showed with the mother compared with that he showed with the foster parent was made on the basis of what the therapeutic family time professionals determined were the child's specific needs, and the court's comparison, when viewed as a whole, focused on the child's needs and the inability of the father and mother to meet those needs.

Argued March 2—officially released June 8, 2020**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Driscoll*, *J.*; thereafter, the court denied the respondent father's motion to revoke the commitment of the minor child to the petitioner; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, assigned counsel, for the appellant (respondent father).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

** June 8, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

KELLER, J. The respondent, Corey C., appeals from the judgment of the trial court terminating his parental rights with respect to his biological minor son, Corey C., Jr., pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[1] The respondent claims that the court improperly (1) concluded that the Department of Children and Families (department) made reasonable efforts to reunify him with Corey and that he was unable or unwilling to benefit from the department's reunification efforts, (2) concluded that he failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering Corey's age and needs, the respondent could assume a responsible position in Corey's life, and (3) compared his suitability as a parent, and that of Corey's biological mother, to that of Corey's foster parent during the adjudicatory phase of the termination proceeding. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. Corey was born on September 28, 2017. On October 4, 2017, the petitioner, the Commissioner of Children and Families (commissioner), filed a neglect petition and obtained an ex parte order of temporary custody of Corey. In the neglect petition, the commissioner alleged predictive neglect, given the

[1] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts . . . to reunify the child with the parent in accordance with subsection (a) of section 17a-111b . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

fact that the parents were married and living together, had an unstable relationship, mental health and substance abuse issues, and the mother had failed to care safely for her first two children. The order of temporary custody was sustained by agreement. On March 6, 2018, the respondent and the mother submitted written pleas of nolo contendere, and Corey was adjudicated neglected and committed to the care and custody of the commissioner. Prior to and following Corey's commitment, the department provided services to the respondent and the mother.

Subsequently, a petition to terminate parental rights was brought against the respondent and the mother. On April 11 and May 2, 2019, a termination of parental rights trial was held before the trial court, *Driscoll*, *J*. The court granted the petition and terminated the parental rights of the respondent and the mother.[2]

In its memorandum of decision, the court found the following adjudicative facts under the clear and convincing evidence standard of proof: "[Corey] was born on September 28, 2017, to the . . . mother and [the] respondent. [The] [m]other had two older children, both of whom were removed from [the] mother's care. Guardianship of [the] mother's firstborn was transferred to [the] maternal grandmother, with whom [the] mother has a conflicted relationship. [The] [m]other's parental rights [as to] her second son were terminated with [the] mother's consent, and the child was adopted by a relative of [Corey's] father. [The respondent] is not the biological father of the adopted child but was [the] mother's boyfriend and emotional support throughout the termination and adoptive process. [The]

[2] The court's judgment with respect to the termination of the mother's parental rights is not before us on appeal. We therefore refer in this opinion to the father as the respondent. Pursuant to Practice Book § 67-13, the attorney for Corey has adopted the brief filed by the petitioner and has requested that this court affirm the judgment of the trial court as consistent with his client's best interest.

[m]other lost both children due to concerns about her mental health, her parental shortcomings, and her history of substance abuse.

"[The] [m]other, by history, has mental health diagnoses, including bipolar disorder with psychotic features, anxiety, depression, and obsessive compulsive disorder. She was inconsistent in her mental health treatment and medication management. She also has a history of substance abuse, including opiates, heroin, marijuana, and K2 [synthetic marijuana]. She has a history of anger management issues and threatening behavior. The fiancé of the adoptive mother obtained a full, no contact protective order against [the] mother, which was in effect from February, 2016, until February, 2017.

"[The respondent], by history, has mental health diagnoses, including bipolar disorder, sociopath, intermittent explosive disorder, and he has been hospitalized psychiatrically on four occasions. [The respondent] has a substance abuse history, including Percocet, morphine, and Klonopin abuse. He, too, has a conflicted relationship with his mother. He has a criminal history dating back to 2004, with his most recent conviction based on an October, 2014 arrest. He completed a five year term of probation in July, 2017. He self-reported significant health care issues.

"Staff from the Lawrence + Memorial Hospital [in New London] notified the department that [the] mother had given birth to [Corey]. Due to the difficulties the parents had in their relationship, their own mental health issues, and their lack of parenting skills, an agreement was made that [the] parents and [Corey] would reside with relatives and be supervised at all times with [Corey].[3] A considered removal meeting was held on

[3] The record reflects that, eventually, the relatives were no longer able to provide a home for Corey that satisfied applicable licensing requirements, and, therefore, he subsequently was placed in his current foster home in March, 2018.

October 3, 2017. On October 4, 2017, the petitioner filed a neglect petition and obtained an ex parte order of temporary custody . . . of [Corey] based on . . . predictive neglect. [Corey] remained with the relatives.[4] The parents were served, appeared in court, were advised of their rights, and appointed counsel. The order of temporary custody was sustained by . . . agreement. An updated psychological evaluation was ordered to be done by [Nancy] Randall [a licensed psychologist]. [Randall] previously [had] done one of [the] mother and the [respondent], [and] then [the] mother's boyfriend, in connection with the prior termination case for [the] mother's second child.

"[Randall's] report was dated February 13, 2018. [Randall] found [the] mother's prior diagnosis of bipolar disorder with psychotic features to be appropriate, and that [the] mother's panic disorder had improved and [that] there was no current evidence of obsessive compulsive disorder. [The respondent], due to greatly reducing caffeine consumption, had eliminated signs of manic functioning, which may have led to a prior bipolar disorder diagnosis. [Randall] felt [that] a more accurate diagnosis was major depressive disorder, in remission. She felt [that] both parents were in need of continued individual therapy. [The] [m]other continued psychiatric care for medication management. Couples therapy was essential. Hands-on parenting was also necessary, with a focus for [the] mother on attachment. The parents demonstrated limited skills, particularly with the use of [Corey's] car seat. They needed more training in understanding their child's developmental and attachment needs.[5] [Randall] indicated that if the parents were

[4] The record does not reflect why the initial agreement that the parents and Corey reside with the relatives was not implemented.

[5] Specifically, Randall testified that the respondent and the mother "really need to work extra hard at building that kind of attachment relationship with [Corey], and the failure to even make eye contact for most of the session really suggests that that relationship is not there for them and that they're not doing a lot to foster that."

able to demonstrate consistent emotional control and appropriate judgment, they could move forward toward reunification. However, [Corey] could not be left in their care if they have incidents of emotional outbursts, domestic violence, or [of] becoming too overwhelmed to attend to his needs. She felt [that] the reunification process should be extended with close monitoring of their parenting.[6]

"On March 6, 2018, [the] mother and [the respondent] submitted written pleas of nolo contendere, [and Corey] was adjudicated neglected and committed to the [care and custody of the commissioner] . . . until further court order. [Corey] has been in the [commissioner's] care and custody since the October, 2017 order of temporary custody. The parents were issued specific steps[7]

[6] Randall testified that the respondent and the mother "are not able to provide the kind of care that Corey would need in his home, that he would continue to be at risk due to the possibility of emotional volatility within the home, conflicts within the home between the parents."

[7] The respondent's specific steps, in relevant part, were: "Keep all appointments set by or with [the department]. Cooperate with [the department's] home visits, announced or unannounced, and visits by the [child's] court-appointed attorney and/or guardian ad litem. Let [the department], your attorney and the attorney for the [child] know where you and the child(ren) are at all times. Take part in counseling and make progress toward the identified treatment goals: [p]arenting . . . [i]ndividual . . . . Accept in-home support services referred by [the department] and cooperate with them . . . . Submit to random drug testing; the time and method of the testing will be up to [the department] to decide. [Do] [n]ot use illegal drugs or abuse alcohol or medicine. Cooperate with service providers recommended for parenting/individual/family counseling, in-home support services and/or substance abuse assessment/treatment . . . . Cooperate with [court-ordered] evaluations or testing. Sign releases allowing [the department] to communicate with service providers to check on your attendance, cooperation and progress toward identified goals, and for use in future proceedings with this court. Sign the release[s] within [thirty] days. Sign releases allowing your child's attorney and guardian ad litem to review your child's medical, psychological, psychiatric and/or educational records. Get and/or maintain adequate housing and a legal income. Immediately let [the department] know about any changes in the [makeup] of the household to make sure that the change does not hurt the health and safety of the [child] . . . . [Do] [n]ot get involved with the criminal justice system. Cooperate with the Office of Adult Probation or parole officer and follow your conditions of probation or parole. . . . Take care of the [child's] physical, educa-

[pursuant to General Statutes § 46b-129] to address their reunification needs.

"[The] [m]other and [the respondent] have met several of their steps. They have maintained consistent housing in a one bedroom home. They have maintained stable employment, though their employment would make a parenting plan difficult. [The respondent] works long hours, some weeks up to seventy hours,[8] and the mother works as a live-in companion in [a] client's home. [The] [m]other stays [at the client's home] from Thursday through Sunday and sleeps in the home. Her agency had begun the process of firing [the] mother in January, 2019, but reconsidered at the request of the client.

"The parents indicated that the multiple days of separation every week reduced the likelihood of relationship discord. While the parents present as a committed couple, they have had a history of difficulties. In 2015, [the] mother moved in with another man for approximately three months. [The] [m]other describes [the respondent] as very jealous of any interactions between [the] mother and other men. At an intake for Sound Community Services, in August, 2018, [the] mother said her long-term goal was . . . 'becoming a healthier person, change myself from cheating to being the wife that

tional, medical, or emotional needs, including keeping the [child's] appointments with his/her/their medical, psychological, psychiatric, or educational providers. . . . Keep the [child] in the [s]tate of Connecticut while this case is going on unless you get permission from [the department] or the court to take them out of state. You must get permission first. Visit the [child] as often as [the department] permits. Within thirty (30) days of this order, and at any time after that, tell [the department] in writing the name, address, family relationship, and birth date of any person(s) who you would like the department to investigate and consider as a placement resource for the [child]. Tell [the department] the names and addresses of the grandparents of the [child]."

The respondent signed these steps and agreed to comply with them.

[8] There was evidence before the court that the respondent works from approximately 7:30 a.m. until 6 or 7 p.m., Monday through Friday; 8 a.m. to 5 p.m. on Saturdays; and 9 a.m. until 4 p.m. on Sundays.

my husband wants me to be.' [The] [m]other and [the respondent] did not begin couples counseling until July, 2018. There is no record of successful completion of couples counseling. The parents' Facebook pages posted in August, 2018, contain allegations of infidelity and potential separation. Several arguments have been observed by the department.

"[The] [m]other has been inconsistent in her individual therapy. She began counseling with Sound Community Services and remained with [it] until February, 2018, when she discontinued treatment. She resumed individual therapy in August, 2018. At the time of trial, her history of therapeutic engagement was inconsistent. She was doing outpatient therapy approximately one time a month, much less than required, and she advised [the department] that she did not know her therapist's name. She did appear more emotionally stable, but the court has concerns about her insight into her treatment, particularly when [the] mother advises providers that if she does not reunify with her child, all of this therapy would have been a waste of time. This demonstrates a lack of insight into her own mental health needs. . . .

"[The respondent] also has a history of sporadic compliance with individual counseling. [Stephanie] Gill-Manville was [the respondent's] clinician [at Sound Community Services] from 2013 until [2017]. She, like Randall, saw no need for medication for [the respondent]. [The respondent], without advice, discontinued individual therapy in February, 2018, and did not resume until October, 2018. He had not been successfully discharged or released from the reunification step. Since October or November, 2018, [the respondent] has resumed counseling at Sound Community Services. [Peggy Ann Nelson], [the respondent's] individual therapist, has included [the] mother in some sessions. [Nelson] said [the respondent] has been candid about difficulties in their relationship but believes that [the]

mother and [the respondent] were strongly attached and united as a couple. She was unable to opine on [the respondent's] parenting, as she has never seen him with [Corey], but she knows he wishes to be an active parent. He has not been discharged. It does not appear that [the respondent] has sufficient insight into the negative effect [that the] mother's mental health has on her parenting, despite [the respondent's] substantial period of individual counseling.

"Most important in determining rehabilitation are issues relative to parenting and visitation. The parents indicated that they had a strong desire to parent [Corey] during the critical period of [his] infancy. The department on four separate occasions in November, 2017, and December, 2017, offered to the parents an additional supervised weekly visit. The parents declined. Even more telling, with respect to the parents' interest in [Corey], was the fact that [Corey] was in the relative foster home, [which] had adopted [the] mother's second child, and was related to [the respondent]. [The] [m]other and [the respondent] were given the opportunity to call the home to check on [Corey] but failed to do so.

"The department referred the parents to Kids [Advocates, LLC], a supervised visitation and parenting education program. The provider reported that the parents were essentially passive and that [the] mother, in particular, did not make eye contact or interact with [Corey]. [The] [m]other needed frequent redirection and instructions to meet [Corey's] basic needs and often disregarded the suggestions. [The] [m]other had trouble soothing [Corey] when [he was] fussy and often passed him to [the respondent]. Limited progress was made by the parents. In March, 2018, the department referred the family to the Child & Family Agency [of Southeastern Connecticut, Inc.] for its therapeutic family time

(TFT) program.[9] [Elizabeth Keniston, the TFT community worker assigned to work with the family] noted limited to moderate progress.[10] It took a long time to teach [the] mother not to let [Corey] pick things up off the ground and put them in his mouth, with [the] mother often attempting to justify the cleanliness of the item. [The] [m]other reported her difficulty in soothing a fussy baby and expressed a concern that her [post-traumatic stress disorder] would kick in[11] and put [Corey] at risk. [The respondent] expressed a concern that all this work would be a waste of time if they didn't get [Corey] back. [Keniston] noted a lack of affect by [Corey] in the parents' company, especially with [the] mother. She contrasted this with the warmth and attachment observed between [Corey] and [the] foster parent. At times, [Keniston] had difficulty redirecting [the] mother's attention from [the] mother's cell phone to [Corey]. [The] [m]other complained of having to carry [Corey] in the car seat, as it was too heavy for her. [The] [m]other asked the worker to carry the baby instead. On one visit to the beach, while [Corey] was sitting with [the] mother, [he] fell face forward into the sand, and it required [the respondent] to tell [the] mother to pick up [Corey]. At another outdoor visit, on a cloudy day, [Corey] became sunburned, much to the embarrassing chagrin of [Keniston]. [Keniston] noted, however, that neither parent assumed any shared responsibility for the failure to protect [Corey] and apply sunscreen. The parents were unable to provide a clear plan for [Corey] if reunification occurred. [The respon-

[9] "The goal of TFT is to provide an intervention between the child and his parents so that the child can benefit as much as possible from the contact. TFT provides direct consultation and assessment, works directly with parents on parenting skills, and works towards improving parent/child interactions and promotes attachments."

[10] There was evidence before the court that, at one of the TFT visits, the respondent stated to Keniston, "I love [Corey], but I regret having him."

[11] There was evidence before the court that the mother's post-traumatic stress disorder had contributed to her prior feelings of wanting to shake one of her other children when she was unable to comfort him.

dent] indicated that [the] mother would never be left home unsupervised with [Corey] but did not have a reasonable plan for who would supervise [him] while he was working up to seventy hours per week. He also indicated that the proposal was being done to satisfy the department, as he had no concern [about the] mother['s] being alone with [Corey] despite [the] mother's demonstrated, limited parenting skills. [The] [m]other did complete a brief parenting program with Catholic Charities but the court finds no evidence that it was effective.

"TFT recommended against reunification and closed its file.[12] At the conclusion of [the] assessment, [it] determined not to proceed further. The major example of parenting deficits, which was of great concern to the program, and of great concern to the court, was the parents' wholly inadequate response to [Corey's] medical needs. [Corey] has a serious asthmatic condition. He is being treated by Nutmeg Pediatric Pulmonary Services [in Branford]. The parents have been advised that it is particularly important for [Corey] to be in a smoke-free atmosphere, which includes eliminating secondhand[13] smoke exposure transferred from clothing or upholstery. He has difficulty breathing, increased coughing, and heightened fussiness after visiting with his parents. They have been repeatedly urged to stop smoking or, if not, to shower and change into clean clothes, [to] not [drive] in a car in which they've been smoking, and to walk to visits for further airing, if necessary. Despite frequent admonitions, [Corey's] physical

[12] The evidence reflects that the date of case closure was June 18, 2018, and that closure was recommended by Keniston.

[13] Although, in its memorandum of decision, the court referred to the exposure to smoke particles through fabrics as secondhand smoke, this type of exposure is known as thirdhand smoke. "Thirdhand smoke is residual nicotine and other chemicals left on indoor surfaces by tobacco smoke. People are exposed to these chemicals by touching contaminated surfaces or breathing in the off-gassing from these surfaces." J. Taylor Hays, M.D., Mayo Clinic, "What is thirdhand smoke, and why is it a concern?" (July 13, 2017), available at https://www.mayoclinic.org/healthy-lifestyle/adult-health/expert-answers/third-hand-smoke/faq-20057791 (last visited June 8, 2020).

reaction to visits indicates ongoing exposure to secondhand smoke.[14] [The] [m]other insisted that she quit smoking as of January, 2019. [Gail Hooper, the department social] worker, credibly testified that she saw numerous cigarette butts outside the private entry to the parents' home and smelled . . . stale smoke in the home. [Although the] mother testified that she had stopped smoking, in her own exhibit G, a clinical summary from Sound Community Services of an encounter with [the] mother on April 8, 2019, [the] mother disclosed that she was a heavy tobacco smoker from January 3, 2017, to the present . . . . [The respondent] is unable or unwilling to change [the] mother's smoking habits and make the environment safe for [Corey]. This, to the court, is the most definitive example of the parents' lack of insight into [Corey's] needs.

"Finally, the court can, and does, give added weight to the opinions of Randall, who was recognized as an expert. In 2018, Randall found both parents to be more emotionally stable than when she saw them in 2014, but she did not feel [that] either parent was invested in the extra work it takes to create an attachment. She opined at trial that the parents had not rehabilitated and that [Corey] would be at emotional risk if [he were] returned to them and at medical risk as well. She testified that the TFT program was exactly the kind of

[14] There is evidence that on May 11, 2018, at an administrative case review meeting at TFT at which the respondent, but not the mother, was present, Cassandra Bunkley, the administrative case review facilitator, explained to the respondent that the foster parents had reported that they had to administer breathing treatment to Corey after he returned from visits with the parents. The respondent indicated that the parents did not smoke during visits, but Bunkley explained that the lingering smell of smoke in clothes and hair can trigger an infant's asthma. It was then decided that the parents would not smoke three hours prior to their visits and would change their clothes. Keniston again discussed the effects of thirdhand smoke during appointments on June 4, June 11 and June 18, 2018. In Hooper's addendum to the department's social study in support of its petition for termination of parental rights, dated April 9, 2019, she also noted that, although both parents maintained that they had quit smoking, Corey continued to have asthma attacks after visits.

program [that the] mother needed. As noted, that program recommended against reunification. Randall persuasively testified that the parents are each other's primary supports, and, given their troubled relationship, there is increased risk of conflict and fighting. If [the] mother were to lose [the respondent's] support, she could become disregulated emotionally, with a potential for risk to any child in her care. She said the prognosis for reunification was not good and [that] it would not be in [Corey's] best interest to deny him a stable, permanent home. Thus, she opined that termination of parental rights would be in [Corey's] best interest. The parents love their son and they wish to care for him, but they do not demonstrate the essential insight and parental skills. Neither parent demonstrates a desire or ability to be a single parent. The issue is not whether the parents have improved their ability to manage their own lives but whether they can manage their son's needs. Willingness does not equate to ability.

"The court finds by clear and convincing evidence that the department has proven its adjudicatory allegations, to wit, that it made reasonable efforts to reunify [Corey] with [the] mother and [the respondent], that [the] mother and [the respondent] are unable or unwilling to benefit from those efforts, that [Corey] was adjudicated neglected in a prior proceeding and that [the] mother and [the respondent] have each failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering their child's age and needs, that either parent could assume a responsible position in [Corey's] life." (Emphasis omitted; footnotes added.)

The court set forth findings with respect to the seven criteria set forth in § 17a-112 (k).[15] With respect to the first criterion, the court found: "The parents were

[15] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether

offered timely services, including supervised visitation, parenting education, psychological evaluation, individual and couples counseling, and the TFT program and assessment." With respect to the second criterion, the court found: "[The department] made reasonable efforts. The parents expressed concerns that the department did not engage in greater feedback from the department with respect to the reports of the providers. While this might be an optimum strategy, the issue is not whether the department made all possible efforts, but whether [it] made reasonable efforts. The referrals made, especially to TFT, clearly were reasonable." With respect to the third criterion, the court found: "Reunification steps were set by the court on October 4, 2017, and March 6, 2018.[16] The parents' attempts and

to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

[16] The preliminary specific steps set on October 4, 2017, the date of the issuance of the ex parte order of temporary custody, were required pursuant to General Statutes § 46b-129 (c) (6) and Practice Book § 33a-7 (a) (8). The final specific steps were issued on March 6, 2018, at the time of the neglect adjudication and commitment.

failures to comply are noted herein [previously].'' (Footnote added.) With respect to the fourth criterion, the court found: ''The parents love their son and wish to reunify. They were unable or unwilling to put in the effort at attachment. [The] [m]other, in particular, was not invested sufficiently. [Corey's] affect around them was flat or fussy and outside his normal behavior. He was exposed to physical discomfort when with his parents due to secondhand smoke exposure, aggravating his asthma. [Corey] is fully bonded to his foster parents, with whom he has been placed since March, 2018.'' With respect to the fifth criterion, the court found: ''[Corey] is almost two years old, born September 28, 2017.'' With respect to the sixth criterion, the court found: ''The parents have maintained reasonable contact with [Corey] and the department. The parents have improved their personal circumstances favorably, but there is no reasonable prospect that they will be able to meet [Corey's] particular needs.'' With respect to the seventh criterion, the court found: ''No such prevention was shown.''

The court then made the following dispositional findings. ''[Corey] has serious allergy and pulmonary needs. The parents are unable or unwilling to take the necessary measures to meet them. Further, the parents have shown limited progress in addressing those needs common to all children, specifically, attachment, and the child's interest in sustained growth, development, well-being, and continuity and stability of his environment. [Corey] is in a placement that can meet his needs and wishes to adopt. [Corey's] attorney advocates for termination so [he] can be adopted. As noted, there is a distinction between parental love and parental competence. The [petitioner] has proven by clear and convincing evidence that termination of parental rights is in [Corey's] best interests.

''Wherefore, after due consideration of [Corey's] need for a secure, permanent placement, and the totality of

the circumstances, and having considered all statutory criteria, and having found by clear and convincing evidence that grounds exist to terminate [the] mother['s] and [the respondent's] parental rights as alleged, and that it is in [Corey's] best interests to do so, and having denied [the respondent's] motion to revoke commitment, the court orders:

"That the parental rights of the . . . mother . . . and the respondent father . . . are hereby terminated . . . ." This appeal followed.

I

We first address the respondent's claim that the court improperly concluded that the department made reasonable efforts to reunify him with Corey and that he was unable or unwilling to benefit from the department's reunification efforts.

Section "17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate. . . . The trial court's determination of this issue will not be overturned on appeal unless, in light of all of the evidence in the record, it is clearly erroneous." (Citation omitted; internal quotation marks omitted.) *In re Jonathan C.*, 86 Conn. App. 169, 172–73, 860 A.2d 305 (2004).

Our Supreme Court "clarified the applicable standard of review of an appeal from a judgment of the trial court pursuant to § 17a-112 (j). See *In re Shane M.*, 318 Conn. 569, 587, 122 A.3d 1247 (2015); see also *In re Gabriella A.*, 319 Conn. 775, 789–90, 127 A.3d 948 (2015). In those cases, the court clarified that '[w]e review the trial court's subordinate factual findings for clear error. . . . We review the trial court's ultimate determination that a parent has failed to achieve sufficient rehabilitation [or that a parent is unable to benefit from reunification services] for evidentiary sufficiency . . . .' *In re Gabriella A.*, supra, 789. We conclude that it is appropriate to apply the same standard of review of a trial court's decision with respect to whether the department made reasonable efforts at reunification. See id.; see also *In re Jorden R.*, 293 Conn. 539, 558–59, 979 A.2d 469 (2009). Accordingly, we conclude that we must review the trial court's decision in the present case with respect to whether the department made reasonable efforts at reunification for evidentiary sufficiency." *In re Oreoluwa O.*, 321 Conn. 523, 533, 139 A.3d 674 (2016).

"[Section 17a-112] imposes on the department the duty, inter alia, to make reasonable efforts to reunite the child or children with the parents. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . The trial court's determination of this issue will not be overturned on appeal unless, in light of all of the evidence in the record, it is clearly erroneous." (Internal quotation marks omitted.) *In re G.S.*, 117 Conn. App. 710, 716, 980 A.2d 935, cert. denied, 294 Conn. 919, 984 A.2d 67 (2009).

A

The respondent's claim that the court improperly found that the department made reasonable efforts to reunify him with Corey is premised on two arguments. First, the respondent argues that the department failed to offer any feedback to him and the mother in the TFT program, and, second, he argues that the department failed to offer any smoking cessation services to either of the parents. We disagree that the court improperly found that the department failed to make reasonable efforts to assist them in quitting smoking.

The record contains sufficient evidence on which to affirm the court's finding that the department made reasonable efforts at reunification with respect to the specific factual findings of which the respondent complains. First, we conclude that the department offered both the respondent and the mother adequate feedback with respect to their participation and progress in the TFT program. Keniston, the TFT community worker assigned to supervise and instruct the respondent, the mother, and Corey, completed nine TFT visits with the parents and Corey and typically also met with the parents alone each week. At trial, Keniston testified that she provided the parents with feedback at each weekly visit. A series of detailed reports are in evidence that provide considerable detail as to discussions between Keniston and the parents. In addition to the weekly feedback provided to the parents after visits with Corey, the parents also participated in two provider meetings, in which Keniston and Hooper reviewed the parents' overall progress in the TFT program with respect to their parenting skills. Further, Hooper testified that, as part of the TFT program, the TFT workers "actually discuss [feedback] with the parents because goals are made at the beginning of the service with the parents. And then at each session they talk about how they did with those goals that were developed with the parents." We conclude that this evidence demonstrates that the

respondent and the mother received adequate feedback at both provider meetings and weekly meetings with Keniston. Accordingly, we disagree with the respondent's argument that the department did not make reasonable efforts to reunify because it failed to offer any feedback to him or the mother with respect to their progress in the TFT program.

Second, we also disagree with the respondent's argument that the department did not make reasonable efforts to reunify because it failed to offer smoking cessation treatment to the respondent and the mother.[17] As aforementioned, the parents' smoking habits were of particular concern to the court, which found, on the basis of the evidence before it, that Corey suffers from asthma, bronchitis, and gastroesophageal reflux disease. There was evidence in a TFT meeting summary dated May 11, 2018, of the foster father reporting to the attendants at the meeting, which included the respondent, that following Corey's weekly TFT visits with the respondent and the mother, Corey's asthma symptoms were aggravated and the foster parents had to administer breathing treatments. The meeting's administrative case review facilitator, Cassandra Bunkley, explained to the respondent that the lingering smell of smoke in clothes and hair can trigger an infant's asthma. It was decided that the parents would not smoke three hours prior to the visits and would change their clothes. The mother, however, was not present at this meeting. On June 11, 2018, Keniston told the parents that Corey's pediatrician had reported to the foster parents that thirdhand smoke from visits was impacting Corey's health. She provided them with materials on the effects of thirdhand smoke. The mother stated that the reason

[17] Specifically, the respondent argues for the first time, on appeal, that the department should have provided him with behavioral treatment, such as cognitive behavioral therapy or motivational interviewing, and medication, such as nicotine replacement therapy, Bupropion, Varenicline, or antidepressants.

that she and the respondent smoke so much is because of the department and the stress that they are going through. It was determined that the parents would not bring any outside items to the visits, such as clothes and toys. Keniston noted that the parents expressed no understanding of the reasons for the smoking guidelines for visits. On June 18, 2018, the respondent and the mother informed Keniston that they were quitting smoking. There also was evidence that, although the respondent and the mother did not smoke during their supervised visits with Corey, Corey's pulmonologist, Regina M. Palazzo, after treating Corey for asthma related symptoms on October 1, 2018, determined that, during a visit that day, thirdhand smoke from the parents' clothes and belongings was the cause of Corey's exposure and aggravated symptoms. In her report discharging the parents from the TFT program, Keniston noted that the parents were "unable to take responsibility for the effect smoking has on [Corey] and instead shifted [blame to the department]."

The respondent argues that the department did not provide him or the mother with adequate smoking cessation services, and, therefore, the department did not make reasonable efforts to reunify the parents with Corey.[18] We disagree with the respondent for several reasons. First, in his brief, the respondent concedes that he and the mother were "repeatedly urged to stop smoking . . . ." Additionally, the evidence reflected that the respondent and the mother participated in

[18] As part of his argument, the respondent cites to numerous resources emphasizing the addictive nature of nicotine. The record reflects that these resources were not admitted into evidence before the trial court, they are not part of the record and, thus, on appeal, we do not consider them. "[W]e cannot consider evidence not available to the trial court to find adjudicative facts for the first time on appeal. . . . It is well established that this court does not find facts." (Internal quotation marks omitted.) *D'Amato* v. *Hart-D'Amato*, 169 Conn. App. 669, 685, 152 A.3d 546 (2016). Even if we were to consider the resources cited by the respondent, his argument still fails to address the department's repeated attempts to address his and the mother's smoking.

weekly TFT meetings with Keniston. As part of these meetings, Keniston provided the respondent and the mother with printed material on the effects of thirdhand smoke and reviewed the materials with the parents. Further, the evidence reflected that the respondent and the mother were made aware of the medical issues that exposure to smoke particles during their visits could cause Corey. Specifically, Keniston advised the respondent and the mother that Corey's pediatrician had reported to the foster parents that thirdhand smoke from the biological parents' visits was impacting Corey's health. The court found that, despite these attempts to change the parents' smoking habits, the parents "demonstrated little concern and understanding of [Corey's] medical needs in regard to the impact [thirdhand] smoke has on [Corey] . . . and instead shifted blame to [the department]."

Further, the parents represented, in several instances, that they were attempting to quit smoking, or that they had quit smoking, further undermining the respondent's claim that the department should have recognized a need for its further intervention. For example, after Keniston advised the parents of the effects of smoking on Corey's health, the respondent and the mother stated that they were going to quit smoking. Specifically, the respondent stated that he scheduled an appointment with his primary care doctor to discuss quitting options. However, despite these assertions, the mother represented to Sound Community Services on April 8, 2019, that she was a heavy tobacco smoker from January 3, 2017, to the *present*. Further, there was evidence that, when Hooper visited the respondent's and the mother's residence in January, 2019, she noticed cigarette butts outside the home and smelled stale smoke in the home. As this court previously has held, reasonable efforts by the department include doing everything "reasonable," not everything "possible." (Internal quotation

marks omitted.) *In re G.S.*, supra, 117 Conn. App. 716. Here, the evidence reflects that the parents were provided with educational tools to stop smoking, and, more importantly, they were advised how their smoking adversely affected Corey's health.

To the extent that the respondent claims that the department failed to provide him or the mother with any specialized smoking cessation services such as cognitive behavioral therapy, nicotine replacement therapy, motivational interviewing or antidepressants, he never made this claim at trial. Further, there was no evidence before the court that the respondent, who signed and agreed with the specific steps, asked the department at any time for any of the smoking cessation services, which, he contends for the first time, on appeal, should have been provided to him. If the respondent believed that the department was not doing enough, he could have moved the court for an order directing the department to provide him with smoking cessation services. The respondent's failure to request such services undermines his present argument that those services were part of what the department should have provided as part of its reasonable efforts to reunify him with Corey.[19] "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial." (Internal quotation marks omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014). This principle was applied in the context of a reasonable efforts claim in *In re Elijah C.*, 326 Conn. 480, 503–504, 165 A.3d 1149 (2017). In that case, the respondent mother claimed for the first time, on appeal, that the department should have secured an out-of-state

[19] No such requirement of the department for smoking cessation services was set forth in the specific steps, and the respondent signed both forms, indicating he understood that he "should contact my lawyer and/or [the department] worker if I need help in reaching any of these steps."

assisted living facility for her because none was available in this state. Id. In rejecting this claim, our Supreme Court explained that "the proper place for the respondent to have raised her claim concerning an out-of-state placement was in the trial court, where the issue could have been litigated and a factual record developed as to whether reasonable reunification efforts required the department to search for an out-of-state placement." Id.

"[O]ur courts are instructed to look to the totality of the facts and circumstances presented in each individual case" in deciding whether reasonable efforts have been made. *In re Unique R.*, 170 Conn. App. 833, 856, 156 A.3d 1 (2017). In this case, the department tailored its reunification efforts to help the respondent overcome the specific impediments to reunification identified by Randall in her updated psychological evaluation in 2018. The department monitored the respondent's engagement with his existing therapist, identified a couples counselor for the respondent and the mother, and referred them to three separate parenting education services, including the TFT program, the most intensive parenting education service available. The department offered to provide the parents with an additional supervised visit every week but they declined. The respondent ignores the totality of the services in which he engaged and narrowly focuses on only two aspects, the lack of feedback from TFT and the lack of an offer of smoking cessation services. We conclude that the court properly considered the totality of the facts and circumstances and correctly determined that the department made reasonable efforts to reunify Corey with the respondent.

B

Next, the respondent argues that the court improperly found that he was unable or unwilling to benefit from the department's reasonable efforts to reunify him with Corey.

As our discussion of the court's decision reflects, in its analysis under § 17a-112 (j) (1), the court found that the department made reasonable reunification efforts. Alternatively, the court found that the respondent was unable or unwilling to benefit from reunification efforts. "[T]he [petitioner] must prove [by clear and convincing evidence] *either* that [the department] has made reasonable efforts to reunify or, *alternatively*, that the parent is unwilling or unable to benefit from the reunification efforts. Section 17a-112 (j) clearly provides that the [petitioner] is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Emphasis in original; internal quotation marks omitted.) *In re Anvahnay S.*, 128 Conn. App. 186, 191, 16 A.3d 1244 (2011).

As previously stated, we conclude that the court properly found that the department made reasonable efforts to reunify the respondent with Corey. Because, as we have explained, this finding is sufficient to satisfy § 17a-112 (j), we need not reach the merits of the respondent's argument that the court improperly found that the respondent was unable or unwilling to benefit from those reunification efforts.

II

The respondent next claims that the court improperly concluded that the respondent failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering Corey's age and needs, the respondent could assume a responsible position in Corey's life. We disagree.

Section 17a-112 (j) (3) (B) requires the court to find by clear and convincing evidence "that . . . the child (i) has been found by the Superior Court . . . to have been neglected or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed

to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .'' (Internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 572 n.1.

Our Supreme Court has clarified that ''[a] conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court.'' (Emphasis omitted; internal quotation marks omitted.) Id., 587–88. We will not disturb the court's subordinate factual findings unless they are clearly erroneous. See id., 587.

''Personal rehabilitation as used in the statute refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [Section 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [that the parent has] achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved

[his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue. . . . As part of the analysis, the trial court must obtain a historical perspective of the respondent's child caring and parenting abilities, which includes prior adjudications of neglect, substance abuse and criminal activity." (Internal quotation marks omitted.) *In re Christopher L.*, 135 Conn. App. 232, 245, 41 A.3d 664 (2012).

Here, the respondent claims that "virtually all of the factual predicates that the trial court relied upon to support its legal conclusion are clearly erroneous," and, therefore, that "there is insufficient evidence to support the trial court's conclusion that the [respondent] failed to rehabilitate . . . ." Specifically, the respondent highlights eight factual findings, each of which we will address in turn. We conclude that the court's subordinate factual findings are supported by the evidence and the rational inferences to be drawn therefrom, and, thus, the respondent has failed to demonstrate that there was insufficient evidence to support the court's determination that he failed to rehabilitate.

First, the respondent challenges as clearly erroneous the court's finding that "the parents demonstrated limited skills, particularly with the use of [Corey's] car seat." The respondent argues that this finding "does not support the trial court's conclusion that [he] failed to rehabilitate because it does not tend to show that [he] will not be able to assume a responsible position in [Corey's] life at some future point." In support of his argument, the respondent cites to studies highlighting the high frequency with which parents misuse child car seats.[20] We disagree with the respondent and conclude that the court's finding was not clearly erroneous.

[20] The record reflects that the studies cited by the respondent were not admitted as exhibits before the trial court, they were not part of the record, and, therefore, we cannot consider them on appeal. "[W]e cannot consider evidence not available to the trial court to find adjudicative facts for the

At trial, Randall testified that she observed the respondent and the mother struggle for about eight minutes trying to put Corey in a car seat. She further testified that the respondent sought the aid of one of the foster mothers to resolve the issue. Randall testified that the parents' difficulty with the car seat raised more general concerns about the parents' "ability just to do basic kinds of childcare needs because that is a very basic need." The evidence thus reflected that a parent's ability to utilize a car seat is a basic parenting skill that, when viewed in light of the parents' other parenting skills, sheds light on whether they possess the ability to adequately care for a child. Therefore, we disagree with the respondent's argument that his difficulty with the car seat does not relate more generally to his ability to responsibly provide for Corey. Accordingly, we conclude that the court's finding was not clearly erroneous because it was adequately supported by evidence presented at trial and the reasonable inferences drawn therefrom.

Second, the respondent challenges as clearly erroneous the court's finding that he was unable or unwilling to change the mother's smoking habits. Specifically, the respondent claims that it is "fundamentally unfair" to hold him responsible for the mother's actions, and he also argues that a parent's failure to stop smoking should not be a reason to terminate their parental rights. We conclude that the court's finding was not clearly erroneous because the evidence presented at trial supported the fact that the mother smoked cigarettes from the beginning of the case until the beginning of trial in April, 2019. Further, the respondent was aware of the dangers that smoking posed to Corey due to his unique medical conditions, including asthma, reflux disease, and bronchitis. Indeed, through the respondent's

first time on appeal. . . . It is well established that this court does not find facts." (Internal quotation marks omitted.) *D'Amato* v. *Hart-D'Amato*, 169 Conn. App. 669, 685, 152 A.3d 546 (2016).

own efforts to quit smoking, he demonstrated that he recognized the adverse effects smoking had on Corey's health. Moreover, even though the parents were given specific instructions as to how to avoid exposing Corey to thirdhand smoke during their visits at TFT in early 2018, Corey's adverse reactions after their visits persisted well into 2019. If the respondent, who accompanied the mother to the visits, was aware that he or the mother, or both of them, were not adhering to these instructions in order to avoid further harm to Corey, he exercised poor judgment in failing to disclose that lack of compliance to the person supervising the visits. Therefore, it was reasonable for the court to consider the respondent's efforts to protect Corey from both his and the mother's smoking with respect to whether the respondent failed to rehabilitate. The respondent and the mother were married and living together, and, therefore, the mother's smoking would affect whether the respondent could provide Corey with a safe home environment.

Third, the respondent challenges as clearly erroneous the court's finding that he has a sporadic history with individual counseling. We disagree with the respondent and conclude that evidence was presented at trial that clearly supports the court's finding. Specifically, at trial, Hooper testified that the respondent, despite the fact that engaging in individual counseling was one of his required specific steps, discontinued his therapy from February until October, 2018. This significant gap in treatment is sufficient to support the court's finding that the respondent's history with individual counseling was sporadic. The respondent argues that from July through October, 2018, he did not need to partake in individual counseling because he was engaged in couples counseling with the mother, although the court found that there was no record of the parents' successful completion of counseling. Given the number of months in which the respondent was not engaged in

the requisite individual counseling, a time period during which his compliance with specific steps was crucial, the court's finding is not clearly erroneous.

Fourth, the respondent challenges as clearly erroneous the court's finding that he, "by history, has mental health diagnoses," as well as a history of substance abuse. The respondent does not dispute that he has a history of both mental health diagnoses as well as substance abuse issues. He also does not dispute that adequate evidence was presented at trial to support these histories. Rather, the respondent argues that, by referencing these histories, the court suggested that the respondent still suffered from past mental health diagnoses or substance abuse issues at the time of trial. Simply put, the court made no such suggestion, and we therefore reject the respondent's claim with regard to this finding, as it is not based on the facts found.[21]

Fifth, the respondent challenges as clearly erroneous the court's finding that he did not have a clear plan for Corey if reunification were to occur. In particular, the court stated that the parents' "employment would make a parenting plan difficult" and that "[the respondent] indicated that [the] mother would never be left home unsupervised with [Corey] but did not have a reasonable plan for who would supervise [him] while he was working up to [seventy] hours per week." The respondent argues that the evidence presented at trial did not support the court's finding because Hooper testified that the respondent had "talked about possibly having [Corey] go into day care while [the respondent is working]."

At trial, however, no evidence was presented as to which day care Corey would attend, who would provide the transportation, or who would pay for the childcare. Further, the mother testified that, due to her employ-

[21] In her updated evaluation, which was in evidence, Randall diagnosed the respondent with major depressive disorder, in remission.

ment as a live-in companion, she lived at a client's home from Thursdays through Sundays. Although the mother mentioned the possibility of alternate employment or an alternate shift, she did not provide any clear idea of what her employment would consist of were Corey to return home. The parents did not provide a concrete plan that would account for the respondent working seventy hours per week, including Saturdays and Sundays, and the mother being absent four out of seven days of the week. Keniston also expressed concern regarding the parents' incomplete care plan for Corey. Specifically, in a TFT appointment summary, she questioned "how realistic the [parents'] plan was and if it was beneficial for [Corey] . . . to return home to a household where he can't be alone with his mother." Further, Randall stated: "I do not believe . . . that [the respondent] would become the only caregiver and that [the mother] would not have a significant role in that. That goes against really what their relationship is. [The respondent] kind of has a tendency to . . . give in to [the mother] and to give her what she wants, and I believe that if she wanted to take primary care of [Corey], that [the respondent] would be pretty likely to allow that." On the basis of the evidence presented at trial and the reasonable inferences that could be drawn from the evidence, we conclude that the court's finding that the respondent did not have an acceptable parenting plan for Corey was not clearly erroneous.

Sixth, the respondent challenges as clearly erroneous the court's finding that he and the mother had a "history of difficulties" as a couple. We disagree with the respondent because sufficient evidence was presented at trial to support this finding, and, thus, it is not clearly erroneous. The court found that the respondent and the mother indicated that the multiple days of separation that resulted from their weekly work schedules reduced

the likelihood of relationship discord and that the parents' Facebook pages in August, 2018, contained allegations of infidelity and a discussion of potential separation. Several arguments between the parents had been observed by department workers. For example, Randall testified that the mother had a history of infidelity while she and the respondent were together and that the respondent had a history of domestic violence against the mother. Hooper also testified that the biological parents "have struggled with being able to resolve conflicts in a positive way" and that "[the respondent] reported that he had one time become angry and choked [the mother]." Randall also testified that the respondent and the mother "tend to get aggravated with each other" and that "the relationship issues between the two of them were a concern" for her. She went on to state that the respondent is a "very dependent individual," that the respondent and the mother "are very dependent on each other" and that she has "continuing concerns about the strength of their relationship." On the basis of the evidence presented at trial and the reasonable inferences to be drawn from the evidence, we conclude that the court's finding that the respondent and the mother had a history of difficulties was not clearly erroneous.

Seventh, the respondent challenges as clearly erroneous the court's findings that relate solely to the mother because the respondent argues that they "simply do not apply to the issue of whether [he] failed to rehabilitate." We disagree. This court has previously held that, despite the department's failure to put in concrete terms any requirement that the father change his relationship with the mother, the negative relationship between the parents posed a significant barrier to the father's rehabilitation as a parent because he failed fully to appreciate the risk that the mother, who suffered from numerous impairments that interfered with her parenting,

could pose to their young child. See *In re Albert M.*, 124 Conn. App. 561, 565, 6 A.3d 815, cert. denied, 299 Conn. 920, 10 A.3d 1050 (2010). Here, similarly, although the respondent's specific steps did not require him to separate from the mother, the respondent was aware that if he and the mother were to remain a unified couple, the mother's parenting deficiencies posed a significant barrier to reunification. During one of the TFT meetings in May, 2018, the respondent was advised that "the department's permanency plan is adoption due to concerns of [the mother's] mental health and the inability shown in visits to meet [Corey's] needs. . . . [The respondent] reported that he wouldn't have married [the mother] if he would have known this would happen. [The department social worker] explained that even though the majority of the concerns are with [the mother], the department assesses the parents together as one to determine if reunification is appropriate." The respondent's understanding that the mother posed a barrier to reunification was further evidenced when he told the TFT community worker that he was working to create a care plan for Corey "so [that the mother] will not be alone with [Corey]."[22] At trial, when asked by counsel for Corey, "[a]nd if parents are presenting as a unified couple, together, would you agree that one's lack of engagement would reflect negatively on the other?" Randall responded, "[y]es, I would agree with that." Moreover, the respondent was aware that the mother had previously lost custody of her other two children and that she had reported wanting to "shake" one of those children. In fact, he was the mother's boyfriend and provided emotional support throughout the period when her parental rights as to her second child

[22] There was evidence that, in response to the respondent's statement that he was working to create a care plan for Corey, Keniston questioned how realistic it would be for Corey to live in a household where he cannot be alone with the mother and whether that arrangement would be beneficial for Corey. The respondent also told Keniston that he did not have any concern if the mother was left alone with Corey.

were being terminated. On the basis of the respondent's involvement with the mother and his knowledge of the mother's significant parenting issues, the court's findings with respect to the mother were related to the issue of whether the respondent had rehabilitated, especially because it noted that "the parents present as a committed couple," and "[n]either parent demonstrates a desire or ability to be a single parent."

In determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific steps ordered by the court or imposed by the department. See *In re Shane M.*, supra, 318 Conn. 586. The court in the present case dealt with the respondent's rehabilitation issues by accepting the fact that the parents were a firmly committed unit. It never ordered that the respondent separate from the mother. In its decision, the court did not fault the respondent for not separating from the mother. Rather, it faulted him for not having a reasonable plan as to who would care for Corey, other than the mother, while he was at work seventy hours a week, and for being unable or unwilling to change the mother's smoking habits to make the home environment safer for Corey. It also found that the respondent did not have "sufficient insight into the negative effect [the] mother's mental health has on her parenting, despite [the respondent's] substantial period of individual counseling." By failing to sufficiently develop a plan to protect Corey from the mother's deficient parenting, the respondent demonstrated poor judgment and undermined any prospect of Corey's being reunified with him. Regardless of the moderate progress that the respondent made personally toward complying with some of his specific steps, Corey could not be reunited with the respondent until the overall environment in the parental home would not pose a threat to Corey.

Therefore, the following evidence presented at trial, relating to the mother, was relevant to whether the respondent failed to rehabilitate. Randall testified that, because of the mother's post-traumatic stress disorder, which led to her feelings of wanting to shake her other child, the mother had the potential to be very dangerous to a young child in her care. Randall further testified that the mother "is more vulnerable to emotional problems, which could result [in] domestic violence, could result in her even possibly hurting her child because of her own lack of impulse control."[23] The TFT reports, which were introduced into evidence at trial, include a plethora of evidence supporting the mother's inability to safely parent Corey. For example, the mother needed "prompting and redirecting" with Corey, she let him put unsafe and dirty items in his mouth, she spent time on her phone instead of interacting with Corey, she complained about the weight of the car seat, she did not appropriately interact or bond with Corey, and she demonstrated a lack of understanding that her smoking had adverse effects on Corey's health. Randall also testified that she did not believe that the respondent would become the sole caregiver and that the mother would not also play a significant role. Randall testified: "That goes against really what their relationship is. He kind of has a tendency to . . . give in to her and give her what she wants, and I believe that if she wanted to take primary care of the baby, that he would be pretty likely to allow that." On this record, we conclude that it was not improper for the court to determine that the respondent failed to rehabilitate, in part, due to factual findings relating to the mother.

Eighth, the respondent challenges as clearly erroneous the court's finding that, "[d]espite frequent admo-

[23] As part of the mother's psychiatric treatment with Sound Community Services, she reported, "I go from calm, cool to I want to kill you status. I get triggered when my husband asks me [twenty] questions or someone mentions my kids." She also reported that her "mood is highly and quickly changeable . . . varying from calm to enraged over a matter of hours."

nitions, [Corey's] physical reaction to visits [with his parents] indicates ongoing exposure to secondhand[24] smoke." (Footnote added.) Preliminarily, the respondent claims that the petitioner did not introduce any expert medical testimony to support the finding that Corey's breathing difficulty and coughing was caused by exposure to smoke particles during his visits with the parents. Specifically, the respondent refers to language from *Sherman* v. *Bristol Hospital, Inc.*, 79 Conn. App. 78, 828 A.2d 1260 (2003), in which this court stated that "[e]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the [layperson]." (Internal quotation marks omitted.) Id., 88. The court went on to state that "[a]n exception to the general rule with regard to expert medical opinion evidence is when the medical condition is obvious or common in everyday life. . . . Similarly, expert opinion may not be necessary as to causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief." (Citations omitted; internal quotation marks omitted.) Id., 89.

Here, the petitioner's evidence included a report from Corey's pulmonologist, Palazzo, dated October 1, 2018, in which she stated that Corey had increased mucous, a cough and difficulty breathing on Monday nights into Tuesdays, following visits with his biological parents, which resulted in the need to administer nasal saline and Albuterol. Palazzo's letter also stated: "I am concerned that exposure to [secondhand] smoke from his biological parents' clothes or breath is what is causing these issues" and that "[i]t would be my recommendation to postpone a visit with his biological parents until he has fully recovered from these symptoms." This

[24] See footnote 14 of this opinion.

evidence supports the court's finding that Corey's breathing difficulties were caused by exposure to thirdhand smoke during visits with the respondent and the mother. Although Palazzo did not testify, her report was admitted into evidence without challenge. Because the court did not admit it for a limited purpose, it can be used for all purposes, including establishing causation.[25]

Even if the letter from Palazzo did not establish causation between Corey's breathing problems and thirdhand exposure to smoke particles from the parents, the exception from *Sherman* v. *Bristol Hospital, Inc.*, supra, 79 Conn. App. 89, would apply because the petitioner's evidence created a probability so strong that a reasonable trier of fact, applying a commonsense evaluation to the evidence, would be able to form a reasonable belief with respect to causation. In addition to the letter from Corey's pulmonologist, Palazzo, the evidence also included reports from TFT indicating that, as early as May, 2018, the foster parents were having to administer asthma treatment to Corey after his visits and that his pediatrician had advised the foster parents that thirdhand smoke could be the issue. In her testimony, Hooper, the department social worker, stated that she visited with Corey both immediately after his visits with his biological parents and later in the week following those visits. Through these encounters with Corey, Hooper was able to determine that, after his visits with the respondent and the mother, Corey's eyes were "runny" and "red" and he was "miserable."

The respondent fails to recognize the much broader concern that the court was expressing with respect to the parents' smoking, which the court considered "[t]he major example of the parenting deficits . . . ." The court went beyond just finding fault with the parents

[25] To the extent that the respondent claims that the report from Palazzo constituted "wholly unreliable hearsay evidence," he failed to object to its admission on that, or any other ground, at trial.

for aggravating Corey's asthma due to the presence of thirdhand smoke on their persons during supervised visits. Ultimately, even if the thirdhand smoke was possibly not the cause of Corey's adverse reactions after the visits, the continued smoking of one or both of the parents would create an unacceptably risky home environment for a child with the medical issues Corey has, and, in the court's view, the parents' continued smoking, or the respondent's tolerance of the mother's smoking, indicated an inability to prioritize Corey's medically fragile needs over one's own.

On the basis of the evidence presented by the petitioner and the reasonable inferences to be drawn therefrom, we conclude that the court's finding that Corey's physical reaction to his visits with his parents indicates exposure to thirdhand smoke was not clearly erroneous. Accordingly, we conclude that the court's subordinate findings that were challenged by the respondent are not clearly erroneous, and, therefore, that the court properly determined that the respondent failed to rehabilitate.

III

Finally, the respondent claims that the court, in its findings in the adjudicatory phase of the proceeding, improperly compared his suitability as a parent, and that of Corey's biological mother, to that of Corey's foster parent during the adjudicatory phase of the termination proceeding. We disagree.

The respondent takes issue with the following language: "[The respondent] expressed a concern that all this work would be a waste of time if they didn't get [Corey] back. [Keniston] noted a lack of affect by [Corey] in the parents' company, especially with [the] mother. *She contrasted this with the warmth and attachment observed between* [*Corey*] *and* [*the*] *foster parent.* At times, [Keniston] had difficulty redirecting [the] mother's attention from [the] mother's cell phone

to [Corey].'' (Emphasis added.) Although the majority of the court's comparison involved the mother, and not the respondent, the respondent properly challenges the comparison because it references ''the parents'' and because the parents were being reviewed as a unit, and, therefore, the mother's attachment with Corey also affected the respondent.

We first set forth the applicable standard of review. ''The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment.'' (Internal quotation marks omitted.) *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016).

''[A] judicial termination of parental rights may not be premised on a determination that it would be in the child's best interests to terminate the parent's rights in order to substitute another, more suitable set of adoptive parents.[26] Our statutes and [case law] make it crystal clear that the determination of the child's best interests comes into play only after statutory grounds for termination of parental rights have been established by clear and convincing evidence. . . . [A] parent cannot be displaced because someone else could do a better job raising the child. . . . The court, however, is statutorily required to determine whether the parent has achieved such degree of personal rehabilitation as would encourage the belief that within a reasonable time, *considering*

[26] We should note, however, that in the dispositional phase, pursuant to § 17a-112 (k) (4), one of the seven findings on which the court must opine is ''the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties . . . .'' At the time of trial, Corey had been living with his foster parents for more than one year.

the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .'' (Citation omitted; emphasis in original; footnote added; internal quotation marks omitted.) *In re Zion R.*, 116 Conn. App. 723, 738, 977 A.2d 247 (2009).

In support of their respective positions, both parties cite to our Supreme Court's decision in *In re James O.*, supra, 322 Conn. 636. The petitioner relies on the majority's opinion, and the respondent relies on the concurring opinion in *In re James O.*, as well as attempts to distinguish the majority's analysis from the present case. In *In re James O.*, in concluding that the respondent mother had failed to rehabilitate, the court held that the trial court did not improperly compare the respondent parents with the foster parent of the children at issue. Id., 652–57. The trial court noted that the foster parent provided the children with ''an environment that is calm and understanding of the children's needs.'' (Internal quotation marks omitted.) Id., 653. Further, the court stated that, ''[a]s both [children's] therapists have made clear, the children have needed a caregiver who is calm, patient, able to set appropriate limits, willing to participate intensively in the children's therapy, and able to help the children with coping skills to manage their anxiety.'' (Internal quotation marks omitted.) Id. The court went on to state that the foster mother provided the children with such an environment and that she embodied the requisite characteristics of a parent who could meet the child's needs. ''In contrast,'' the court continued, ''[the respondent mother] is volatile and prone to violence, unable to set appropriate limits, unwilling to talk with the children's therapists and, therefore, unable to help them use coping skills to manage their anxiety and ultimately, unwilling to believe the children's statements regarding the trauma.'' (Internal quotation marks omitted.) Id., 653–54. In reviewing this language, the

Supreme Court determined that the trial court's comparison to the foster mother was not improper because it was made "in light of what the children's therapists have testified are the specific needs of the children. . . . The court is basing the level of care needed not on what [the foster mother] is providing to the children, but on what the children's therapists have testified the children need from a caregiver." (Emphasis omitted; internal quotation marks omitted.) Id., 655. Further, "[i]mportantly, the court never opined that [the foster mother] could meet the children's needs or that [the foster mother] ought to be the person to meet their needs." (Internal quotation marks omitted.) Id. Therefore, our Supreme Court held that the trial court did not improperly compare the respondent mother with the foster mother. Id., 657.

Here, we conclude that the trial court's comparison between the foster parent and the respondent and the mother was not improper. Similar to the challenged decision of the trial court in *In re James O.*, the trial court in the present case used the comparison between the foster parent and the biological parents to highlight Corey's emotional and development needs as outlined by Keniston.[27] In her reports, Keniston repeatedly highlighted that several of the TFT program's goals were to "create a physical and emotional environment" for Corey, and to "establish developmentally appropriate routines that improve attachment . . . ." Therefore, the reference to the lack of affect Corey showed with the mother, compared to the warmth and attachment he showed with the foster parent, was used not to opine that the foster parent ought to be the person to meet Corey's needs but, rather, was made on the basis of what the TFT professionals determined were Corey's specific needs. Further, the court's comparison should not be viewed in isolation because the court's analysis,

[27] This evidence also established that Corey is not a child incapable of forming an attachment to a caregiver.

as a whole, focused on Corey's needs and the biological parents' inability to meet those needs. For example, the court also referenced that, on the basis of Randall's report, "[h]ands-on parenting was also necessary, with a focus for [the] mother on attachment" but that Randall "did not feel [that] either parent was invested in the extra work it takes to create an attachment." Accordingly, we conclude that the court's comparison between the foster parent and the biological parents was not improper.

The judgment is affirmed.

In this opinion the other judges concurred.

ALVIN J. ROSARIO II *v.* THYJUAN ROSARIO
(AC 41942)

Lavine, Devlin and Bear, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court, which found him in contempt for failing to satisfy various financial obligations relating to the marital home. On appeal, the defendant claimed that there were no motions pending before the court on which it could find him in contempt, as the trial court had denied the defendant's motions because she had failed to appear in court on the date of the scheduled hearing on the motions. *Held* that the plaintiff could not prevail on his claim that there were no motions pending before the trial court when it found him in contempt: the record demonstrated that the defendant filed three motions for a continuance on the same day and prior to the scheduled hearing on the pending motions for contempt and the trial court thereafter ordered the parties to obtain a hearing date from the family caseflow office to continue the hearing on the defendant's claims and granted in part the defendant's motions for a continuance, which effectively vacated its denial of the defendant's motions for contempt; furthermore, this court declined to review the plaintiff's claim that he did not receive a motion for contempt by service of process, as that claim was not adequately briefed.

Argued October 7, 2019—officially released June 16, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Turner*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the trial court, *Sommer*, *J.*, granted two motions for contempt filed by the defendant and entered orders thereon, and the plaintiff appealed to this court. *Affirmed.*

Alvin J. Rosario II, self-represented, the appellant (plaintiff).

Opinion

BEAR, J. In this postdissolution of marriage matter, the self-represented plaintiff, Alvin J. Rosario II, appeals from the orders of the trial court granting two motions for contempt, docket entry #154.79 (motion #154.79) and docket entry #156 (motion #156), filed by the defendant, Thyjuan Rosario.[1] On appeal, the plaintiff claims that the trial court erred when it rendered judgment finding him in contempt because (1) those motions for contempt previously had been denied by the court and, thus, they were not properly before the court, and (2) the defendant did not serve the plaintiff with motion #156. Because we conclude, with respect to the first claim, that the court's January 19, 2017 order effectively vacated its January 3, 2017 order denying the motions, and, with respect to the second claim, that it is inadequately briefed, we affirm the judgment of the trial court.

[1] The defendant did not file a brief in this appeal, nor did she attend oral argument before this court. We, therefore, have considered this appeal on the basis of the brief, appendix, and oral argument of the plaintiff alone. See *Kenosia Commons, Inc.* v. *DaCosta*, 161 Conn. App. 668, 669 n.1, 129 A.3d 730 (2015).

The record contains the following facts and procedural history relevant to the plaintiff's claim. The marriage of the parties was dissolved on December 4, 2012. The plaintiff was ordered to pay various financial obligations relating to the marital home existing on December 4, 2012.[2] Specifically, in the dissolution judgment, the court, *Turner*, *J.*, ordered that the plaintiff pay the following outstanding bills: United Illuminating Company (electric company) bill in the amount of $1170; Bridgeport Water Pollution Control Agency (sewer company) bill in the amount of $650; and Aquarion Water Company bill in the amount of $514.44. Approximately eight months later, the defendant filed a motion for contempt, docket entry #123.79, because the plaintiff failed to comply with the court's orders. Subsequently, on July 11, 2013, Judge Turner found that the plaintiff either paid the bills in part or not at all. As a result, the court ordered the plaintiff to make an immediate payment to the electric company in the amount of $945 and to make arrangements for payment to the sewer company in the amount of $550. Additionally, the plaintiff was ordered to contact Hoffman Fuel Oil Company and enter into a written agreement for payment of a $200 obligation.

On July 9, 2016, the defendant filed another motion for contempt, docket entry #136.89, as a result of the plaintiff's failure to obey the trial court's orders.[3]

[2] The plaintiff did not pay all of those obligations, and he continuously has failed to comply with court orders directing him to pay them, prompting the defendant to petition the trial court on several occasions to find the plaintiff in contempt. Both parties frequently have failed to appear before the trial court on days in which the court was scheduled to hear oral argument, or on days the court ordered a status update, on the then pending motions. Each of the parties, after failing to appear in court, filed motions for reargument, reconsideration, and, if the motions were denied or dismissed, each of the parties then generally filed new motions containing the same claims as the previously denied or dismissed motions.

[3] The trial court, *Sommer*, *J.*, recognized that, due to the plaintiff's failure to comply with the court orders which required him to pay the sewer company obligation, additional charges, fees, and legal expenses were added

Because the defendant failed to appear at the scheduled hearing, the motion was denied. Approximately two months later, on September 15, 2016, the defendant filed another motion for contempt, motion #154.79, and a motion to open judgment, docket entry #155.79, with respect to the denial of the motion #136.89. In motion #154.79, the defendant alleged that, as of September 1, 2016, the plaintiff had not paid the sum of $6511.12, the total amount she alleged to be owed by her to the sewer company as a result of the plaintiff's contumacious behavior. On October 27, 2016, the defendant filed a second motion for contempt, motion #156, claiming that due to "fees, fines, legal fees, marshal fees and court fees" having been applied to the original outstanding balance of $650, the new outstanding balance to the sewer company was $8599.93.[4] The parties were due to appear before the court on January 3, 2017, for a continued hearing on the defendant's then pending contempt motions—#154.79 and #156. Following the defendant's failure to appear at the time the motions were called, the court denied the contempt motions and the motion to open judgment. On that same day and previously, however, the defendant had filed a motion for a continuance of the January 3, 2017 hearing date because she had employment obligations that she claimed she could not miss. Notwithstanding the aforementioned denials, the defendant's motion for a continuance was granted in part by the court, *M. Murphy, J.*, on January 19, 2017, subject to an instruction that the parties con-

to the total due to the sewer company. Additionally, the sewer company placed a lien on the former marital home in which the defendant and her children lived, which it then sought to foreclose. The defendant was charged with the sewer company costs related to that foreclosure proceeding. Motion #154.79 and motion #156 contained essentially the same facts and claims, except for the amount alleged to be owed by the plaintiff, $6511.12 in motion #154.79, and $8599.93 in motion #156.

[4] The trial court conducted hearings on the motions for contempt on October 10, 2016, December 12, 2016, and April 13, 2017. The plaintiff has not provided this court with the transcripts of those hearings.

tact the family caseflow office for a firm date to continue the pending hearing on the defendant's motions.[5] The third and final day of the evidentiary hearing took place on April 13, 2017, with both parties present in court.

On June 28, 2017, the court, *Sommer*, *J.*, issued a memorandum of decision on the defendant's pending contempt motions, motion #154.79 and motion #156.[6] In its memorandum, the court recited the findings in its July 11, 2013 memorandum of decision and concluded that the posture of the case and position of the parties was largely unchanged—the original court orders were clear and unambiguous, and the plaintiff had not yet paid all of his court-ordered sewer company obligations. Additionally, the defendant was left to pay those obligations herself, which resulted in nonpayment, followed by a lien being placed on the former marital real property, and the institution of foreclosure proceedings. The court found that, although he was ordered to pay the sewer company, the plaintiff, instead, "travelled, took motorcycle trips and attended professional sporting events." The court found that the defendant's testimony was credible, and that the plaintiff's testimony was not credible. The court concluded that the plaintiff wilfully failed to make payments that were ordered by the court despite having the financial means to do so. The court further concluded that the plaintiff was responsible for the sewer company obligations then totaling $6461.12 and, therefore, ordered him to pay that amount no later than June 29, 2017.

In the year following the court's June 28, 2017 memorandum of decision, the defendant filed several other motions for contempt based on the plaintiff's alleged

[5] The plaintiff did not provide this court with a copy of the transcript of the January 19, 2017 hearing.

[6] In its title caption, the memorandum references the motion for contempt before it as motion #141, which, as will be addressed later in this opinion, is not the correct docket entry number of that motion.

failure to comply with the court's order to pay the total amount then due to the sewer company. As a result of his failure to pay, the plaintiff was incarcerated three times. Each time he was incarcerated, the plaintiff paid the purge amount, which ranged from $500 to $1000.

This appeal was filed on August 3, 2018. On November 14, 2018, this court ordered Judge Sommer to rectify the record by correcting its June 28, 2017 memorandum of decision, in which it, among other things, referenced the incorrect docket entry numbers when it identified the motions for contempt that were the subject of her ruling. Judge Sommer, on December 11, 2018, issued a rectified memorandum of decision, replacing the incorrect reference to docket entry #141 with an accurate reference to motions #154.79 and #156, the motions at issue in this appeal.[7]

I

On appeal, the plaintiff first claims that there was no motion pending before the trial court on which it could find him in contempt. More specifically, he claims that the court erred when it found him in contempt pursuant to motions #154.79 and #156, because the court had denied those motions after the defendant failed to appear in court to prosecute her claims on January 3, 2017. The record reflects, however, that on that same day and previously, the defendant had filed a total of three motions for a continuance and, as a result of those motions, the defendant appeared before the court on January 19, 2017, at which time the court ordered the parties to obtain a hearing date from the family caseflow office to continue the hearing on the defendant's pending claims. In its November 22, 2019 articulation, the

[7] Although docket entry #155.79 is referred to in connection with the contempt proceedings, it is a motion to open the judgment relating to the court's denial of an earlier motion for contempt, docket entry #136.89, concerning the defendant's same debt to the sewer company. The court stated that the defendant had to reinitiate her proceedings for contempt, which she did by filing and serving motion #154.79.

court explained that, on January 19, 2017, when the defendant's motion for a continuance was granted in part, and the parties subsequently were ordered to obtain a hearing date from the family caseflow office, such order effectively vacated the January 3, 2017 order, which denied the defendant's motions for her failure to appear. Therefore, with the January 3, 2017 denials having been vacated, the defendant's motions for contempt, #154.79 and #156, were still properly pending before the trial court when the hearing continued on April 13, 2017, in the presence of both parties.[8]

We, therefore, reject the plaintiff's first claim.

II

The second claim that the plaintiff advances in this appeal is that he did not receive motion #156 by service of process.[9] The plaintiff, however, devotes only one

[8] Additionally, even if we did not have the benefit of the court's articulation concerning the vacating of the January 3, 2017 denial of the pending contempt motions, the plaintiff did not provide this court with transcripts of the hearings held on January 19 and April 13, 2017, and, therefore, we are unable to independently review the proceedings that took place on those days, including statements before the court, if any, that might have related to the plaintiff's claims that the court's January 3, 2017 order should not have been vacated. See *State* v. *Germain*, 142 Conn. App. 805, 807–808, 65 A.3d 536 (2013) ("It is an appellant's duty to provide an adequate record for our review, including the transcript . . . . Without the transcripts, we are unable to discern what transpired in the prior proceedings or to conduct a meaningful review of the issues on appeal." (Citations omitted; internal quotation marks omitted.)); see also Practice Book §§ 61-10 and 63-8.

[9] We recognize that proper service of process "is a prerequisite to a court's exercise of [personal] jurisdiction over [a] party." (Internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 530, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014). Ordinarily, "[a] challenge to a court's personal jurisdiction . . . is waived if not raised by a motion to dismiss within thirty days . . . . The general waiver rule, however, is inapplicable in situations in which there has been no service of process or attempt of service." (Internal quotation marks omitted.) *Barr* v. *Barr*, 334 Conn. App. 479, 482, 225 A.3d 972 (2020). Although a party who has not been served will not be deemed to have waived any challenge to the trial court's exercise of personal jurisdiction solely by virtue of the fact that the party failed to file a timely motion to dismiss, a party may nonetheless waive any challenge to the trial court's exercise of personal jurisdiction if the

sentence, in his thirty page brief, to this claim. "Claims are . . . inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016). "Where an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived." *Bridgeport Hospital* v. *Commission on Human Rights & Opportunities*, 232 Conn. 91, 115, 653 A.2d 782 (1995). Accordingly, this claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* NECTOR MARRERO (AC 41022)

Prescott, Elgo and Sheldon, Js.

Syllabus

The defendant, who had been convicted of the crimes of home invasion, burglary in the first degree and assault in the second degree, appealed to this court, claiming, inter alia, that he was denied his due process right a fair trial as a result of prosecutorial impropriety. The defendant had kicked in the door of his former girlfriend's home and physically assaulted her. After the police received a tip that he had been in contact with his then current girlfriend, G, who was incarcerated, the police

party appears in the case and actively contests the issues. See *In re Baby Girl B.*, 224 Conn. 263, 292, 618 A.2d 1 (1992); *Beardsley* v. *Beardsley*, 144 Conn. 725, 730, 137 A.2d 752 (1957).

Prior to the defendant filing motion #156, the plaintiff had appeared and was before the court with respect to motions #154.79 and #155.79, which were filed on September 15, 2016. The first day of the hearing on motion #154.79 occurred on October 10, 2016. The plaintiff filed motion #156 on October 27, 2016. The final two days of the hearing occurred on December 12, 2016, and April 13, 2017, after motion #156 had been filed. The defendant waived his objection to the court's exercise of personal jurisdiction with respect to motion #156 when he contested the issues relating to that motion during the hearing through his testimony and other actions. See *In re Baby Girl B.*, supra, 224 Conn. 292; *Beardsley* v. *Beardsley*, supra, 144 Conn. 730.

obtained and examined G's phone records and discovered that she had had several calls with someone who used the same phone number that the victim had given to the police for the defendant. The police thereafter obtained copies of G's recorded phone calls from the Department of Correction, transcripts of which were admitted into evidence. In the transcript of one call, the caller admitted that he had gotten drunk at the home of a friend, J, after which he kicked in the door of the victim's home and began fighting. In the transcript of the second call, the caller told G that he was on the run because the police had gone to his mother's house to ask about G's stolen car. At trial, the victim changed her story and testified that her injuries were not caused by the defendant but occurred when she fell down stairs in her home, and the defendant presented an alibi defense in which J testified that the defendant was with him at J's home on the evening of the assault. *Held*:

1. The defendant could not prevail on his claim that the prosecutor committed improprieties by using excessive leading questions in his direct examination of the victim, by refreshing the recollection of a witness with a document different from the one he stated that he used for that purpose, and stating in closing argument to the jury, without supporting evidence, that the victim had been threatened or otherwise influenced by the defendant to deny her claim against him and to instead insist that she had been injured when she fell down stairs in her home:

a. The sequences of leading questions that the defendant challenged did not constitute acts of prosecutorial impropriety under *State* v. *Salamon* (287 Conn. 509), as they were not improper in the evidentiary sense under the applicable provision (§ 6-8) of the Connecticut Code of Evidence or in the constitutional sense, in that they did not threaten his due process right to a fair trial: because the defendant objected to only one of the prosecutor's several leading questions, the answer to each subsequent leading question was permitted to stand and be given whatever weight the jury chose to give to it, and operated as a waiver of any claim by the defendant of evidentiary error on the ground of improper leading of the witness that he might otherwise have raised on appeal, the defendant's claim that the prosecutor improperly asked the victim leading questions without obtaining the court's permission to do so or establishing any valid legal basis for so doing was meritless, as the defendant's appellate counsel conceded at oral argument before this court that the victim was hostile to the prosecution throughout her testimony, and, in the absence of any objection by the defendant, the court had no sua sponte right or duty to intervene, and no advance judicial determination as to the propriety of the prosecutor's leading questioning was required; moreover, the defendant's claim that the prosecutor used a leading question to identify the victim's injuries before evidence as to those injuries had been introduced was unavailing, as it was not improper for the prosecutor to include facts in those leading questions as to which no other evidence had yet been introduced, as long as he had a good faith basis for doing so, there was no merit to

the defendant's claim that the prosecutor improperly responded to the victim's assertion about her injuries by asking questions that indicated to the jury that she changed her story from the one she had given to the police and that she changed her story frequently, and, although the defendant claimed that the prosecutor's leading questions improperly suggested to the jury that the victim previously stated that the defendant was the caller on the recordings of G's phone conversations, it was not constitutionally improper for the prosecutor to pose those questions, as the defendant pointed to nothing in the challenged questions that appealed to the jury to accept the prosecutor's statements as true, and it was highly unlikely that the mere asking of the challenged questions would cause the jury to draw that inference, as there was substantial evidence that the defendant was the caller; furthermore, the prosecutor's challenged leading questions about the defendant's alleged threatening phone call to the victim were proper because of the witness' hostility to the prosecution and the defendant's lack of any challenge to the prosecutor's good faith basis for asking the leading questions, and there was nothing about the substance of or manner in which the questions were asked that did any more than ask the witness to admit or to deny the truth of the statements concerning her alleged receipt of a threatening phone call from the defendant and her later report of that phone call to the police.

b. The record was inadequate to determine whether, as the defendant claimed, the prosecutor improperly refreshed a witness' recollection by showing the witness a police document different from the one he purported to show the witness for that purpose, as there was no basis to establish that the witness did not in fact prepare the document at issue, and the defendant did not move during the pendency of this appeal to reconstruct the trial court record to identify the document.

c. The prosecutor's comments in closing argument to the jury about the victim's inconsistent statements as to how she had suffered her injuries were not improper, as they were based on reasonable inferences that were supported by the evidence: the challenged comments did not refer to or make substantive use of any of the statements of fact in the prosecutor's previous leading questions to the victim, and the prosecutor did not refer to the victim's having received a threatening phone call from the defendant, as was suggested in his prior leading questions to her, but, instead, suggested that the jury should consider the victim's original statements to be more credible than her trial testimony because, unlike her trial testimony, her original statements were made in the immediate aftermath of the incident at issue; moreover, the prosecutor's argument as to the reasons for the victim's change in her story was proper, as it merely pointed out and drew upon the victim's experience with the defendant, the fear it aroused in her and the logical effects it may have had on her desire to testify against him, and the defendant's failure to object to the prosecutor's argument suggested that his counsel did not perceive the argument to be improper.

2. The defendant could not prevail on his claim that the trial court abused its discretion by admitting into evidence recordings of G's phone calls with him, which was based on his claim that the court improperly prevented him from exploring the state's ability to authenticate his voice on the recordings: although the defendant raised the authentication issue during a pretrial hearing, in which the court responded by stating that the recordings would be admitted subject to authentication by the state, the defendant made no objection when the state introduced them during trial, he did not attempt to voir dire any witnesses about them before they were admitted, he never argued that the state failed to lay a proper foundation to authenticate them or move to strike any testimony about them after he realized that the state failed to meet its burden of authentication, and, as there was no basis in the record for the court's ruling striking the testimony of a police officer who identified the defendant's voice on the recordings after they had been admitted, this court could not determine whether the trial court abused its discretion in striking that testimony; moreover, the defendant's failure to object to the admission of the recordings during trial and to argue that the state failed to prove the identity of the caller appeared to have been a strategic choice, as he did not object to the court's decision to give the jurors during deliberations transcripts of the recordings on which his name was listed as that of the caller, and he told the jury during his closing argument that the state had failed to establish that it was his voice on the recordings.
3. The trial court did not abuse its discretion in instructing the jury on consciousness of guilt: although the defendant's initial objection to the instruction differed from his claim on appeal, which he preserved for appellate review by excepting to the court's instruction after it was approved and delivered, his claim was unavailing, as the record contained significant support for the court's instruction in that it was before the jury that he had a prior relationship with the victim, the jury watched the police body camera recordings that showed the bloodied victim identifying the defendant as her attacker, and the jury heard medical testimony about her injuries, read the statement she gave to the police and heard her testify that she was afraid of the defendant and had asked for a protective order against him; moreover, the victim provided the police with a phone number she knew to be that of the defendant, the billing information for that number showed that it was registered in the defendant's name, and the jury heard evidence in the recordings of the defendant's calls to G that the victim had been assaulted.

Argued September 12, 2019—officially released June 16, 2020

Procedural History

Substitute information charging the defendant with the crimes of home invasion, burglary in the first degree and assault in the second degree, brought to the Supe-

rior Court in the judicial district of Stamford-Norwalk and tried to the jury before *White*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Matthew C. Eagen, assigned counsel, with whom was *Emily L. Graner Sexton*, assigned counsel, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, former state's attorney, and *Joseph C. Valdes*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Nector Marrero, appeals from the judgment of conviction rendered against him after a jury trial on charges of home invasion in violation of General Statutes § 53a-100aa (a) (1), burglary in the first degree in violation of General Statutes § 53a-101 (a) (3), and assault in the second degree in violation of General Statutes § 53a-60 (a) (1). On appeal, the defendant claims that he is entitled to the reversal of his conviction and a new trial on all charges because (1) improprieties by the prosecutor in different parts of his trial violated his due process right to a fair trial; (2) the trial court erred in not requiring the authentication of his voice on the audio recordings of certain allegedly self-incriminating phone conversations he was claimed to have had with his incarcerated girlfriend, Amber Greco, before admitting such recordings into evidence against him; and (3) the court improperly charged the jury on consciousness of guilt. We reject each of these claims and therefore affirm the judgment of conviction.

The following facts, which the jury reasonably could have found, are relevant to our resolution of this appeal. On December 27, 2015, at approximately 4:45 a.m., the

defendant kicked in the door of his ex-girlfriend's[1] home and physically assaulted her, causing her to sustain multiple injuries, including fractured orbital bones, a fractured tooth, and a two centimeter laceration under her left eye. After the assault, the victim fled to a neighbor's home, where she called the police to assist her. When officers from the Norwalk Police Department responded to the neighbor's home, they found the bloodied, injured victim in a hysterical state, crying and breathing heavily.

In the victim's initial report of the incident to the responding officers, as recorded on their body cameras, she claimed that the defendant, whom she described to the officers as her ex-boyfriend, had broken into her home and beaten her up. She gave the officers the defendant's cell phone number. As she did so, however, she pleaded with the officers not to tell the defendant that she had called them. Thereafter, the victim was taken first to a hospital, where she was treated for her injuries, and then, the next day, after being released from the hospital, to the police station, where she was interviewed about the incident and gave a signed, written statement again naming the defendant as her attacker. The victim concluded her statement by stating that she was afraid of the defendant and wanted a protective order to be issued against him.

Shortly after the police interviewed the victim, they began to search the surrounding area for the defendant. When at first they could not find him, they expanded their search to include places he was known to frequent, including the homes of his friends and family members. As their search for the defendant continued, the police received a tip that he had been in contact with his current girlfriend, Greco, who was then incarcerated

[1] In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim. See General Statutes § 54-86e.

at the York Correctional Institution (York) in Niantic. Following up on that tip, the police obtained and examined Greco's phone records at York, where they discovered that she had exchanged several phone calls with someone using a phone with the same phone number for the defendant that the victim had given to the police.[2] Officers thereupon obtained copies of recordings from the Department of Correction (department) of Greco's phone calls to and from that phone number while she was at York.

Two phone calls were of particular interest to the officers—one made on December 28, 2015, the day after the victim reported the incident, and the other made about one month later, on January 30, 2016. In the first of those phone calls, which was made less than thirty-six hours after the victim reported the incident, a male caller whom Greco called "N" admitted to Greco, whom the caller called "babe" or "baby," that he had "fucked up" by doing "some dumb shit . . . ." The caller explained that he got drunk at "Little Joe's house" because "[his] bitch" had stolen his keys. He left Joe's house and went to "[his] bitch['s]" house, where he "kicked in the door and fucking just started fighting."[3]

[2] The number was associated with a prepaid cell phone that had been registered to a "Nector Marrero," whose listed address on the billing records of the cell service provider was the same as the defendant's mother's address.

[3] The male voice on the call greeted Greco by saying, "[b]aby" and proceeded to refer to Greco as "babe" or "baby" throughout the phone call. Greco greeted the caller by saying, "Hey, N." The male caller made the following statements: "Babe, I got to tell you something. . . . I fucked up yo. . . . I did some dumb shit . . . I'm not gonna say it over the phone and shit, but yeah, I kinda like got into a fight and shit and I might go to jail like soon. . . . Yeah, I might go to jail like soon. Like, I don't know, they're probably looking for me now, like, they went to Little Joes and shit. I fucked up, baby. . . . I just—I got drunk, I had gotten heavy, like drinking heavy like at Little Joes house. I fucking walked off from Joes. Fucking went to somebody's house and fucking kicked in the door and fucking started fighting. . . . I was so drunk, I was just so drunk 'cause the bitch stole my keys, you know." In response to a question from Greco about whether it was "his bitch['s] house or something," the male caller said, "[y]eah." Greco, after explaining to the male caller how to bail her out of jail, told the caller, "[w]ell, I—I need you out there and not getting, you know, pissy drunk and arrested and shit behind the girlfriend."

The caller further told Greco that, although he had not yet been arrested, the police were probably looking for him, and he probably would be going to jail soon. In the second recorded phone call of special interest to the police, the same male caller told Greco that he was "on the run" because the police had gone to his mother's house to ask about Greco's "stolen car."[4] After the caller and Greco discussed how to get rid of her car so they could raise money for her bail, the caller stated that he was going to change his phone number, which, shortly thereafter, the defendant did.

On February 18, 2016, the police finally located the defendant and arrested him in connection with the incident at issue on charges of home invasion, burglary in the first degree, and assault in the second degree. The defendant pleaded not guilty to those charges and elected a trial by jury.

The defendant's jury trial took place from June 27 through 29, 2017. At trial, the defendant presented an alibi defense, in support of which he called his friend, Joseph "Little Joe" Ferraro, who testified that the defendant had been with him at his home on the evening of the alleged assault. The jury found the defendant guilty on all charges. On August 18, 2017, the court sentenced the defendant to a total effective sentence of fifteen years of incarceration, ten years of which were mandatory, followed by ten years of special parole. This appeal followed.

I

The defendant first claims that the prosecutor committed improprieties on several occasions during trial in violation of his due process right to a fair trial. Specifically, the defendant claims that the prosecutor committed improprieties by (1) using excessive leading

[4] In their search for the defendant, the police officers told people that they were looking for him in connection with Greco's stolen car.

questions in his direct examination of the victim, (2) refreshing the recollection of a witness with a document different than the one he had told the court, defense counsel, and the jury he was using for that purpose, and (3) arguing in closing argument to the jury, without supporting evidence, that the victim had been threatened or otherwise influenced by the defendant to change her account of the incident by denying her initial claim that the defendant had assaulted her and insisting, to the contrary, that she had injured herself on the date of the reported assault by falling down stairs in her home. We reject each of these claims.

"[W]hen a defendant raises a claim of prosecutorial impropriety, we first must determine whether any impropriety in fact occurred; second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial." (Internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 555–56, 212 A.3d 208 (2019). We first examine each claim separately to determine if any impropriety in fact occurred.

A

The initial focus of the defendant's claim of prosecutorial impropriety is the prosecutor's questioning of the victim on direct examination. In that examination, the defendant claims, for the first time on appeal, that the prosecutor used excessive leading questions to make prejudicial statements of fact before the jury to induce the jury to rely upon such statements as a basis for finding him guilty. He claims, in particular, that the prosecutor used this improper questioning technique to misinform the jury that, despite the victim's testimony to the contrary, she previously had (1) identified the defendant as the male caller who had made self-incriminating statements to Greco, allegedly about this incident, in recorded phone conversations between

them while Greco was incarcerated, and (2) reported to the police that the defendant had threatened her over the phone to induce her to withdraw her allegations against him. We conclude that the defendant has failed to establish any impropriety in the prosecutor's use of leading questions on direct examination of the victim.

Our Supreme Court in *State* v. *Salamon*, 287 Conn. 509, 559, 949 A.2d 1092 (2008), considered a claim of prosecutorial impropriety based upon a prosecutor's allegedly excessive use of leading questions in conducting direct examinations of the state's witnesses at trial. In *Salamon*, although the court ultimately rejected the defendant's claim of prosecutorial impropriety, it explained the rationale for basing such a claim on the excessive use of leading questions on direct examination of the state's witnesses and identified the essential facts that a defendant must prove to prevail on such a claim. As a general rule, the court noted, the use of leading questions on direct examination is prohibited. Id., citing Conn. Code Evid. § 6-8 (b).[5] The court further noted, however, that the general rule is subject to several exceptions, under which the trial court may, in its discretion, allow the use of leading questions on direct examination. Such exceptions include using leading questions to develop the testimony of a witness, to challenge a witness whose testimony has unfairly surprised the party who called the witness to testify, and

[5] Section 6-8 (b) of the Connecticut Code of Evidence provides: "Leading questions shall not be used on the direct or redirect examination of a witness, except that the court may permit leading questions, in its discretion, in circumstances such as, but not limited to, the following: (1) when a party calls a hostile witness or a witness identified with an adverse party; (2) when a witness testifies so as to work a surprise or deceit on the examiner; (3) when necessary to develop a witness' testimony; or (4) when necessary to establish preliminary matters."

"It is axiomatic that trial courts have broad discretion to allow leading questions on direct examination depending upon the circumstances of the individual case." (Internal quotation marks omitted.) *State* v. *Dews*, 87 Conn. App. 63, 86, 864 A.2d 59, cert. denied, 274 Conn. 901, 876 A.2d 13 (2005).

to elicit testimony from a witness who either refuses to answer the direct examiner's nonleading questions due to hostility, or is unable to answer such questions clearly and coherently due to fear, memory loss, confusion, immaturity, or similar problems. See *State* v. *Salamon*, supra, 559; see also Conn. Code Evid. § 6-8 (b), commentary.

The court in *Salamon* first inquired if any of the prosecutor's questions that had been challenged as leading were improper in the evidentiary sense, in that they were objectionable as leading under § 6-8 of the Connecticut Code of Evidence. *State* v. *Salamon*, supra, 287 Conn. 560. In so doing, it determined that all of the prosecutor's leading questions, as to which defense objections on the ground that they were leading, had been overruled were properly permitted under exceptions to the general rule. Id. On that score, it concluded, inter alia, that the trial court properly had permitted the prosecutor to ask leading questions to two of the state's witnesses on direct examination—a frightened teenager who had difficulty answering nonleading questions about the defendant's alleged sexual assault of her, and a witness whose testimony was confusing because his primary language was French. See id. Because all of the leading questions put to those witnesses were proper in the evidentiary sense, the court ruled that no such question could serve as a valid legal basis for establishing a constitutional claim of prosecutorial impropriety based on the prosecutor's allegedly excessive use of leading questions in examining the state's witnesses. See id.

As to several other leading questions in the prosecutor's direct examinations of the state's witnesses, however, the court in *Salamon* found that they had been improper in the evidentiary sense, and thus that defense objections to them on the ground of leading had properly been sustained. See id. Notwithstanding the evidentiary impropriety of such leading questions, however,

the court declined to treat the asking of any such questions as acts of prosecutorial impropriety because the defendant had failed to show that such questions were also improper in the constitutional sense in that they threatened his due process right to a fair trial. Id.

In making its further inquiry as to the possible constitutional impropriety of the prosecutor's leading questions, the court in *Salamon* began by noting that because the answers to all such objectionable questions had been stricken, the only way in which the questions might have threatened the defendant's right to a fair trial was if the mere asking of those questions had posed such a threat. See id. Stating that it had not been given any legal or factual basis for finding that a threat to the defendant's due process right to a fair trial had arisen from the mere asking of the challenged leading questions, the court ruled that such questions had not been constitutionally improper, and thus that the defendant had not satisfied the impropriety prong of his claim of prosecutorial impropriety. See id. Accordingly, the court rejected the defendant's claim without reaching or deciding the prejudice prong of that claim. The upshot of *Salamon* is that to establish the impropriety prong of a claim of prosecutorial impropriety based on a prosecutor's allegedly excessive use of leading questions on direct examination of the state's witnesses, the defendant must prove not only that such questioning was improper in the evidentiary sense but that it was improper in the constitutional sense as well because it threatened his due process right to a fair trial.

Salamon offered no fixed list of circumstances in which a prosecutor's improper use of leading questions on direct examination could, potentially, be found to threaten the defendant's right to a fair trial and, thus, to constitute an act of prosecutorial impropriety. Our case law, however, and that of our sister jurisdictions, furnish several useful examples of such circumstances, including, but not limited to, repeatedly asking

improper leading questions after defense objections to those questions have been sustained,[6] asking questions stating facts that the prosecutor has no good faith basis to believe are true,[7] asking questions referencing prejudicial material that the prosecutor has no good faith basis to believe is relevant and otherwise admissible at trial,[8] calling a known uncooperative witness to testify for the purpose of putting the witness' prior inconsistent statements before the jury, ostensibly to impeach the witness, but actually to induce the jury to make substantive use of such prior inconsistent statements in deciding the issues before them,[9] and asking leading questions in such a way as to induce the jury to rely upon the truth of the factual statements made

[6] See *Locken* v. *United States*, 383 F.2d 340, 341 (9th Cir. 1967) (prosecutor engaged in multiple improprieties, including continuing to ask leading questions despite sustained objections by court); *People* v. *Rosa*, 108 App. Div. 2d 531, 536–40, 489 N.Y.S. 2d 722 (1985); id., 537 (court focused on cumulative impact of many prosecutorial improprieties, including continually repeating questions on both direct and cross-examination after objections had been sustained, "shouting at the defendant's wife," "protest[ing] the [c]ourt's adverse rulings" in inappropriate manner, communicating nonverbally to jury demonstrating his contempt for defendant, vouching for witness' credibility, putting facts before jury that were not introduced into evidence, and asking irrelevant questions to prejudice defendant); *State* v. *Torres*, 16 Wn. App. 254, 257–58, 554 P.2d 1069 (1976) (court focused on amount of repetition).

[7] See *State* v. *Barnes*, 232 Conn. 740, 747, 657 A.2d 611 (1995) ("[a] good faith basis on the part of examining counsel as to the truth of the matter contained in questions propounded to a witness on cross-examination is required" (internal quotation marks omitted)).

[8] See *Dakin* v. *State*, 632 S.W.2d 864, 866 (Tex. App. 1982) (court overturned conviction when presented with record that contained "numerous attempts by the prosecutor to present harmful facts, unsupported by the evidence, to the jury in the form of questions").

[9] See *State* v. *Williams*, 204 Conn. 523, 530, 529 A.2d 653 (1987). In *Williams*, our Supreme Court held that it recently had moved away from the common-law rule that a party could not impeach its own witness but explained: "By this holding, however, we did not mean to intimate that a state's attorney enjoys unfettered discretion in calling a witness and impeaching [his] credibility by use of inconsistent statements. The prosecution may not use a prior inconsistent statement under the guise of impeachment for the primary purpose of placing before the jury evidence which is admissible only for credibility purposes in [the] hope that the jury will use it substantively." (Internal quotation marks omitted.) Id.

in them, even if the witness denied that such statements were true.[10]

In the present case, unlike in *Salamon*, the defendant objected to only one of the several leading questions on which he bases his present claim of prosecutorial impropriety. As a result, the trial court made only one ruling as to the evidentiary propriety of one of the prosecutor's allegedly leading questions. Although the court overruled that objection, it did not treat the objection as a continuing one or otherwise suggest, much less rule, that any further objections on the ground of leading would be unnecessary, unwelcome, or futile. Accordingly, it remained the defendant's responsibility throughout the victim's direct examination to object to any question he wanted to preclude on the ground of leading. His failure to do so permitted the answer to each such question to stand and be given whatever weight the jury chose to give it in deciding the issues before it. It also operated as a waiver of any claim of evidentiary error, on the ground of improperly leading, that the defendant might otherwise have raised on appeal.

Here, of course, the defendant does not raise a nonconstitutional claim of evidentiary error but a constitutional claim of prosecutorial impropriety. Such a claim is not waived on appeal as a result of defense counsel's failure to raise it at trial, although defense counsel's failure to object to the underlying conduct, or to ask

[10] Although the following cases are not explicit examples of a court determining that a prosecutor committed improprieties, they are useful in developing our understanding of colorable claims of prosecutorial impropriety on the basis of leading questions. *State* v. *Stevenson*, 269 Conn. 563, 587, 849 A.2d 626 (2004) ("[t]he privilege of counsel in addressing the jury . . . must never be used as a license to state, or to comment upon, or even to suggest an inference from, facts not in evidence, or to present matters which the jury [has] no right to consider" (internal quotation marks omitted)); *State* v. *Ross*, 151 Conn. App. 687, 694, 95 A.3d 1208 ("the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case" (internal quotation marks omitted)), cert. denied, 314 Conn. 926, 101 A.3d 271 (2014).

that appropriate curative measures be taken to lessen any prejudice potentially arising from it, is strong evidence that the conduct did not truly threaten his client's right to a fair trial. See *State* v. *Stevenson*, 269 Conn. 563, 576, 849 A.2d 626 (2004) ("[w]e emphasize the responsibility of defense counsel, at the very least, to object to perceived prosecutorial improprieties as they occur at trial, and we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was unfair in light of the record of the case at the time" (internal quotation marks omitted)). Accordingly, we must examine each sequence of leading questions now challenged to determine, as the court did in *Salamon*, if it satisfied the impropriety prong of a claim of prosecutorial impropriety because it was improper both in the evidentiary sense—because it was objectionable as leading—and in the constitutional sense—because it threatened the defendant's due process right to a fair trial. For the following reasons, we conclude that none of the questioning sequences here challenged constituted an act of prosecutorial impropriety under *Salamon*.

The defendant first claims that the prosecutor improperly asked the victim leading questions without obtaining the court's permission to do so or establishing any valid legal basis for so doing. This claim is meritless because, as the defendant ultimately conceded at oral argument before this court, the victim was demonstrably hostile to the prosecution throughout her testimony.[11] See Conn. Code Evid. § 6-8 (b). Further-

[11] The defendant's concession was well-founded. Almost as soon as the victim began testifying, she presented herself as a hostile and uncooperative witness. Within the first few questions posed to the victim, it was clear that she did not want to testify. In fact, she stated, "I don't really want to be here." When asked to identify herself in a photograph, she, at first, refused, and then said that it "[c]ould be me . . . ." Throughout her testimony, the court admonished her more than twenty-one times for not answering the prosecutor's questions, not answering the particular question posed, not

more, the law of evidence is not self-executing. A judicial determination as to the propriety of asking leading questions on direct examination can be made only when a party opposing such questions objects to them as leading at trial. In the absence of such an objection, the court had no sua sponte right or duty to intervene. Therefore, no advance judicial determination as to the propriety of the prosecutor's leading questioning was required. See E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 6.19.4, p. 360 ("A party may lead its own witness whom the court has found to be hostile or who has so testified as to work a surprise or deceit on the examiner. . . . Although not essential, an express finding of surprise or hostility by the court is the better practice." (Citations omitted; internal quotation marks omitted.)).

The defendant next claims that the prosecutor identified the victim's injuries in a leading question before any evidence listing or describing those injuries had been introduced.[12] This claim fails, however, both in the evidentiary sense and in the constitutional sense, for two reasons. First, it is not improper for a prosecutor, when using leading questions to examine a hostile witness, to include facts in those questions—as to which no other evidence has yet been introduced—as long as the prosecutor has a good faith basis for believing that such facts are true. Here, defense counsel conceded at oral argument before this court that he was making no claim that the prosecutor lacked a good faith basis for asking any of his challenged leading questions. Second, the defendant's claim is unsupported

audibly responding, and not speaking clearly and loudly enough for the jury to hear.

[12] The defendant explains: "Rather than [the victim] testifying that she suffered a missing tooth or a broken bone, the prosecutor, through the questioning, stated the witness' injuries . . . and, significantly, the witness never confirmed that information. The prosecutor was, in effect, using his own leading question as evidence that the witness had testified in a certain manner when the record demonstrates that she had not." (Citation omitted.)

by the record because substantial testimony and other evidence regarding the victim's injuries were introduced both before and after the victim testified at trial. Such evidence included both the victim's hospital records, which documented her injuries as her treaters had seen and described them, and the responding officers' body camera videos that confirmed those injuries by showing the victim's swollen and bloodied face. The challenged questions were thus not improper, either in the evidentiary sense or in the constitutional sense, as required to establish the impropriety prong of a claim of prosecutorial impropriety under *Salamon*.

The defendant further claims that it was improper for the prosecutor to respond to the victim's revised version of events—that she had sustained her injuries by falling down stairs—with questions such as, "[o]h, you're claiming you fell," and, "[o]h, you fell down the stairs. Is that what you're saying now?" The defendant argues that the prosecutor, by asking such questions, "indicated to the jury not only that the witness had changed her story from the one she gave on the police body cam[era] footage (which had not yet been introduced) or in her written statement to the police (also not yet introduced), but that she changed her story frequently." This claim, however, is meritless. Before the victim testified that she had injured herself on the day of the reported incident—by falling down stairs in her home—the jury had in fact seen her on the responding police officers' body camera recordings telling the officers that the defendant had caused those injuries by breaking into her home and beating her up. The jury thus had ample reason to know that the victim had changed her story before the prosecutor asked her leading questions so suggesting on direct examination. The questions were not improper because they did not introduce any facts into the record that had not been introduced through other witnesses or had not been supported by proper inferences that the jury reasonably could have drawn from the evidence before it.

The defendant also raises claims of impropriety as to two other sequences of leading questions that the prosecutor asked the victim on direct examination. The defendant argues that the prosecutor asked such questions for the improper purpose of inducing the jury to accept as true and to rely upon the statements of fact included in those questions, even though the witness denied such statements and there was no other evidence to support them. The first such challenged sequence of leading questions concerned the victim's ability to identify the defendant as the male caller whose voice could be heard on the department's recording of Greco's jailhouse phone conversations admitting that he "fucked up" by kicking down the door to his "bitch['s] house" and fighting. This challenged sequence of leading questions in the prosecutor's direct examination of the victim was as follows:

"Q. Did you listen to an audio recording—a tape of a man speaking with a woman? Did you remember hearing that in our offices?

"A. Umm—

"Q. Yes?

"A. I heard a video of a man—

"Q. An audio. It's a tape on a computer. You heard an audiotape on a computer?

"A. Yes, I heard—

"Q. Who was the man on that tape?

"A. I'm sorry?

"Q. Who was the man speaking—

"A. Can you tell me who the man was?

"Q. No. Didn't you tell us who the man was?

"A. I'm sorry?

"Q. You don't remember telling us who the man was?

"A. No."

The defendant claims that this sequence of leading questions threatened his due process right to a fair trial by suggesting to the jury, without supporting evidence, that the victim had previously stated that the defendant was the male caller whose voice could be heard on the recording of Greco's jailhouse phone conversations while Greco was incarcerated at York. Such a suggestion, he asserts, was especially damaging because, apart from the prosecutor's suggestion, there was nothing in the record tending to identify him as that male caller who had made several potentially damaging statements to Greco about his involvement in an incident very similar, if not identical, to the one the victim initially had reported.

To reiterate, despite the defendant's initial claim that the prosecutor did not lay a foundation for asking the victim leading questions on direct examination based on her hostility to the prosecution, the record is replete with evidence to the contrary, as the defendant's appellate counsel conceded at oral argument before this court. Counsel also conceded at oral argument that he was making no claim that the prosecutor lacked a good faith basis for asking any of the challenged leading questions. In light of those concessions, the defendant was left with no basis for claiming that the substance of the prosecutor's leading questions should not have come before the jury, except that they were asked in such a way as to induce the jury to accept and rely on the truth of the facts stated in them even if the victim denied them.

The defendant, however, has pointed to nothing in the challenged questions that appealed to the jury to accept the prosecutor's statements as true even if the witness should deny them, as in fact she did. The questions were brief and to the point, and the prosecutor

did not suggest that he was in possession of evidence outside of the record that independently established the truth of the facts stated in them. Moreover, the ultimate inference supported by such statements of fact—that the defendant was the male caller who had admitted his involvement in an incident very similar, if not identical, to the incident here at issue—was supported by substantial evidence, making it highly unlikely that the prosecutor's mere asking of the challenged leading questions would cause the jury to draw that inference. Among such evidence was testimony that the caller was a male who called Greco, the defendant's girlfriend, "babe" or "baby," and whom Greco called by the defendant's initial, "N"; the caller used a phone that was registered to the defendant in his own name and at his mother's address; the caller's first statements to Greco about a similar incident were made on the day after the incident reported by the victim; the caller noted in his first call about the incident that he had spent time on the evening of that incident with a friend named "Little Joe" before going to and kicking down the door of "[his] bitch['s] house"; and the defendant's defense at trial was that he had spent that very evening with a friend named "Little Joe."

Considered in light of that evidence, it was not constitutionally improper for the prosecutor to pose leading questions to the victim, a hostile witness, about whether she had previously identified the defendant as the male caller who had made the damaging admissions to Greco in the recorded phone conversations.

The defendant finally claims that the prosecutor's use of leading questions threatened his due process right to a fair trial by suggesting to the jury that he had phoned the victim and threatened her to induce her to withdraw her accusations against him.[13] The sequence

[13] In this vein, the defendant also claims that the prosecutor improperly used leading questions to demonize the defendant and to express his opinion about the defendant's guilt. For example, the defendant cites the following

of questions upon which he bases this claim was as follows:

"[The Prosecutor]: On January 27, 2016, in the afternoon, did you call Officer [Bruce] Lovallo and tell him that you had received a phone call from [the defendant]?

"[The Victim]: No.

"[The Prosecutor]: And did you relay to the officer what [the defendant] told you?

"[The Victim]: No.

"[The Prosecutor]: And that you gave the police officers [the defendant's] phone number?

"[The Victim]: No, I did not.

"[The Prosecutor]: And that [the defendant's] conversation with you was, in essence, a threat?

"[The Victim]: No, I did not, because I was never threatened by him. So—ever.

"[The Prosecutor]: And do you recall coming to court the day that the defendant filed a motion with [the] court that he wanted his trial to go forward? And you, all of a sudden that day, showed up and asked the state [to have] the charges dropped?

"[The Victim]: I'm sorry?

question by the prosecutor: "[W]hen [the defendant] was assaulting you, did he have permission to stay in your house?" The defendant argues that this was improper because the victim did not answer the question, which left "the prosecutor's assertion that [the defendant] was, in fact, assaulting her as the only testimony the jury heard on the subject." This claim can be quickly rejected because it has absolutely no support in the record. The majority of the victim's prior statements identifying the defendant as her attacker had already been admitted for substantive purposes prior to the victim's testimony. Therefore, because the defendant's claim lacks any factual basis, we determine that there was no evidentiary impropriety as to this claim.

"[The Prosecutor]: Do you recall coming by on a day, uninvited. We didn't request that you come by. And you came by as a surprise. And you came by to tell us that you wanted the charges dropped?

"[The Victim]: No. I have not even spoken with him or any of his—anybody about this case at all. So, that is false."

The defendant claims that, by posing these questions to the victim, the prosecutor introduced evidence of uncharged misconduct concerning the defendant "to insinuate that [he] had engaged in tactics designed to threaten and intimidate [the victim] and prevent her from testifying truthfully." Such questions, the defendant claims, were improper because they suggested to the jury that the prosecutor had knowledge of the defendant's threatening call, and thus that they should rely upon his statements about the call, even in the absence of supporting evidence, as a basis for finding the defendant guilty.

To reiterate, however, it is proper for a prosecutor to lead a hostile witness about matters not yet in evidence as long as the prosecutor has a good faith basis for believing in the truth of the facts suggested by his questions and for believing that such facts, if the witness admits them, will be relevant and otherwise admissible at trial. Such leading questioning is proper unless the prosecutor asks the questions in such a manner as to vouch for the truthfulness of the statements of fact included in them or otherwise to urge the fact finder to rely on the truth of those statements in reaching a verdict, even if the witness denies them and there is no other evidence in the record to support them.

By this standard, the prosecutor's challenged questions about the defendant's alleged threatening phone call to the victim were proper for several reasons. First, such questions were properly put to the witness in leading form because of the witness' hostility to the

prosecution. Second, the defendant admittedly did not challenge the prosecutor's good faith basis for asking any of his leading questions at trial. Third, there is nothing about the substance of the questions or the manner in which the prosecutor asked them that did any more than ask the witness to admit or deny the truth of the statements concerning her alleged receipt of a threatening phone call from the defendant and her later report of that phone call to the police. The prosecutor did not vouch for the truth of the facts so suggested or ask questions in such a way as to suggest that he personally disbelieved her denials or had extrinsic evidence to contradict those denials. Rather, as with any questioning sequence that a questioner is permitted to use in examining an adverse witness without having the right to contradict the witness if the witness should deny the truth of his suggestions, the prosecutor simply posed his questions to the witness and let the matter drop when she answered them in the negative. See, e.g., *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 128, 124 A.3d 501 (2015) ("[T]he only way to prove misconduct of a witness for impeachment purposes is through examination of the witness. . . . The party examining the witness must accept the witness' answers about a particular act of misconduct and may not use extrinsic evidence to contradict the witness' answers." (Citation omitted; internal quotation marks omitted.)); see also *Martyn* v. *Donlin*, 151 Conn. 402, 407–408, 198 A.2d 700 (1964) (extrinsic evidence inadmissible to prove particular acts of misconduct going solely to witness' veracity).

In this case, the defendant has not challenged the prosecutor's good faith basis for asking the victim about the defendant's alleged threatening phone call. Given that the prosecutor's questions were limited to asking the witness if she had received such a call and reported it, without improperly vouching for the truth of any suggestion, there was no constitutional impropriety in

asking the victim about it. See, e.g., *State* v. *Barnes*, 232 Conn. 740, 747, 657 A.2d 611 (1995) ("[a] cross-examiner may inquire into the motivation of a witness if he or she has a good faith belief that a factual predicate for the question exists"). Accordingly, we reject the defendant's final claim of prosecutorial impropriety, which was based upon the prosecutor's alleged use of excessive leading questions on direct examination of the state's witness.

B

The defendant next claims that the prosecutor improperly refreshed the recollection of a witness. Specifically, he argues that the prosecutor improperly refreshed Officer Steven Luciano's recollection on direct examination by showing him a document different than the one he purported to show the officer for that purpose. We disagree, concluding that this aspect of the defendant's claim of prosecutorial impropriety is unsupported by the record before us.

The following facts are relevant to this claim. The prosecutor, as previously noted, sought to introduce certain department recordings of phone conversations between the defendant's incarcerated girlfriend, Greco, and a male caller the prosecutor claimed to be the defendant, who was then using a cell phone with the same number as that which the victim had told the police was the defendant's number. In order to connect the defendant to the recordings, which contained self-incriminating statements by the male caller that the prosecutor claimed to concern the assault at issue in this case, the prosecutor questioned Officer Luciano about the address that the defendant had given when he was arrested to demonstrate that it was the same address as the one listed by the cell service provider in the billing account information for the male caller's cell phone. To that end, the prosecutor asked the following sequence of questions to Officer Luciano concerning

the address that the defendant had provided when the officer arrested him:

"Q. And do you recall the address he gave you?

"A. At the time of arrest?

"Q. Yes.

"A. No, I do not. I don't recall.

"Q. Okay. Just a moment. . . .

"Q. Did you prepare arrest police reports?

"A. I did. . . .

"Q. All right. So, if I were to show you this part of the police report, is it enough to refresh your recollection as to the address that [the defendant] gave you at the time of your arrest?

"A. Yes it does.

"Q. And what address was that?

"A. 126 North Water Street, Greenwich, Connecticut.

"Q. The same address that the phone records would go to?

"A. Correct."

The defendant claims that the prosecutor's refreshing of the officer's recollection was improper because none of the police reports he authored in this case listed the defendant's address as "126 North Water Street, Greenwich, Connecticut . . . ." The defendant therefore claims that the prosecutor improperly must have shown the officer a document different than the one mentioned in his question, ostensibly on the basis of his refreshed recollection.

"A [witness'] memory may be refreshed by any memorandum, object, picture, sound, or smell that can in fact stimulate present recollection." E. Prescott, supra, § 6.21.2, p. 364. "Any memorandum which can in fact

stimulate the present recollection may be used, whether made by the witness or not, whether it be the original or a copy, or whether made at the time of the events testified to or not." (Internal quotation marks omitted.) *State* v. *Rado*, 172 Conn. 74, 79, 372 A.2d 159 (1976), cert. denied, 430 U.S. 918, 97 S. Ct. 1335, 51 L. Ed. 2d 598 (1977). "The procedure for refreshing the recollection of a witness who has taken the [witness] stand ordinarily entails counsel['s] . . . hand[ing] her a memorandum to inspect for the purpose of refreshing her recollection, with the result that when she speaks from memory thus revived, her testimony is what she says, not the writing. . . . A safeguard to this procedure is the rule which entitles the adverse party, when the witness seeks to resort to the memorandum, to inspect the memorandum so that she may object to its use if ground appears, and to have the memorandum available for her reference in cross-examinat[ion] . . . . With the memorandum before her, the cross-examiner has a good opportunity to test the credibility of the [witness'] claim that her memory has been revived, and to search out any discrepancies between the writing and the testimony." (Citation omitted; internal quotation marks omitted.) *State* v. *Bruno*, 236 Conn. 514, 535, 673 A.2d 1117 (1996).

Although the defendant acknowledges that a witness' memory can be refreshed with any document, he argues that the prosecutor misled the court, the jury, and defense counsel by explicitly asking Officer Luciano whether he had written any "arrest police reports" that might refresh his recollection as to the address the defendant had given when he was arrested, before handing the officer a document for that purpose. This action, the defendant claims, implied that the document the prosecutor was showing the officer was one of the officer's "arrest police reports . . . ." Such an implication was misleading and improper, the defendant claims, because he later discovered, upon subsequent

investigation, that the officer had not written any police reports in this case that contained the defendant's Greenwich address.

So presented, this claim has two fatal flaws that prevent us from reviewing it. First, apart from the defendant's own unsubstantiated representations concerning the results of the subsequent investigation he claims to have been conducted as to the contents of Officer Luciano's police reports in this case, there is no basis in the record for establishing that Officer Luciano did not in fact prepare a police report listing the defendant's Greenwich address in this case. Second, while this appeal was pending, the defendant did not move to reconstruct the trial court record to identify the document that was used to refresh the witness' recollection. As a result, we have no factual basis on which to rely in assessing this claim. Because we cannot rely on the representations of counsel to establish the factual basis for a claim on appeal, we cannot review this unsupported aspect of the defendant's prosecutorial impropriety claim.

"The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." *State* v. *Golding*, 213 Conn. 233, 240, 567 A.2d 823 (1989). Because the record is inadequate to determine what document was used to refresh the witness' memory, we cannot determine whether any impropriety has occurred.

C

The defendant also claims that, during closing argument, the prosecutor improperly argued facts that were

not in evidence. Specifically, the defendant claims that the prosecutor improperly attempted to explain the victim's inconsistent statements as to how she had suffered the injuries she initially accused the defendant of inflicting upon her by arguing, without supporting evidence, that the defendant had threatened her before trial and thereby caused her to deny her prior allegations against him. We disagree.

The defendant argues that the following statement by the prosecutor regarding the victim's inconsistent testimony was improper: "[I]f you set aside that inconsistency and you choose to look at the evidence that [the victim] gave in the very beginning, when she was not under the influence of other people, when no one had an opportunity to persuade her and ask and beg her or induce her to change her testimony, what did [the victim] say?" The defendant claims that this statement was improper because no evidence was introduced at trial showing why the victim had changed her story. The defendant claims that the only statement by a trial participant suggesting that the victim had changed her story because the defendant had influenced her to do so was that of the prosecutor when he asked the victim, in a leading question she answered in the negative, if she had informed one of the investigating police officers that the defendant had threatened her in a phone call. That question, as previously noted, was asked during the following portion of the prosecutor's direct examination of the victim:

"Q. On January 27th, 2016, in the afternoon, did you call Officer Lovallo and tell him that you had received a phone call from [the defendant]?

"A. No.

"Q. And did you relay to the officer what [the defendant] told you?

"A. No.

"Q. And that you gave the police officers [the defendant's] phone number?

"A. No, I did not.

"Q. And that [the defendant's] conversation with you was, in essence, a threat?

"A. No, I did not because I was never threatened by him. So—ever."

The defendant argues that the prosecutor's comments during closing argument "harkened back" to the foregoing colloquy because the prosecutor thereby insinuated that the defendant's alleged threat had influenced the victim's testimony. Because the victim denied that the defendant had ever threatened her and no other witness testified to such a threat, the defendant insists that there was no evidence in the record to support the prosecutor's argument that the victim changed her story because of the defendant's threat.

"It is well settled that, in addressing the jury, [c]ounsel must be allowed a generous latitude in argument . . . . The parameters of the term zealous advocacy are also well settled. The prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions. . . . [I]t does not follow . . . that every use of rhetorical language or device is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Furthermore, this court realizes that the credibility of the witnesses was central to the case. [The jury] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *State* v. *Williams*, 81 Conn. App. 1, 8–9, 838 A.2d 214, cert. denied, 268 Conn. 904, 845 A.2d 409 (2004).

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument. . . . Our case law reflects the expectation that jurors will not only weigh conflicting evidence and resolve issues of credibility as they resolve factual issues, but also that they will consider evidence on the basis of their common sense. Jurors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." (Internal quotation marks omitted.) Id., 13. "A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence." *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002).

The defendant's claim that the prosecutor's comments during closing argument were improper fails for several reasons. First, contrary to the defendant's argument on appeal, the prosecutor's challenged comments did not refer to or make substantive use of any of the statements of fact set forth in his leading questions to the victim, all of which the victim had denied. Whereas the prosecutor's leading questions had suggested that

the victim had received a threatening phone call from the defendant, which she later reported to the police, his closing argument made no reference to any such phone call, or to the report of such a phone call to the police. Instead, the prosecutor asked the jury more generally to consider the difference in circumstances between the time when the victim first reported the incident and the later time when she testified at trial. In this regard, the prosecutor suggested only that the jury should consider the victim's original statements to be more credible than her trial testimony because those statements, unlike her testimony, had been made in the immediate aftermath of the incident, while she was in the presence of her neighbors, her medical treaters, and the police, before anyone with an interest in causing her to change her story had yet had a chance to try to influence her to do so. The jury had been shown the body camera recordings of the victim, seriously injured, upset, and crying, as she reported the assault to the responding officers and pleaded with them not to tell the defendant that she had called for their assistance. The jury had also reviewed the victim's medical records, in which her medical treaters had described her injuries and recorded her very similar account of how she had received them at the hands of the defendant. Furthermore, the jury had read the victim's signed written statement concerning the incident, in which, once again, she had accused the defendant of assaulting her and requested that a protective order be issued against him.

In view of the consistency of the victim's initial allegations that the defendant had assaulted her and the strength of the evidence supporting those allegations, her surprising withdrawal of those allegations at trial surely required an explanation. To make sense of this uncorroborated change in the victim's story, the jury reasonably could have inferred that something significant had happened to bring about that change. Although the jury had no evidence before it about any contact

between the defendant and the victim, other than the assault itself, it had heard from her initial report that the defendant had brutally beaten her and that she was very much afraid of him, as evidenced by her plea that the police not tell the defendant that she had called them and by her request for a protective order. With or without an explicit threat to her well-being if she persisted in accusing him of crimes that could result in his long-term incarceration, her fear was so great that any suggestion of such a threat, real or imagined, could have caused the victim to back away from her story to avoid courting disaster in the future. Her vulnerability to his violence, and her fear of such violence in light of its painful consequences, which she claimed to have experienced, could reasonably have been inferred to be the motivating force behind her wholesale abandonment of her original allegations against the defendant at the time of trial. The prosecutor's argument as to the reasons for the victim's change in story was proper because it merely pointed out and drew upon her harrowing experience with the defendant, the understandable fear it had aroused in her, and the logical effects it may have had on her desire to testify against him. See *State* v. *Fauci*, 282 Conn. 23, 45–46, 917 A.2d 978 (2007) ("As we previously have noted, [w]e must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade [it] to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. . . . In other words, a prosecutor's remarks are not improper when they underscore an inference, on the basis of the evidence presented at trial, that the jury could have drawn on its own." (Citation omitted; internal quotation marks omitted.))

Additionally, the defendant did not object to the prosecutor's argument at trial. A defendant's failure to object to an alleged impropriety strongly suggests that his

counsel did not perceive the argument to be improper. If counsel did not believe that the argument was improper at the time, it is difficult for this court, on review, to reach a contrary conclusion. Our Supreme Court in *State* v. *Stevenson*, supra, 269 Conn. 576, expressly addressed the impact of a defendant's failure to object at trial to what he later claimed to have been an act of prosecutorial impropriety: "We emphasize the responsibility of defense counsel, at the very least, to object to perceived prosecutorial improprieties as they occur at trial, and we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was unfair in light of the record of the case at the time." (Internal quotation marks omitted.)

For the foregoing reasons, we conclude that the prosecutor's challenged comments in his closing argument were not acts of prosecutorial impropriety because they were based upon reasonable inferences supported by the evidence. We, therefore, reject this final aspect of the defendant's claim of prosecutorial impropriety.

II

The defendant next claims that the trial court erred by "preventing the defendant from exploring the state's ability to authenticate [the] defendant's voice on the phone recordings." The defendant argues that the state did not offer any evidence "that the voice on the recordings was that of the defendant" and that the "trial court prevented either party from eliciting testimony related to whether witnesses could identify the voices on the recordings." We disagree.

The following additional facts are relevant to this claim. Officer Luciano testified that the victim had provided a known cell phone number for the defendant. While searching for the defendant, Officer Luciano sub-

mitted a request to Sprint, the cell service provider for the phone with that number, for the records associated with that phone. Sprint complied by providing the account information for that phone, which showed that it was a prepaid cell phone that had been registered to "Nector Marrero" of 126 North Water Street, Greenwich, Connecticut, the known address of the defendant's mother.

The prosecutor informed the court in a pretrial hearing that he intended to offer recordings of Greco's prison phone calls into evidence at trial. Defense counsel did not object to the proposed admission of such recordings at that time but noted that he "would just ask for the proper foundation to be laid before" they were introduced.[14] The trial court responded that the recordings would be admitted "subject to the . . . state authenticating [them] . . . ."

During the trial, this matter arose on only two occasions. First, during the direct examination of Officer Luciano, the officer testified that, "the [phone record] [indicated] that it was [the defendant] and, based on his voice, it appeared to be [the defendant] when I heard the recording." When the defendant objected to this answer, a sidebar was held, after which the trial court ordered the officer's testimony identifying the male caller's voice as that of the defendant to be stricken. Neither the ground for the objection nor the basis for the court's ruling was ever put on the record.

Second, the matter arose during the cross-examination of Officer Luciano, when the defendant questioned the officer about his ability to identify the defendant's voice. The following colloquy then occurred:

[14] After a short discussion on the record, defense counsel stated that he did not object to the admission of the first recording, "[g]iven that the—the state will authenticate all the [phone] numbers." The defendant did object to the introduction of a portion of the second recording because it was not relevant and was potentially prejudicial.

"[Defense Counsel]: Okay. You don't know [the defendant's] voice, do you?

"[Officer Luciano]: I've had prior interactions with [the defendant]—

"[Defense Counsel]: Were—

"[Officer Luciano]: —on a positive level.

"[Defense Counsel]: Do you have any kind of expertise in voice analysis?

"[Officer Luciano]: No, I don't.

"[Defense Counsel]: So, you couldn't positively identify a voice on a recording; correct?

"[Officer Luciano]: No.

"[The Court]: Approach bench please.

"(Sidebar)

"[Defense Counsel]: I withdraw the previous question, Your Honor."

The basis for defense counsel's withdrawal of his final question was never put on the record.

"We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence. . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion. . . .

Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." (Citation omitted; internal quotation marks omitted.) *State* v. *Smith*, 179 Conn. App. 734, 761, 181 A.3d 118, cert. denied, 328 Conn. 927, 182 A.3d 637 (2018).

" 'Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court.' Conn. Code Evid. § 1-3 (a). 'The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be.' Conn. Code Evid. § 9-1 (a). The official commentary to § 9-1 (a) of the Code of Evidence provides in relevant part: 'The requirement of authentication applies to all types of evidence, including writings, sound recordings, electronically stored information, real evidence such as a weapon used in the commission of a crime, demonstrative evidence such as a photograph depicting an accident scene, and the like. . . . The category of evidence known as electronically stored information can take various forms. It includes, by way of example only, e-mails, Internet website postings, text messages and "chat room" content, computer stored records and data, and computer generated or enhanced animations and simulations. As with any other form of evidence, a party may use any appropriate method, or combination of methods . . . or any other proof to demonstrate that the proffer is what the proponent claims it to be, to authenticate any particular item of electronically stored information.' " *State* v. *Smith*, supra, 179 Conn. App. 761–62.

Although the defendant admits that he "did not preserve this claim in the classical manner through straightforward objection," he argues that the claim was pre-

served because he did object at the pretrial hearing, and thus the typical reasons for preventing the review of unpreserved claims are not present in this case. The defendant claims that the trial court prevented either side from eliciting testimony regarding authentication, referencing the two statements the court had stricken during Officer Luciano's testimony. The defendant argues that these rulings signaled to defense counsel that it would be futile to continue objecting to such statements. We disagree.

The defendant did raise the issue of authentication during the pretrial hearing. The trial court responded by ruling that the recordings would be admitted subject to authentication by the state. The defendant, however, made no subsequent objections to the recordings when the state introduced them during trial. The defendant did not attempt to voir dire any of the witnesses about the recordings prior to their introduction. The defendant never argued to the court that the state had not yet laid a proper foundation to authenticate the recordings before they were admitted into evidence, nor did he move to strike any testimony concerning the recordings or their contents after realizing that the state had failed to meet its burden of authentication. The only objection occurred when Officer Luciano was being questioned about his ability to identify the male voice on the recordings. That objection was made after the recordings had already been admitted into evidence. Because the basis for the court's ruling to strike Officer Luciano's voice identification of the defendant is not in the record before us, we cannot determine whether the court's decision to strike the testimony was an abuse of its discretion. The defendant does not point to, nor does our review of the record reveal, any other occasions when the court prevented the defendant from questioning the witnesses about the authentication of his voice as that of the male caller on the recordings.

Moreover, not only did the defendant not challenge the introduction of the recordings during trial, he did not challenge the court's decision during the jury's deliberations to give the jurors a transcript of the recordings on which the defendant's name was listed as that of the male caller. Although the court advised the jurors that the transcript was not evidence—that it was meant to serve them only as a guide, and that if anything in the transcript was different from what they had heard in the recording, the recording should prevail—the transcript still went into the jury room by agreement and without objection.[15] The Connecticut Code of Evidence is not self-enforcing. It is incumbent upon lawyers to invoke the rules of evidence in accordance with their own evaluation of any violation they become aware of and of its impact upon their trial strategy. "[W]hen opposing counsel does not object to evidence, it is inappropriate for the trial court to assume the role of advocate and decide that the evidence should be stricken. . . . The court cannot determine if counsel has elected not to object to the evidence for strategic reasons. . . . Experienced litigators utilize the trial technique of not objecting to inadmissible evidence to avoid highlighting it in the minds of the jury. Such court involvement might interfere with defense counsel's tactical decision to avoid highlighting the testimony. When subsequent

[15] The court gave the jury the following instruction: "I instruct you that what is said on each audio recording, state's [exhibits] 7C and 7D, is the evidence. In other words, what's said on the tape, that is the evidence. The transcript of state's exhibit 7C, however, is not evidence and should not be treated as such by you. You are being given a transcript of state's exhibit 7C in order to assist you in understanding what is said on the audiotape. In other words, it's what's said on the tape that's the evidence, not the transcript.

"If you find that the audio recording reflected in state's exhibit 7C is different in some respect than the transcript marked court's exhibit 5, then you must ignore court's exhibit 5 to the extent that it is inconsistent with state's exhibit 7 and—and decide for yourself what you heard on the audio recording, which is included in state's exhibit 7C. It is up to you, as judges of the facts, to decide what is said on state's exhibit 7C and state's exhibit 7D, the audio recordings, and to decide the credibility of that information and to decide how much weight to—to give to such information."

events reveal that it was an imprudent choice, however, the defendant is not entitled to turn the clock back and have [the appellate court] reverse the judgment because the trial court did not, sua sponte, strike the testimony and give the jury a cautionary instruction." (Internal quotation marks omitted.) *State* v. *Elias V.*, 168 Conn. App. 321, 335, 147 A.3d 1102, cert. denied, 323 Conn. 938, 151 A.3d 386 (2016).

Furthermore, the defendant later claimed in closing argument that the state had failed to establish that it was the defendant's voice on the recordings. In his argument, while discussing the recordings, defense counsel stated: "So, we don't know who opened the [cell phone] account. But let's assume [that the defendant] did. We don't know that that's his voice on the recording. No one confirmed that that was his voice on that recording. Nobody came in and said it. No one was asked. Do you know whose voice that is? I mean, that's reasonable doubt, too, because we don't [know] who the heck's voice that is."

Finally, the defendant claims that no witness testified that it was the defendant's voice on the recordings. On the first day of his testimony, however, Officer Luciano, testified, without objection, that the recording was "a phone conversation between Amber Greco and a male, whom I believe to be [the defendant]."

The defendant appears to have made the conscious decision not to seek any remedies available in the trial court to limit damage potentially arising from this question, instead choosing to argue the state's failure to authenticate and identify the voice on the recordings in closing argument as a basis on which the jury could have found him not guilty. "We cannot permit an accused to elect to pursue one course at the trial and then . . . to insist on appeal that the course which he rejected at the trial be reopened to him. . . . [T]he protection which could have been obtained was plainly

waived . . . . The court only followed the course which he himself helped to chart . . . .'' (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 208, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). The failure to object and the decision to argue the state's failure to prove identity on the calls appears to have been a strategic choice. Therefore, we conclude that the trial court did not abuse its discretion in admitting the challenged recordings as it did. Accordingly, we reject the defendant's second claim.

III

The defendant finally claims that the trial court improperly gave a consciousness of guilt instruction to the jury. On appeal, the defendant argues that, because ''the evidence the trial court relied on to grant that [request did] not relate to the defendant's consciousness of guilt as to the alleged criminal conduct here at issue, the trial court erred in granting the instruction.'' We disagree.

The following facts are relevant to this claim. During a charging conference, a consciousness of guilt instruction was proposed. The court provided the prosecutor and defense counsel with a draft of its proposed charge on June 28, 2017. The parties reviewed the draft charge in chambers the next day[16] and, subsequently, a charging conference was conducted on the record.

On the record, defense counsel objected to the proposed instruction, claiming that such an instruction was inappropriate because the defendant had raised an alibi defense. Defense counsel argued: ''[W]e would object to the inclusion of that instruction. The court is aware of what the defense is. Essentially, [the defendant] was not present. So, if he wasn't present, there's nothing to

[16] In chambers, the court made a ''few changes to the draft and added . . . two charges.'' No changes were made to the charge on consciousness of guilt.

consciously be guilty of. So, we would object to the inclusion of that instruction." The prosecutor defended the proposed instruction in two ways. First, he argued that the defendant's avoidance of detection by the police for a great length of time after the incident was reported, despite their active efforts to inquire of his family and friends about his whereabouts, supported an inference of consciousness of guilt and justified the giving of the proposed instruction. Second, he argued that the defendant's alleged comment to Greco that he was going to change his phone number—which he later did—because the police were searching for him supported an inference of consciousness of guilt, and thus the appropriateness of giving the proposed instruction.

The court agreed with the prosecutor that sufficient evidence had been presented to support the giving of a consciousness of guilt instruction, stating: "Well, I recall testimony about the difficulty the authorities had finding [the defendant], about changing a phone number. And . . . I remember the evidence regarding the alleged conversation between [the defendant] and Amber Greco, and that recording is in evidence. And there were certain things said. And I didn't refer to them in the instruction, but it will be up to the state to argue about those statements or acts. And if the jury believes them, they may think that those statements or that conduct is circumstantial evidence indicating guilty knowledge or consciousness of guilt. And if—perhaps there's an innocent reason for those statements or conduct, and if you think there is—if the defense thinks there is one, you're free to argue it. So, in any event, your objection is noted."

During their closing arguments, both the prosecutor and defense counsel addressed whether and how the evidence cited by the court as grounds for instructing the jury on consciousness of guilt actually supported such an inference, and thus whether, and if so how, it

tended to prove him guilty as charged in connection with the alleged break-in and assault reported by the victim. The main focus of these arguments was on the prosecutor's claim that the defendant was the male caller who had made self-incriminating statements to his girlfriend, Greco, about a very similar break-in and assault in recorded phone conversations with her on the defendant's cell phone while she was incarcerated.

In its final charge, the court gave the same instruction on consciousness of guilt it had shown to counsel and approved before closing argument. That instruction read: "In any criminal case, it is permissible for the state to show that conduct or statements made by a defendant after the time of the alleged [offense] may have been influenced by the criminal act; that is, the conduct or statements show a consciousness of guilt. For example, flight, when unexplained, may indicate consciousness of guilt if the facts and the circumstances support it. Such acts or statements, do not, however, raise a presumption of guilt. If you find the evidence proved and also find that the acts or statements were influenced by the criminal act and not by any other reason, you may, but are not required to, infer from this evidence that the defendant was acting from a guilty conscience. It is up to you as judges of the facts to decide whether the defendant's acts or statements, if proved, reflect a consciousness of guilt and to consider such in your deliberations in conformity with these instructions." Defense counsel took a timely exception to that instruction after it was given.

A

As a preliminary matter, we must determine whether the defendant's claim has been preserved for appellate review. Practice Book § 60-5 provides in relevant part: "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent

to the trial. . . .'' ''[T]he purpose of the [preservation requirement] is to alert the court to any claims of error while there is still an opportunity for correction in order to avoid the economic waste and increased court congestion caused by unnecessary retrials.'' (Internal quotation marks omitted.) *State* v. *Ross*, 269 Conn. 213, 335, 849 A.2d 648 (2004).

On appeal, the defendant argues that his claim is preserved because he ''objected to the inclusion of the instruction'' and that the ''trial court noted the defendant's objection.'' The state responds that the defendant's argument ''misunderstands the law regarding preservation of claims.'' The state, citing to Practice Book § 42-16[17] and *State* v. *Tierinni*, 165 Conn. App. 839, 854–55, 140 A.3d 377 (2016), aff'd, 329 Conn. 289, 185 A.3d 591 (2018), contends that ''in order to obtain appellate review, our rules not only require a timely objection, but they require the appellate claim to be distinctly raised.'' Here, the state claims that the defendant's initial objection on the basis of his presentation of an alibi defense is different from his present claim, which is that ''there was no evidence that his evasive conduct related to the charged offenses.''

Although we agree with the state that the claim presented on appeal is different from the defendant's initial objection to the proposed instruction, we conclude that the defendant preserved his present claim for review by excepting to the instruction as the court approved and delivered it. By his exception, the defendant took issue with the court's ruling that the state's consciousness of guilt evidence could appropriately be used to

[17] Practice Book § 42-16 provides: ''An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of exception. The exception shall be taken out of the hearing of the jury.''

support an inference of his guilt as the person who had caused the victim's injuries by breaking into her home and assaulting her. The defendant thereby preserved that very claim for appellate review.

B

Turning to the merits of the defendant's claim, we conclude that his claim fails. It was well within the province of the jury to infer from the evidence before it that the defendant's actions supported an inference that he had a guilty conscience in relation to the incident in which the victim initially reported that he had attacked her, which thus tended to prove him guilty of the crimes charged against him in connection with that incident.

"[Consciousness of guilt] is relevant to show the conduct of an accused, as well as any statement made by him subsequent to an alleged criminal act, which may be inferred to have been influenced by the criminal act. . . . The state of mind which is characterized as guilty consciousness or consciousness of guilt is strong evidence that the person is indeed guilty . . . and under proper safeguards . . . is admissible evidence against an accused." (Internal quotation marks omitted.) *State* v. *Henry*, 76 Conn. App. 515, 547–48, 820 A.2d 1076, cert. denied, 264 Conn. 908, 826 A.2d 178 (2003). "Evidence that an accused has taken some kind of evasive action to avoid detection for a crime, such as flight, concealment of evidence, or a false statement, is ordinarily the basis for a [jury] charge on the inference of consciousness of guilt." (Internal quotation marks omitted.) *State* v. *Grajales*, 181 Conn. App. 440, 448, 186 A.3d 1189, cert. denied, 329 Conn. 910, 186 A.3d 707 (2018).

"Undisputed evidence that a defendant acted because of consciousness of guilt is not required before an instruction is proper. Generally speaking, all that is

required is that the evidence have relevance, and the fact that ambiguities or explanations may exist which tend to rebut an inference of guilt does not render evidence of flight inadmissible but simply constitutes a factor for the jury's consideration. . . . The fact that the evidence might support an innocent explanation as well as an inference of a consciousness of guilt does not make an instruction on flight erroneous. . . . Moreover, [t]he court [is] not required to enumerate all the possible innocent explanations offered by the defendant. . . . Once [relevant] evidence is admitted, if it is sufficient for a jury to infer from it that the defendant had a consciousness of guilt, it is proper for the court to instruct the jury as to how it can use that evidence." (Internal quotation marks omitted.) *State* v. *Pugh*, 190 Conn. App. 794, 814–15, 212 A.3d 787, cert. denied, 333 Conn. 914, 217 A.3d 635 (2019).

"If there is a reasonable view of the evidence that would support an inference that [the defendant fled] because he was guilty of the crime and wanted to evade apprehension—even for a short period of time—then the trial court is within its discretion in giving such an instruction . . . ." *State* v. *Scott*, 270 Conn. 92, 105–106, 851 A.2d 291 (2004), cert. denied, 544 U.S. 987, 125 S. Ct. 1861, 161 L. Ed. 2d 746 (2005).

The record before us demonstrates that there was significant support for a consciousness of guilt instruction in this case. It was before the jury that the defendant had a prior personal relationship with the victim. The jury watched the body camera recordings from the police department on which the jury could see the bloodied victim identifying the defendant as her attacker, explaining that he had come into her house and beaten her. The attending physician who treated the victim testified about her injuries as he had documented them in her medical records. The jury also read the victim's signed, written statement, given at the police

station, in which she had identified the defendant as her attacker. She also stated that she was afraid of the defendant and asked for a protective order against him.

There was also evidence before the jury that the victim had provided officers with the phone number that she knew to be the defendant's. The billing account information for that number showed that the number was registered in the defendant's name at his mother's address. That phone number was the same number used to phone Greco, the defendant's girlfriend.

The jury heard further evidence that the victim was assaulted in the early morning hours of December 27, 2015. The first recorded phone call that the state presented between Greco and the male caller using the defendant's phone number was made the very next day, December 28, 2015. In that phone call, the male caller apologized to Greco, continuously called her "babe" and "baby," and stated that he had done something stupid but that he did not want to describe it over the phone. He said he had gone to "[his] bitch['s]" house and gotten into a fight and that he was sore from it. He also said that the woman he had fought with had called the police, who were probably looking for him at that time, and thus that he might go to jail soon.

The male caller further explained that he had been at "Little Joe's" house on the night he had gotten into the fight. He explained that he was at "Little Joe's" house where he had gotten drunk and was upset because "[his] bitch" had stolen his keys and then he went to her house where he "like kicked in the door and . . . started fighting." At trial, the defendant admitted, by way of his alibi defense, that he had been at the house of Joseph Ferraro—who was known to law enforcement as "Little Joe"—on the night of the assault.

During the second phone call, the male caller, again calling Greco affectionate names and telling her that

he loved her, stated that he was "on the run" as a result of the incident that he had described in a previous phone call. He stated that the police had been looking for him at his friends' and family's homes, although he said that he was being sought in connection with Greco's stolen car, which was the very story the police had been giving to his friends and family to explain why they were looking for him. He finally stated that he had gotten a new phone and was going to change his number after he sent Greco a letter with his new phone number. Shortly after that call, the name on the billing account information for that phone number was changed.

On the basis of the foregoing evidence, we determine that the trial court did not abuse its discretion in instructing the jury on consciousness of guilt. Accordingly, we reject the defendant's final claim.

The judgment is affirmed.

In this opinion the other judges concurred.

PRIME BANK *v.* VITANO, INC.
(AC 42920)

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

Syllabus

The plaintiff bank sought to recover damages from the defendant guarantor in connection with the alleged default by the borrower, A, on a certain promissory note. The defendant had entered into an agreement with the plaintiff providing that the defendant guaranteed payment of all liabilities owed to the plaintiff by A. A ceased making required payments on October 18, 2011, and the plaintiff subsequently obtained a judgment against A. Thereafter, the members of another entity, P Co., agreed to fund the monthly interest payment due on A's note, and did so until October, 2017, but ceased thereafter. The plaintiff then made a demand on the defendant pursuant to the guarantee agreement, which the defendant failed to satisfy, and the plaintiff commenced this action. Following a bench trial, the court rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. *Held:*

1. The trial court properly found that the plaintiff's cause of action to recover from the defendant on its guarantee of A's note accrued on October 18, 2011, and, therefore, was barred by the applicable six year statute of limitations (§ 52-576): the court found that, by the terms of the guarantee, A's default on October 18, 2011, immediately implicated the guarantee, and, found that the plaintiff was aware that it had a cause of action on October 18, 2011, as evidenced by its October 18, 2011 letter notifying the defendant it was commencing legal action against A and its filing of an action against A; moreover, the language of the guarantee expressly contravened the plaintiff's argument that its action against the defendant did not accrue on A's initial default but, rather, when partial payments by P Co. ceased; furthermore, this court has explicitly held that an action accrues on the date the note becomes due and payable, not the date of the debtor's last installment payment, and this court concluded that this holding should be extended to apply to actions on third-party guarantee agreements.
2. The plaintiff could not prevail on its claim that the trial court erred in failing to conclude that there was an acknowledgment of debt by the defendant, thereby tolling the statute of limitations: although the plaintiff claimed that there was a recognition of the debt, its brief provided no support for what constituted recognition of a debt; moreover, the court found that the reason the members of P Co. promised to pay on A's debt was the plaintiff's threat that it would call all notes owed by the members of P Co., and the plaintiff failed to provide analysis as to how a promise made by members of P Co. for their individual benefits constituted a new promise by the defendant, and, to the extent that the plaintiff presented these arguments as independent bases for establishing the defendant's acknowledgment of the debt, they were inadequately briefed and this court declined to review them; furthermore, the partial payments made on the note by P Co. did not constitute an acknowledgment of the debt by the defendant, as the plaintiff failed to provide any law or adequate analysis to contest the court's finding that P Co. and the defendant were separate legal entities, and it did not support its contention that payments made by a third party can establish an acknowledgment of debt by the defendant.

Argued March 4—officially released June 16, 2020

Procedural History

Action to recover damages for the alleged default by a guarantor on a promissory note, brought to the Superior Court in the judicial district of Ansonia-Milford, where Patriot National Bankcorp, Inc., was substituted as the plaintiff; thereafter, the case was tried to

the court, *Hon. John Moran*, judge trial referee; judgment for the defendant, from which the substitute plaintiff appealed to this court. *Affirmed.*

Stephen R. Bellis, for the appellant (substitute plaintiff).

Adam J. Lyke, with whom were *David C. Pite*, and, on the brief, *Glenn A. Duhl*, for the appellee (defendant).

Opinion

FLYNN, J. The plaintiff, Prime Bank,[1] appeals from the judgment of the trial court rendered in favor of the defendant, Vitano, Inc. The plaintiff claims that the court erred in finding that its cause of action to recover from the defendant on a promissory note accrued on October 18, 2011, and was barred by the statute of limitations in General Statutes § 52-576 on October 18, 2017. The plaintiff also claims that the court erred in failing to conclude that there was an acknowledgement of the debt by the defendant, thereby tolling the statute of limitations. We disagree and affirm the judgment of the trial court.

The following facts, as found by the trial court in its memorandum of decision or as undisputed in the record, and procedural history are relevant to our disposition of this appeal. On July 18, 2008, Anthony Villano entered into an agreement with the plaintiff for a revolving line of credit, as expressed in a "Commercial Demand Revolving Loan Note" (note). The note was payable on demand in the amount of $400,000 and called for monthly interest payments beginning on August 6, 2008, and continuing monthly, with a grace period of ten days.

[1] Prime Bank merged with Patriot National Bankcorp, Inc., in May, 2018, and Patriot National Bankcorp, Inc., was substituted as the plaintiff by the court on November 28, 2018. For ease of reference, we hereinafter refer to Prime Bank as the plaintiff in this opinion.

Contemporaneously with the loan agreement between Anthony Villano and the plaintiff, the defendant, Vitano, Inc., entered into a "Guaranty Agreement by Corporation" (guarantee) and security agreement with the plaintiff.[2] The guarantee provided, inter alia, that the defendant unconditionally guaranteed full and prompt payment of all liabilities owed to the plaintiff by Anthony Villano and that "[u]pon any default of the [b]orrower, the liability of the [defendant] shall be effective immediately and payable on demand without any suit or action against the [b]orrower."[3]

Anthony Villano made monthly interest payments as required under the note through and including September, 2011. He did not make the interest payment required on or before October 18, 2011. That same day, the plaintiff delivered to the defendant a letter stating, "[we] anticipate that it will be necessary for the [b]ank to institute action to collect that note," and that "[the plaintiff] is reserving all rights under guaranty; the failure to join [the defendant] in that action is NOT a waiver of [the plaintiff's] rights under the guaranty." On October 19, 2011, the plaintiff brought an action against Anthony Villano to collect on the note. See *Prime Bank* v. *Villano*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-11-6008180-S (June 26, 2015). Judgment was rendered in favor of the plaintiff and against Anthony Villano in the amount of $421,145.27 plus costs. Id.

On December 14, 2011, Jasper "Jay" Jaser, the plaintiff's then president, attended a meeting of the members

[2] The guarantee and security agreement were signed by Gabriele Villano, the defendant corporation's president, duly authorized. Anthony Villano served as the defendant's vice president and secretary.

[3] The guarantee also included the following relevant provision: "This is a continuing guaranty and shall remain in full force and effect and be binding upon the undersigned until your actual receipt of written notice of its revocation, sent by registered or certified mail . . . ."

of Post Road Plaza, LLC (Post Road),[4] which included Gabriele Villano and Anthony Villano. At this meeting, "its members agreed, at the behest and urging of . . . Jaser . . . to fund the monthly interest payment due on the Anthony Villano note in lieu of [the plaintiff] calling all the notes and debts owed by individual members to [the plaintiff]." Monthly interest payments on the note were made through October, 2017, but ceased thereafter.[5] By letter dated February 13, 2018, the plaintiff made immediate demand on the defendant pursuant to the guarantee agreement for payment of the judgment against Anthony Villano. The defendant failed to satisfy such demand, and the plaintiff instituted the present action against the defendant on April 3, 2018.[6] The defendant filed a motion for summary judgment, which was denied by the court, *Hon. Arthur A. Hiller*, judge trial referee. Subsequently, the defendant filed its answer and special defenses.[7]

On April 24, 2019, following a bench trial, the court, *Hon. John W. Moran*, judge trial referee, rendered judgment in favor of the defendant and found that the plaintiff's claims were barred by the applicable six year statute of limitations, § 52-576. Because it found the plaintiff's action time barred, the court did not reach the defendant's remaining special defenses or the merits of the plaintiff's claims. This appeal followed.

[4] The plaintiff held a second mortgage on Post Road Plaza, a piece of real estate owned by Post Road and of which the defendant was a tenant.

[5] Gabriele Villano signed the checks on behalf of Post Road until his death in 2017.

[6] On March 19, 2018, the plaintiff attached the bank accounts of the defendant by writ of summons and direction for attachment. On April 6, 2018, the defendant filed a motion to dissolve, wherein it requested a hearing to dissolve the prejudgment remedy. On July 9, 2018, after a hearing, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the defendant's motion, stating: "[The] plaintiff lacks probable cause that judgment will issue on its behalf and . . . the plaintiff is ordered to immediately release all funds and property attached."

[7] The defendant's special defenses included the statute of limitations set forth in § 52-576, waiver, estoppel, revocation, and laches.

First, we set forth the applicable standard of review pertaining to the bar of statute of limitations. "Whether a particular action is barred by the statute of limitations is a question of law to which we apply a plenary standard of review." (Internal quotation marks omitted.) *Florian* v. *Lenge*, 91 Conn. App. 268, 279, 880 A.2d 985 (2005). "The factual findings that underpin that question of law, however, will not be disturbed unless shown to be clearly erroneous." *Jarvis* v. *Lieder*, 117 Conn. App. 129, 146, 978 A.2d 106 (2009).

I

The plaintiff first claims that the court improperly sustained the defendant's special defense of statute of limitations based on its finding that the plaintiff's right of action against the defendant accrued when Anthony Villano defaulted on the note on October 18, 2011. Even though the plaintiff demanded payment from Anthony Villano on October 18, 2011, because it did not demand payment from the *defendant* corporation until February 13, 2018, the plaintiff argues that the statute of limitations in which it could file an action against the defendant pursuant to the guarantee should not have begun running until it made a demand on the defendant on February 13, 2018. We disagree.

Section 52-576 (a) provides in relevant part that "[n]o action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ." The parties do not contest the applicability of the statute or the fact that the plaintiff first made demand on the defendant on February 13, 2018. The only contested issue is when the plaintiff's right of action against the defendant on the guarantee accrued. To make such determination, we first look to the guarantee itself.

"The interpretation of continuing guaranties, as of other contracts, is principally a question of the intention of the contracting parties, a question of fact to be deter-

mined by the trier of facts. . . . Even a continuing guarant[ee] that is, in terms, unlimited as to duration, imposes liability upon a guarantor only for such a period of time as is reasonable in light of all of the circumstances of the particular case. . . . The finding of the trial court with respect to the intent of the contracting parties regarding the scope of their contractual commitment is, like any other finding of fact, subject only to limited review on appeal. . . . Our role is limited to determining whether the decision of the trier of facts was clearly erroneous in light of the evidence and the pleadings in the whole record. . . . In determining the parties' intentions, the trial court was entitled to rely on, inter alia, the language of the guarant[ee]." (Citation omitted; internal quotation marks omitted.) *Access Agency, Inc.* v. *Second Consolidated Blimpie Connecticut Realty, Inc.*, 174 Conn. App. 218, 225, 165 A.3d 174 (2017).

The court found that, by the terms of the guarantee, the default by the borrower, Anthony Villano, which had occurred when he failed to make a payment on or before October 18, 2011, immediately implicated the guarantee. In other words, the court interpreted the agreement between the plaintiff and the defendant as one where, as soon as Anthony Villano, as the original borrower, defaulted on a required payment on the note, the defendant, as the guarantor, immediately assumed liability. In its memorandum of decision, the court specifically cited to the provision of the guarantee stating that the "liability of the [guarantor] shall be effective *immediately* and payable on demand without any suit or action against the [b]orrower." (Emphasis added.) Finding that the plaintiff was aware that it had a cause of action on October 18, 2011, as evidenced by its October 18, 2011 letter notifying the defendant it was commencing legal action against Anthony Villano on the note and its filing of an action against Anthony Villano on the same date, the court concluded that the plaintiff's

cause of action against the defendant under the guarantee accrued on October 18, 2011.[8]

"[Our Supreme Court] has stated that, where the guarantee of a note is unconditional or absolute, default of the maker or endorser to pay the note promptly . . . [causes] the guarantor [to] become liable to the holder, and the relation of debtor and creditor was *at once established* between the guarantor and the holder of the note. (Emphasis added; internal quotation marks omitted.) *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 383, 222 A.3d 950 (2020). Furthermore, our Supreme Court has held that "[i]n the case of a continuing guarant[ee], the statute [of limitations] does not commence to run in favor of a guarantor until there is a default in payment by the principal, and a cause of action has accrued against the former." (Internal quotation marks omitted.) *Associated Catalog Merchandisers, Inc.* v. *Chagnon*, 210 Conn. 734, 745–46, 557 A.2d 525 (1989).

The plaintiff argues that because Anthony Villano's loan was effectuated through a demand note, as opposed to a term note,[9] its rights against the defendant somehow expanded. The plaintiff argues: "[The plaintiff] could have demanded the note or guarant[ee] at [any time] after it was signed, whether or not there was

[8] Paul Lutsky, former vice president of the plaintiff and an officer of the substitute plaintiff, as well as Jaser, conceded at trial that the plaintiff was entitled to bring an action against the defendant pursuant to the guarantee immediately upon Anthony Villano's default. See footnote 9 of this opinion.

[9] A demand note is one that is " 'payable on demand' " if it "(i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment." General Statutes § 42a-3-108 (a). In contrast, a term note is one that is " 'payable at a definite time,' " if "it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of (i) prepayment, (ii) acceleration, (iii) extension at the option of the holder, or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event." General Statutes § 42a-3-108 (b).

a default by the borrower. Furthermore, this was not a note with a maturity [date] that required suit within [six] years of the maturity date. The fact that [the plaintiff] demanded the note from [Anthony] Villano did not require them to sue the guarantor. Arguably, [the plaintiff] could have demanded the guarantor pay off the loan [one] week after [the defendant] signed the [g]uarant[ee]. There simply was no contractual requirement to demand the guarantor pay if [the plaintiff] demanded payment from the borrower.'' The plaintiff fails to explain how this distinction affects the fact that it *could* have initiated legal action, which is the relevant consideration for purposes of determining accrual. We find no merit in this argument.

The plaintiff also attempts to argue that Anthony Villano had not defaulted on the note,[10] instead, charac-

[10] We note that the General Statutes do not provide a definition of the term "default." Black's Law Dictionary, however, defines a "default" as "[t]he omission or failure to perform a legal or contractual duty; [especially], the failure to pay a debt when due." Black's Law Dictionary (11th Ed. 2019) p. 526. Additionally, we note that at trial, Paul Lutsky, an officer of the substitute plaintiff, testified that there was indeed a default by Anthony Villano. The following colloquy took place between Lutsky and the defendant's counsel:

"Q. When demand is made by the bank, as it was in October, 2011, or before then according to your complaint, or the bank's complaint, if not paid, then it becomes due and payable and it's in default, isn't that true?

"A. That's true.

"Q. So, you testified I believe several times in response to questioning by the bank's attorney, that your review of the records never indicated a default by Anthony Villano. That is incorrect, isn't it?

"A. Well, subsequent to this date payments were made on the loan.

"Q. They didn't pay the loan in full, correct?

"A. That's correct. It was not paid in full.

"Q. And only paying the loan in full would cure the default, isn't that true?

"A. That's correct.

"Q. So, the default remained, right?

"A. Yes.

* * *

"Q. So, we have established that a default occurred in 2011, right?

"A. Correct, when the note was demanded.

"Q. And that has not ever been cured?

"A. Correct. . . .

"Q. So, in 2011, Prime Bank had every right to sue Vitano, Inc., isn't that true?

"A. Yes, that's true."

terizing his nonpayment as a general breach of contract.[11] In its brief, the plaintiff contends that as a breach of contract action on a guarantee as opposed to a default by the borrower on the note, the cause of action is complete upon the occurrence of the breach, that is, when the injury has been inflicted, which did not occur until October 13, 2017, when partial payments by the third-party separate entity ceased. Accordingly, the plaintiff contends that its action against the defendant did not accrue upon the borrower's initial default but, rather, when the partial interest payments from Post Road ceased.

The guarantee's express language contravenes the plaintiff's argument. It provides expressly that, "[u]pon any default of the [b]orrower, the liability of the [guarantor] shall be effective immediately and payable on demand without any suit or action against the [b]orrower." We conclude that the plaintiff's argument is also contrary to settled case law. "The true test for determining the appropriate date when a statute of limitations begins to run is to establish the time when the plaintiff *first could have successfully maintained an action*. . . . A guarant[ee] is merely a species of contract. . . . In an action for breach of contract, the cause of action is complete upon the occurrence of the breach, that is, when the injury has been inflicted." (Citations omitted; emphasis added; internal quotation marks omitted.) *Garofalo* v. *Squillante*, 60 Conn. App. 687, 694, 760 A.2d 1271 (2000), cert. denied, 255 Conn. 929, 767 A.2d 101 (2001). This occurs when the note is due in full, but remains unpaid. Id. In *Florian* v. *Lenge*, supra, 91 Conn. App. 279, this court explicitly held that an action accrues on the date the note becomes due and payable, not the date of the debtor's last installment

[11] At oral argument before this court, the plaintiff attempted to explain how a default and breach of contract were different. We find no merit in this argument.

payment. Although this holding pertained to an action on the note itself, we conclude that, based on the previously discussed case law, this holding should be extended to apply to actions on third-party guarantee agreements. Here, the plaintiff's action against the defendant accrued when Anthony Villano, as the borrower, failed to make the required payment on the note on October 18, 2011, thus implicating the guarantee agreement between the plaintiff and the defendant, and not when the partial payments of interest by a separate entity ceased on October 13, 2017.

In light of the foregoing, we conclude that the court's finding that the plaintiff's action against the defendant accrued upon Anthony Villano's default on the note, which occurred on October 18, 2011, was not clearly erroneous. As such, it properly held that the six year limitation in which the plaintiff could have brought an action against the defendant upon the guarantee expired on October 18, 2017.

II

The plaintiff next claims that, even if the statute of limitations commenced on October 18, 2011, the court erred in concluding there was no acknowledgement of the debt by the defendant such that the limitation period would be tolled. Specifically, the plaintiff argues that there was (1) an unqualified recognition of the debt by Gabriele Villano and Anthony Villano, (2) a new promise that Post Road would make the monthly payments on the note, and (3) a partial payment of the debt in the form of interest payments by Post Road, all of which constituted an acknowledgement by the defendant of the debt. We disagree.

"We review the trial court's finding [of an acknowledgment of the debt] . . . under a clearly erroneous standard. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . . We do not examine the record to determine

whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Internal quotation marks omitted.) *Alarmax Distributors, Inc.* v. *New Canaan Alarm Co.*, 141 Conn. App. 319, 333, 61 A.3d 1142 (2013).

"The [s]tatute of [l]imitations creates a defense to an action. It does not erase the debt. Hence, the defense can be lost by an unequivocal acknowledgment of the debt, such as a new promise, an unqualified recognition of the debt, or a payment on account. . . . Whether partial payment constitutes unequivocal acknowledgment of the whole debt from which an unconditional promise to pay can be implied thereby tolling the statute of limitations is a question for the trier of fact. . . .

"A general acknowledgment of an indebtedness may be sufficient to remove the bar of the statute. The governing principle is this: The determination of whether a sufficient acknowledgment has been made depends upon proof that the defendant has by an express or implied recognition of the debt voluntarily renounced the protection of the statute. . . . But an implication of a promise to pay cannot arise if it appears that although the debt was directly acknowledged, this acknowledgment was accompanied by expressions which showed that the defendant did not intend to pay it, and did not intend to deprive himself of the right to rely on the [s]tatute of [l]imitations . . . . [A] general acknowledgment may be inferred from acquiescence as well as from silence, as where the existence of the debt has been asserted in the debtor's presence and he did not contradict the assertion." (Internal quotation marks omitted.) *Zatakia* v. *Ecoair Corp.*, 128 Conn. App. 362, 369–70, 18 A.3d 604, cert. denied, 301 Conn. 936, 23 A.3d 729 (2011).

The plaintiff first argues that there was "an unqualified recognition of the debt" by Gabriele Villano and Anthony Villano to Jaser at the Post Road meeting, as revealed through Jaser's testimony. The plaintiff's brief provides no legal support for what constitutes recognition of a debt, or any analysis as to how the testimony that the plaintiff cited in its brief evidences a recognition of debt by the defendant. The plaintiff further argues that "there was a new promise that Post Road . . . would make the monthly payments on [the] loan." Its explanation states merely that "members of [Post Road] at their meeting of December 14, 2011 agreed to the monthly interest payments to [the plaintiff]. . . . [Post Road] continued to make the monthly payments on [the] account." The court found that the reason the members of Post Road authorized the promise to pay on Anthony Villano's debt was the plaintiff's threat that it would "call all notes and/or indebtedness owed by the individual members" and "[t]hese members were financially unable to pay these notes and/or indebtedness if they were called and therefore capitulated in [Jaser's] urging, which they construed as an imminent threat." Although the plaintiff cites a string of cases to support its proposition that "subsequent promises of repayment extend the statute of limitations and the debt," the plaintiff failed to contest the court's finding or provide analysis as to how a promise made by members of the third-party entity Post Road for their individual benefits, constituted a new promise by the *defendant*, Vitano, Inc., for purposes of acknowledgement of its debt. To the extent that the plaintiff presents these two arguments as independent bases for establishing the defendant's acknowledgement of the debt, they are inadequately briefed, and we decline to review them. *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 541, 89 A.3d 938 ("We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere

abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)), cert. denied, 312 Conn. 917, 94 A.3d 642 (2014).

The plaintiff's final basis for the defendant's acknowledgement of debt is the actual partial interest payments made on the note by Post Road. "Whether partial payment constitutes unequivocal acknowledgment of the whole debt from which an unconditional promise to pay can be implied thereby tolling the statute of limitations is a question for the trier of fact." (Internal quotation marks omitted). *Williams Ground Services, Inc.* v. *Jordan*, 174 Conn. App. 247, 252, 166 A.3d 791 (2017). "The mere fact that one knows that another, also obligated to pay the debt, has made payments upon it, without his authorizing, consenting to, or participating in such payments, is not a sufficient basis upon which to base such a recognition." *Broadway Bank & Trust Co.* v. *Longley*, 116 Conn. 557, 563–64, 165 A. 800 (1933).

The court found the following: "[E]ach and every monthly interest payment on the Anthony Villano note was made on a [Post Road] check . . . . These payments were made by a separate and distinct legal entity, namely [Post Road].[12] They were not made by the defendant . . . ." It further found that "all payments made by [Post Road] were for the sole and singular benefit of [Post Road] and/or its members. They were not made

[12] Gerald Butcher, an accountant for Gabriele Villano, the defendant, and Post Road, testified to the following regarding the defendant and Post Road:

"A. Well, they are different legal entities. [The defendant] is a corporation, a C corporation. That was incorporated . . . in 1975, I believe June of 1975. And that has, obviously, stockholders and it has directors and officers. Whereas [Post Road] was organized, I believe, in September of 2006. That is organized as a limited liability company, which has members and managers.

"Q. So, they are two, clearly, distinct and separate legal entities, is that right?

"A. Yes.

"Q. And did [the defendant] ever make a payment on Anthony Villano's $400,000 line of credit personal note with [the plaintiff]?

"A. No, they did not."

for the benefit of the defendant . . . .'' On appeal, the plaintiff simply asserts that ''[t]he fact that [Post Road] made monthly interest payments on the [Anthony] Villano loan is an unequivocal recognition that [the defendant] was liable on the loan.'' The plaintiff seems to suggest that the mere fact that there is a business relationship between the two entities, and the fact that Gabriele Villano was involved in both entities, is sufficient to extend the actions of Post Road into an acknowledgement of the debt by the defendant.[13] Again, the plaintiff fails to provide any law or adequate analysis to contest the court's finding that Post Road and the defendant are separate legal entities. Moreover, the plaintiff does not support its contention that payment made by a third party can establish an acknowledgement of debt by the defendant. Additionally, its suggestion that Gabriele Villano's role in one entity can implicate another is contrary to law. It is well established that ''[a] limited liability company is a distinct legal entity whose existence is separate from its members.'' *Wasko* v. *Farley*, 108 Conn. App. 156, 170, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008). Therefore, Gabriele Villano's dual role as a member of Post Road and an officer of the defendant does not legally tie the two entities together. The corporate veil was never pierced.[14] The defendant was never a member of Post Road, and the defendant did not engage with Post Road in relation to the debt.

In light of the foregoing, we conclude that the trial court properly held that there was no acknowledgement

[13] The extent of the plaintiff's argument is nothing more than a mere recitation of facts, including that Gabriele Villano and Anthony Villano were members of Post Road, Gabriele Villano was the president of the defendant and signed the Post Road checks, the defendant was a tenant of Post Road, and Post Road did not want the plaintiff to demand the guarantee.

[14] In a situation involving multiple business entities, the actions of one can have legal consequences on the other if there was such a unity of interest and ownership that there is effectively no independence between the two. See *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 131–33, 2 A.3d 859 (2010); *Zaist* v. *Olson*, 154 Conn. 563, 576, 227 A.2d 552 (1967).

of the debt by the defendant. Thus, we conclude that the plaintiff has not sustained its burden to show that the court erred in finding that the six year statute of limitations was not tolled, and the plaintiff's ability to bring an action against the defendant was barred on October 18, 2017.

The judgment is affirmed.

In this opinion the other judges concurred.

WELLS FARGO BANK, N.A., TRUSTEE *v.* MICHAEL JOHN MELAHN ET AL.
(AC 39426)

Bright, Moll and Bear, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property of the defendant M, who filed a second amended answer with special defenses and an eight count counterclaim. The counterclaim included claims for, inter alia, violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Thereafter, the plaintiff filed a motion to strike M's special defenses and all eight counts of the counterclaim, which the trial court granted on the grounds of legal insufficiency and that seven of the counterclaims did not relate to the making, validity, or enforcement of the note and mortgage, and, therefore, failed the transaction test. Subsequently, the trial court rendered judgment on the counterclaim in favor of the plaintiff, from which M appealed to this court, which dismissed the appeal in part and affirmed in part. The plaintiff, on the granting of certification, appealed to our Supreme Court, which vacated the judgment of this court and remanded the case to this court with direction to reconsider in light of its decision in *U.S. Bank National Assn.* v. *Blowers* (332 Conn. 656). *Held*:

1. This court dismissed M's appeal from the trial court's striking of the second amended special defenses because that portion of his appeal was not taken from a final judgment.
2. The trial court did not err in striking M's second amended counterclaim and rendering judgment thereon in favor of the plaintiff: at oral argument before this court, M abandoned any claim regarding the trial court's rulings as to the counts of his second amended counterclaim sounding in negligent and intentional misrepresentation, fraud and breach of contract/breach of the implied contract of good faith and fair dealing; moreover, the court properly determined that the defendant failed to allege

sufficient facts to demonstrate CUTPA violations and did not rely on the making, validity or enforcement test in striking the counts of that counterclaim alleging deceptive acts and practices in violation of CUTPA, wanton and reckless violation of M's rights in misrepresentations and omissions made during loan negotiations, and unfair trade practices, and a claim for punitive damages, thus, *Blowers* was not germane to the issue of whether the trial court erred; furthermore, M's allegations that the plaintiff violated the uniform foreclosure standing orders, inter alia, by failing to send him notice of the foreclosure judgment within ten days following the entry thereof did not sufficiently relate to the enforcement of the note or mortgage because the alleged conduct occurred after the foreclosure judgment had been rendered and thus did not arise out of the same transaction as the plaintiff's foreclosure complaint.

Argued January 21—officially released June 16, 2020

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the named defendant was defaulted for failure to appear; thereafter, the court, *Pavia*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Pavia*, *J.*, opened the judgment and granted the motion to dismiss filed by the named defendant; thereafter, the court, *Pavia*, *J.*, granted the plaintiff's motion to reargue and vacated its order of dismissal, and the named defendant appealed to this court, *Gruendel*, *Bear* and *Flynn*, *Js.*, which reversed the trial court's judgment and remanded the matter for further proceedings; subsequently, the named defendant filed amended special defenses and a counterclaim; thereafter, the court, *Russo*, *J.*, granted the plaintiff's motion to strike the amended special defenses and counterclaim and rendered judgment on the counterclaim for the plaintiff, from which the named defendant appealed to this court, *Sheldon*, *Bright* and *Bear*, *Js.*, which dismissed the appeal in part and affirmed the trial court's judgment in part, and the named defendant, on the granting of certification, appealed to our Supreme

Court, which vacated the judgment of this court and remanded the case to this court with direction to reconsider. *Appeal dismissed in part; affirmed in part.*

Ridgely Whitmore Brown, for the appellant (named defendant).

Marissa I. Delinks, for the appellee (plaintiff).

Opinion

MOLL, J. This foreclosure case returns to this court on remand from our Supreme Court. See *Wells Fargo Bank, N.A.* v. *Melahn*, 333 Conn. 923, 218 A.3d 67 (2019). The defendant Michael John Melahn[1] appeals from the judgment of the trial court rendered in favor of the plaintiff, Wells Fargo Bank, N.A., as trustee,[2] on the defendant's stricken second amended counterclaim and the court's striking of the defendant's second amended special defenses. In *Wells Fargo Bank, N.A.* v. *Melahn*, 181 Conn. App. 607, 614, 186 A.3d 1215 (2018), rev'd, 333 Conn. 923, 218 A.3d 67 (2019), this court dismissed, for lack of a final judgment, the portion of the defendant's appeal taken from the striking of his second amended special defenses and affirmed the judgment in all other respects. Thereafter, the defendant petitioned our Supreme Court for certification to appeal. Our Supreme Court granted the defendant's petition, vacated this court's judgment, and remanded the case to this court with direction to reconsider its judgment in light of our Supreme Court's decision in *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 226 (2019). *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 333

[1] The complaint also named Danbury Radiological Associates, P.C., and Danbury Hospital as defendants, but those parties were defaulted for failure to appear and are not participating in this appeal. For purposes of clarity, we will refer to Michael John Melahn as the defendant.

[2] The full name of the plaintiff is Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2007-6, Asset-Backed Certificates, Series 2007-6.

Conn. 923. On remand, we conclude that *Blowers* does not require a different disposition of the appeal. Accordingly, we dismiss, for lack of a final judgment, the appeal as to the striking of the defendant's second amended special defenses, and we affirm the judgment in all other respects.

The following facts and procedural history, as set forth by this court in two prior opinions, are relevant to our resolution of this appeal. "On September 9, 2010, the plaintiff filed an action against the defendant to foreclose a mortgage on certain of his real property. The defendant was defaulted for failure to appear on November 2, 2010. The court rendered a judgment of strict foreclosure on November 22, 2010, with a law day of January 11, 2011. As part of its judgment, the court ordered the plaintiff to 'send notice to nonappearing individual defendants by regular and certified mail in accordance with the standing orders.' Paragraph D of the uniform foreclosure standing orders, form JD-CV-104, provides: 'Within 10 days following the entry of judgment of strict foreclosure the plaintiff must send a letter by certified mail, return receipt requested, and by regular mail, to all non-appearing defendant owners of the equity and a copy of the notice must be sent to the clerk's office. The letter must contain the following information: a.) the letter is being sent by order of the Superior Court; b.) the terms of the judgment of strict foreclosure; c.) non-appearing defendant owner(s) of equity risk the loss of the property if they fail to take steps to protect their interest in the property on or before the defendant owners' law day; d.) non-appearing defendant owner(s) should either file an individual appearance or have counsel file an appearance in order to protect their interest in the equity. The plaintiff must file the return receipt with the Court. The Plaintiff Must Not File A Certificate Of Foreclosure On The Land Records Before Proof Of Mailing Has Been Filed With The

Court.' On November 23, 2010, the court sent notice of the order and judgment to the plaintiff. The plaintiff, however, did not send notice to the defendant until January 7, 2011, four days before his law day, and the certified notice was not delivered to him until January 11, 2011, the actual law day. The notice sent to the then nonappearing defendant also did not contain the important information required by the standing orders, which the court had mandated in its judgment. Despite this deficiency, the plaintiff nevertheless certified to the court that notice had been mailed 'in compliance with Uniform Foreclosure Standing Order JD-CV-79 and JD-CV-104 (d), on January 7, 2011, to all counsel and pro se parties of record to this action . . . .' (Emphasis omitted.)

"On February 22, 2011, after the defendant secured legal representation, his attorney filed an appearance in the case, and, on March 31, 2011, he filed a motion to dismiss the foreclosure action due to the plaintiff's noncompliance with the court's judgment and the false certification. The plaintiff opposed the motion. On July 14, 2011, the court opened the judgment of strict foreclosure and granted the defendant's motion to dismiss, holding that because the plaintiff had 'failed to comply with the notice requirement of the standing orders, the matter is dismissed as to [the defendant]. . . .' On August 24, 2011, the plaintiff filed a motion to reargue, citing the case of *Falls Mill of Vernon Condominium Assn., Inc.* v. *Sudsbury*, 128 Conn. App. 314, 320–21, 15 A.3d 1210 (2011). The defendant objected to the plaintiff's motion and argued that the dismissal was a proper sanction for the plaintiff's failure to adhere to the order contained in the court's judgment and that it filed a false certification. The court granted the plaintiff's motion and concluded that, despite the plaintiff's failure to adhere to the notice requirements contained in the judgment of strict foreclosure, the court was

precluded from opening the judgment and dismissing the action because the law day had passed and title had become absolute in the plaintiff. The court therefore vacated its order granting the defendant's motion to dismiss and then denied the defendant's motion." (Footnotes omitted.) *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 3–6, 85 A.3d 1 (2014). The defendant appealed therefrom. Id., 5–6.

"In [*Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 1], this court, despite the running of the law day, reversed the judgment of strict foreclosure and remanded the case to the trial court because the plaintiff had failed to comply with the foreclosure standing orders by giving timely notice to the defendant of certain important terms of the foreclosure judgment and the adverse consequences of his continued failure to take action. Id., 4, 12–13. Moreover, the plaintiff incorrectly had certified to the court that the required notice had been provided to the defendant when, in fact, it had not been provided. Id., 6, 12–13.

"After the case was remanded to the trial court, the defendant, on June 4, 2015, filed an answer with special defenses and a four count counterclaim, which included a count alleging no specific cause of action, a count alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., a count alleging breach of contract/breach of the implied covenant of good faith and fair dealing, and a count alleging fraudulent or negligent misrepresentation. The plaintiff moved to strike the special defenses and the counterclaim, alleging, in relevant part, that all counts of the counterclaim were legally insufficient. The defendant, thereafter, consented to the granting of that motion.

"On August 28, 2015, the defendant filed an amended answer with special defenses and a four count counterclaim, which included counts for (1) tortious predatory lending and foreclosure practices, (2) a CUTPA viola-

tion, (3) breach of contract/breach of the implied covenant of good faith and fair dealing, and (4) fraudulent and negligent misrepresentation. The plaintiff again moved, in relevant part, to strike all counts of the counterclaim on the ground of legal insufficiency. On September 10, 2015, the court granted the motion to strike.

"On October 26, 2015, the defendant filed a second amended answer with special defenses and an eight count counterclaim. The alleged factual basis for the defendant's counterclaim was, in relevant part, as follows: The defendant, his wife, and his mother-in-law reside in the subject property. The defendant was nonappearing in the initial foreclosure. The plaintiff had failed to comply with the uniform foreclosure standing orders by sending a letter, via regular and certified mail, to the defendant regarding the rendering of judgment. . . . The plaintiff negligently misrepresented facts that induced the defendant to enter into the mortgage and loan agreement, despite the defendant's inability to pay the loan on a long-term basis, and the plaintiff benefited from these misrepresentations. The plaintiff made several misrepresentations that it knew, or should have known, to be false, and, as a result of these misrepresentations, the defendant was harmed.

"On the basis of these alleged facts, the defendant set forth the following numbered counts in his counterclaim: (1) negligent misrepresentation, (2) intentional misrepresentation and fraud, (3) breach of contract/breach of the implied covenant of good faith and fair dealing, (4) a violation of CUTPA, (5) wanton and reckless violation of CUTPA, (6) a violation of CUTPA, (7) a violation of CUTPA with an ascertainable loss, and (8) a violation of CUTPA with punitive damages. The plaintiff objected to the second amended answer with special defenses and counterclaim on the ground that the defendant had failed to comply with Practice Book

(2015) § 10-60 (a).[3] The court sustained the objection and ordered the second amended answer with special defenses and counterclaim stricken.

"On November 12, 2015, the defendant refiled his second amended answer with special defenses and an eight count counterclaim. In response, on November 25, 2015, the plaintiff filed a motion to strike with prejudice the defendant's refiled pleading on the ground that the special defenses and each count of the counterclaim were legally insufficient. The plaintiff alleged, in relevant part, that counts one, two, four, five, six, seven, and eight of the counterclaim failed to allege required elements, and did not relate to the making, validity, or enforcement of the note and mortgage, and that they, therefore, failed the transaction test. . . . As to count three of the counterclaim, the plaintiff alleged that it failed to identify a breach by the plaintiff. The court, in a thorough memorandum of decision, issued on May 20, 2016, granted the plaintiff's motion on the grounds advanced by the plaintiff.

"On June 6, 2016, the defendant filed an 'amendment of counterclaim after motion to strike,' which sought

[3] "Practice Book (2015) § 10-60 (a) provides: 'Except as provided in Section 10-66, a party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner:

" '(1) By order of judicial authority; or

" '(2) By written consent of the adverse party; or

" '(3) By filing a request for leave to file such amendment, with the amendment appended, after service upon each party as provided by Sections 10-12 through 10-17, and with proof of service endorsed thereon. If no objection thereto has been filed by any party within fifteen days from the date of the filing of said request, the amendment shall be deemed to have been filed by consent of the adverse party. If an opposing party shall have objection to any part of such request or the amendment appended thereto, such objection in writing specifying the particular paragraph or paragraphs to which there is objection and the reasons therefor, shall, after service upon each party as provided by Sections 10-12 through 10-17 and with proof of service endorsed thereon, be filed with the clerk within the time specified above and placed upon the next short calendar list.' " *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 181 Conn. App. 611–12 n.3.

to add a single paragraph to counts one through four, providing: 'The above facts implicate the making, validity, and enforcement of the original note and arise out of the same transactional facts that are the subject of [the] plaintiff's complaint.' In that pleading, the defendant also stated that he would be filing a motion to reargue the other stricken counts of his counterclaim within twenty days.[4]

"On June 21, 2016, the plaintiff filed a motion for judgment on the defendant's counterclaims on the basis of the court's May 20, 2016 decision striking each count.

In that motion, the plaintiff also objected to the June 6, 2016 purported amendment on the ground that it was improper and did not constitute a new pleading that required a response. The defendant did not file an objection to the motion for judgment. The court, apparently in agreement with the plaintiff, rendered judgment on the counterclaim in favor of the plaintiff."[5] (Citations omitted; footnotes in original.) *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 181 Conn. App. 609–13. The defendant appealed from the judgment rendered on his second amended counterclaim in the plaintiff's favor and the court's striking of his second amended special defenses. Id., 609.

[4] "But see Practice Book § 10-44, which provides: 'Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint, counterclaim or cross complaint, or any count in a complaint, counterclaim or cross complaint has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint, counterclaim or cross complaint, or count thereof. Nothing in this section shall dispense with the requirements of Sections 61-3 or 61-4 of the appellate rules.' " *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 181 Conn. App. 613 n.4.

[5] In a footnote in *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 181 Conn. App. 613 n.5, this court concluded that the "June 6, 2016 attempted amendment was disregarded as improper by the trial court" and that the defendant had not raised a claim of error regarding that action.

In resolving the defendant's appeal, this court dismissed, for lack of a final judgment, the portion of the appeal taken from the striking of the defendant's second amended special defenses and affirmed the judgment in all other respects. Id., 614. Thereafter, in granting the defendant's petition for certification to appeal, our Supreme Court vacated this court's judgment and remanded the case with direction to reconsider the judgment in light of *Blowers*. See *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 333 Conn. 923. We now revisit the defendant's appeal in accordance with our Supreme Court's order.[6]

We begin by providing "an overview of our Supreme Court's decision in [*U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 656]. In *Blowers*, after the mortgagee had commenced an action to foreclose the mortgage encumbering the mortgagor's real property, the mortgagor filed special defenses sounding in equitable estoppel and unclean hands, and a counterclaim sounding in negligence and violations of CUTPA. Id., 659. In support thereof, the mortgagor alleged that the mortgagee committed various acts, which occurred either after the mortgagor's default on the promissory note or after the mortgagee had commenced the foreclosure action,[7] that, inter alia, frustrated his ability to obtain

[6] Following the remand from our Supreme Court, we sua sponte ordered the parties to file supplemental briefs addressing the impact, if any, of *Blowers* on the defendant's appellate claims. The parties filed supplemental briefs in accordance with our order and, thereafter, appeared before us for oral argument.

[7] "The mortgagor alleged, inter alia, that the mortgagee had (1) offered rate reductions lowering the mortgagor's monthly mortgage payments, only to later renege on the modifications following the mortgagor's successful completion of trial payment periods, (2) increased the mortgagor's monthly payment amount of modified payments that had been agreed to following the intervention of the state's Department of Banking, (3) erroneously informed the mortgagor's insurance company that the mortgagor's real property was no longer being used as the mortgagor's residence, resulting in the cancelation of the mortgagor's insurance policy and requiring the mortgagor to replace the coverage at higher premium costs, and (4) engaged in dilatory conduct during the course of approximately ten months of mediation ses-

a proper loan modification and increased the amount of the debt, including attorney's fees and interest, claimed by the mortgagee in the foreclosure action. Id., 661. Additionally, in support of his negligence claim, the mortgagor alleged that the mortgagee's actions had ruined his credit score, which detrimentally affected his business and personal affairs, and caused him to incur significant legal and other expenses. Id. The mortgagor also asserted that the mortgagee should be estopped from collecting the damages that it had caused by its own alleged misconduct and barred from foreclosing the mortgage at issue due to its unclean hands. Id., 661–62. With respect to his counterclaim, he sought compensatory and punitive damages, injunctive relief, and attorney's fees. Id., 662.

"The mortgagee moved to strike the mortgagor's special defenses and counterclaim, claiming that they were unrelated to the making, validity, or enforcement of the note and failed to state a claim upon which relief may be granted. Id. The trial court granted the motion to strike, concluding that the alleged misconduct by the mortgagee had occurred following the execution of the note and, therefore, neither the counterclaim nor the special defenses related to the making, validity, or enforcement thereof. Id., 662–63. Additionally, the court determined that the mortgagor had alleged sufficient facts to support his special defenses, but the court did not reach the issue of whether the counterclaim was supported by adequate facts. Id., 662. Thereafter, the court rendered a judgment of strict foreclosure. Id., 663. The mortgagor appealed to this court, which affirmed the judgment, with one judge dissenting. *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 638, 172 A.3d 837 (2017), rev'd, 332 Conn. 656, 212 A.3d 226 (2019); id., 638–51 (*Prescott*, *J.*, dissenting).

sions held after the commencement of the foreclosure action. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 659–61." *HSBC Bank USA, National Assn.* v. *Nathan*, 195 Conn. App. 179, 194 n.13, 224 A.3d 1173 (2020).

"On certified appeal to our Supreme Court, the mortgagor challenged, inter alia, the propriety of the making, validity, or enforcement test, and, to the extent that the test applied in foreclosure actions, the proper scope of "'enforcement'" under the test. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 664. Our Supreme Court explained that the making, validity, or enforcement test is 'nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions.' . . . Id., 667. Having clarified the proper standard, the court agreed with the mortgagor that 'a proper construction of "enforcement" includes allegations of harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications, when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default.' Id.

"The court observed that '[a]n action for foreclosure is "peculiarly an equitable action"'; id., 670; and that 'appellate case law recognizes that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action may form a proper basis for defenses in a foreclosure action.' Id., 672. The court determined that '[t]his broader temporal scope is consistent with the principle that, in equitable actions, "the facts determinative of the rights of the parties are those in existence at the time of final hearing" . . . [and] is not inconsistent with a requirement that a defense sufficiently relates to enforcement of the note or mortgage. The various rights of the mortgagee under the note and mortgage (or related security instruments) are not finally or completely "enforced" until the foreclosure action is concluded.' (Citations omitted.) Id., 673. The court further determined that '[t]he mortgagor's rights and liabilities . . . depend not only on the validity of the note and mortgage but

also on the amount of the debt. That debt will determine whether strict foreclosure or foreclosure by sale is ordered, and, in turn, whether a deficiency judgment may be recovered and the amount of that deficiency. . . . The debt may include principal, interest, taxes, and late charges owed. . . . The terms of the note or mortgage may also permit an award of reasonable attorney's fees for expenses arising from any controversy relating to the note or mortgage . . . .' (Citations omitted.) Id., 674–75.

"The court continued: 'These equitable and practical considerations inexorably lead to the conclusion that allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement . . . . Such allegations, therefore, provide a legally sufficient basis for special defenses in the foreclosure action. Insofar as the counterclaims rest, at this stage, upon the same allegations as the special defenses, judicial economy would certainly weigh in favor of their inclusion in the present action.'[8] (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 675–76. On the basis of that

[8] "In striking the mortgagor's special defenses and counterclaim, the trial court also 'acknowledged that a foreclosure sought after a modification had been reached during mediation could have the requisite nexus to enforcement of the note, but found that there had been no such modification . . . .' *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 662. On appeal, the mortgagor also challenged 'the sufficiency of the allegations to establish that the parties had entered into a binding modification if such allegations are necessary to seek equitable relief on the basis of postorigination conduct.' Id., 664. Our Supreme Court determined that '[t]o the extent that the pleadings reasonably may be construed to allege that the April, 2012 intervention by the Department of Banking resulted in a binding modification, there can be no doubt that the breach of such an agreement would bear the requisite nexus [to enforcement of the note or mortgage].' Id., 675." *HSBC Bank USA, National Assn.* v. *Nathan*, supra, 195 Conn. App. 197 n.15.

rationale, the court reversed this court's judgment and remanded the matter to this court with direction to reverse the judgment of strict foreclosure and remand the matter to the trial court for further proceedings. Id., 678." (Footnotes in original and footnote omitted.) *HSBC Bank USA, National Assn.* v. *Nathan*, 195 Conn. App. 179, 193–97, 224 A.3d 1173 (2020).

With *Blowers* in mind, we turn to the defendant's claims on appeal. The defendant asserts that the trial court improperly (1) struck his second amended special defenses, and (2) struck his second amended counterclaim and thereupon rendered judgment in favor of the plaintiff. We address each claim in turn.

I

We first consider the defendant's claim that the trial court improperly struck his second amended special defenses. As this court concluded in *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 181 Conn. App. 613, this portion of the appeal was not taken from a final judgment. See *Glastonbury* v. *Sakon*, 172 Conn. App. 646, 651, 161 A.3d 657 (2017) ("'The granting of a motion to strike a special defense is not a final judgment and is therefore not appealable. . . . The striking of special defenses neither terminates a separate proceeding nor so concludes the rights of the parties that further proceedings cannot affect them.' "). *Blowers* has no bearing on this jurisdictional defect. Accordingly, we dismiss, for lack of a final judgment, the portion of the appeal taken from the striking of the second amended special defenses.

II

We next address the defendant's claim that the trial court improperly struck his second amended counterclaim and thereupon rendered judgment in the plaintiff's favor. As a preliminary matter, we discuss the scope of the claim that the defendant is raising on appeal. The defendant's second amended counterclaim

set forth eight counts, with count one sounding in negligent misrepresentation, count two sounding in intentional misrepresentation and fraud, count three sounding in breach of contract/breach of the implied covenant of good faith and fair dealing, and counts four through eight sounding in CUTPA violations. During oral argument held on remand, the defendant's counsel stated in relevant part that (1) the defendant was not challenging the court's striking of count one sounding in negligent misrepresentation, (2) he did not brief a claim of error regarding the court's striking of count three sounding in breach of contract/breach of the implied covenant of good faith and fair dealing, and (3) the "focus" of the appeal was the court's rulings concerning the defendant's CUTPA claims. We construe the statements made by defendant's counsel as an abandonment of any claim regarding the court's rulings as to counts one through three of the defendant's second amended counterclaim.

With respect to counts four through eight of the defendant's second amended counterclaim, the trial court summarized the defendant's allegations therein as follows: "In count four, the defendant alleges that the plaintiff's actions constitute deceptive acts and practices in violation of General Statutes § 42-110b. In count five, the defendant alleges that the plaintiff committed a wanton and reckless violation of the defendant's rights in the misrepresentations and omissions made during loan negotiations. In count six, the defendant alleges that the plaintiff's failure to provide timely notice of the foreclosure judgment to the defendant constitutes an unfair trade practice or deceptive practice in violation of § 42-110b. In count seven, the defendant further alleges that he has experienced a sustainable injury from the unfair trade practices of the plaintiff, and that he has suffered an ascertainable loss as a result. Finally, in count eight, the defendant alleges

that he is entitled to punitive damages because of the plaintiff's intentional and wanton violation of the defendant's rights." In striking those counts, the court stated: "'[T]he defendant, in [his second amended] counterclaim, does not allege any facts that demonstrate that the plaintiff participated in any act that violated CUTPA. Although the defendant does summarize, at great length, the plaintiff's alleged participation in the 'subprime mortgage crisis,' that summary is conclusory only and is therefore insufficient as a matter of law with regard to whether the plaintiff participated in an actual deceptive practice, or a practice that amounted to the violation of public policy. Moreover, as stated earlier, the defendant's allegations in count six of the second amended counterclaim with regard to any postjudgment activity attributable to the plaintiff does not sufficiently relate to the making, validity, or enforcement of the note or mortgage to satisfy the transaction test for counterclaims in a foreclosure action.[9] The court, accordingly, grants the plaintiff's motion to strike the defendant's second amended counterclaim in connection with counts four, five, six, seven, and eight on the ground that the defendant does not sufficiently allege facts to demonstrate violations of CUTPA.'' (Footnote added.)

In *Blowers*, our Supreme Court expounded on the parameters of the making, validity, or enforcement test

[9] In striking count one of the second amended counterclaim sounding in negligent misrepresentation, in which the defendant alleged in relevant part that the plaintiff's failure to provide him with timely notice of the November 22, 2010 foreclosure judgment constituted negligent misrepresentation, the court determined that the defendant's claim did "not meet the transaction test for a counterclaim in a foreclosure action." In striking count two of the second amended counterclaim sounding in intentional misrepresentation and fraud, in which the defendant alleged in relevant part that the plaintiff made a fraudulent misrepresentation by certifying to the court that it had notified the defendant of the foreclosure judgment, the court determined that "[a]llegations regarding what occurred after the initiation of the foreclosure proceedings do not arise out of the same transaction as the original complaint."

and assumed, for purposes of that opinion, that the special defenses and counterclaim at issue in that case "would otherwise be legally sufficient." *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 670. In striking counts four, five, seven, and eight of the defendant's second amended counterclaim, the trial court did not rely on the making, validity, or enforcement test; instead, the court determined that the defendant failed to allege sufficient facts therein demonstrating CUTPA violations. Therefore, *Blowers* is not germane to the issue of whether the court erred in striking counts four, five, seven, and eight of the second amended counterclaim. In turn, we discern no error in the court striking those counts and thereupon rendering judgment in favor of the plaintiff. In fact, on appeal, the defendant does not argue, in any cognizable manner, that the court committed error in determining that he failed to allege sufficient facts demonstrating violations of CUTPA. See *Traylor* v. *State*, 332 Conn. 789, 805, 213 A.3d 467 (2019) (appellant's "complete failure to challenge what the trial court actually decided in its memoranda of decision operates as an abandonment of his claims").

In count six of his second amended counterclaim, the defendant alleged in relevant part that the plaintiff violated the uniform foreclosure standing orders, inter alia, by failing to send him notice of the November 22, 2010 foreclosure judgment within ten days following the entry thereof and that the plaintiff's violation of the uniform foreclosure standing orders constituted a violation of CUTPA. The court determined that the allegations in count six regarding "any postjudgment activity attributable to the plaintiff" did not sufficiently relate to the making, validity, or enforcement of the note or mortgage.[10] Thus, we must consider whether the court's

[10] The trial court's May 20, 2016 memorandum of decision striking the defendant's second amended counterclaim and special defenses is ambiguous as to whether the court struck count six of the second amended counterclaim only on the ground that the allegations therein did not satisfy the making, validity, or enforcement test, or on the additional ground that the

determination constituted error in light of *Blowers*. We conclude that it did not.

Initially, we observe that, in general, "[a]ppellate review of a trial court's decision to grant a motion to strike is plenary. . . . This is because a motion to strike challenges the legal sufficiency of a pleading . . . and, consequently, requires no factual findings by the trial court . . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency. . . . The allegations of the pleading involved are entitled to the same favorable construction a trier would be required to give in admitting evidence under them and if the facts provable under its allegations would support a defense or a cause of action, the motion to strike must fail." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 667–68. Here, with *Blowers* in mind, we must determine whether the allegations supporting the sixth count of the defendant's second amended counterclaim "bear a sufficient connection to enforcement of the note or mortgage. The meaning of enforcement in this context presents an issue of law over which we also exercise plenary review."[11] (Footnote omitted.) Id., 670.

Having reviewed the allegations of count six of the second amended counterclaim, with *Blowers* guiding our analysis, we conclude that the allegations do not

allegations did not allege adequate facts establishing a CUTPA violation. We need not further address this ambiguity because, mindful of *Blowers*, we conclude that the court did not err in determining that the allegations set forth in count six did not sufficiently relate to the making, validity, or enforcement of the note or mortgage.

[11] The court in *Blowers* focused on the "enforcement" component of the making, validity, or enforcement test. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 667, 670. In the present case, it is evident that the allegations contained in count six of the second amended counterclaim did not relate to the making or validity of the note or mortgage. Accordingly, our analysis focuses on whether the allegations set forth in count six sufficiently related to the enforcement of the note or mortgage.

sufficiently relate to enforcement of the note or mortgage. The alleged conduct by the plaintiff regarding its violation of the uniform foreclosure standing orders occurred postjudgment, that is, *after* the November 22, 2010 foreclosure judgment had been rendered. Whether the plaintiff complied with the uniform foreclosure standing orders related to enforcement of that judgment, not the enforcement of the note or mortgage. Thus, the plaintiff's actions at issue did not arise out of the same transaction as the plaintiff's foreclosure complaint. See Practice Book § 10-10.[12] Additionally, the defendant did not allege that the plaintiff's conduct substantially prevented him from curing his default or materially added to his debt. See *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 675 ("allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement of the note and mortgage" (citation omitted; internal quotation marks omitted)). For these reasons, we conclude that the trial court did not err in striking count six of the second amended counterclaim and thereupon rendering judgment in the plaintiff's favor.

The appeal is dismissed with respect to the striking of the defendant's special defenses; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[12] Practice Book § 10-10 provides in relevant part: "In any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint . . . ." As our Supreme Court explained in *Blowers*, the making, validity, or enforcement test is "nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions." *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 667.

S. A. *v.* D. G.*
(AC 42594)

Prescott, Moll and Eveleigh, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the application for a civil protection order filed pursuant to statute (§ 46b-16a) by the plaintiff, an executive assistant to the first selectman of a Connecticut town. On two occasions in 2018, the defendant, a town resident, visited the first selectman's office where the plaintiff worked, and, during the second visit, the police were called and the defendant was arrested for breach of the peace. In her application, the plaintiff alleged that the defendant stalked her and caused her to fear for her safety at work and at her home, and, in an accompanying affidavit, described, how the defendant had threatened and harassed her. Following a hearing at which the parties, the first selectman and V, an employee of the town's tax collector's office testified, the trial court found that the requirements of § 46b-16a had been satisfied, and, therefore, it granted the plaintiff's application and issued a protection order. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion by excluding evidence of certain audio and videotape recordings that he offered at the hearing on the application for a protection order, that court having properly determined that the recordings were not relevant to its determination of whether to grant the application: the recording of a conversation between the defendant and the first selectman that purportedly contained audio evidence of the first selectman using coarse language at the town hall and calling the defendant inappropriate names would not have aided the court because it would not have made the existence of any fact material to whether the defendant's behavior toward the plaintiff reasonably could have caused her to fear for her physical safety more or less probable than it would have been without the evidence, and, to the extent that the defendant sought to argue that the first selectman's use of such language at his office made it less likely that the defendant's use of similar language would have caused the plaintiff to fear for her safety, the defendant never proffered that the plaintiff was present for the conversation on the recording; moreover, the defendant failed to explain to the court how a recording that purportedly contained evidence of an unidentified employee of the tax collector's office demanding that the defendant pay

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

$20 for his video recording was relevant, as it was not in dispute that the defendant and the town had ongoing issues related to the defendant paying for copies or recordings of public records, and the recording did not purport to involve either V, who had testified at the hearing about her encounters with the defendant, or the plaintiff; furthermore, contrary to the defendant's claim, the court gave the defendant every opportunity to cross-examine witnesses, to present his own testimony, and to call any additional witness or to offer relevant evidence in support of his defense.

2. The defendant's claim that the trial court improperly issued the protection order despite the fact that he was not arrested for violating any of the statutory provisions set forth in statute (§ 54-1k) governing criminal protective orders was unavailing; that court issued the protection order pursuant to § 46b-16a, which contains no reference to § 54-1k, nor does it limit the court's authority to issue a protection order to individuals arrested under any particular enumerated statute.

3. The defendant could not prevail on his claim that the trial court improperly issued the protection order partly on the basis of his having videotaped the plaintiff performing her duties as a public employee, which he claimed did not constitute stalking because he had a legal right to do so; contrary to the defendant's contention, to obtain a civil protection order pursuant to § 46b-16a on the basis of stalking, the plaintiff needed only to allege and prove that on two occasions the defendant harassed, surveilled or monitored her in a manner that reasonably caused her to fear for her physical safety, and the court's findings that the defendant acted on two occasions in 2018, in a manner that would cause a reasonable person to fear for their safety were not clearly erroneous, as the plaintiff testified with respect to the 2018 videotaping incident that the defendant had harassed her by surveilling her and aggressively placing a video camera within one foot of her face while interrogating her about freedom of information requirements, and such actions, when coupled with his threatening behavior during the second 2018 encounter with the plaintiff, were sufficient to satisfy the requirements of stalking necessary to support the issuance of a protection order in this case.

4. This court declined to review the defendant's claim that the trial court improperly issued the protection order on the basis of actions that implicated his exercise of his rights of free speech and access to public records, the defendant having failed to brief the claimed constitutional issues adequately.

5. This court declined to review the defendant's unpreserved claim that the trial court violated his right to due process by improperly engaging in ex parte communications with the plaintiff, the record having been inadequate to review that claim, as it was not adequate to ascertain whether an ex parte communication happened at all, let alone the nature of any such communication or its harm to the defendant.

Argued December 2, 2019—officially released June 16, 2020

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of New London and tried to the court, *Hon. Emmet L. Cosgrove*, judge trial referee; judgment granting the application, from which the defendant appealed to this court. *Affirmed.*

D. G., self-represented, the appellant (defendant).

Mark S. Zamarka, with whom, on the brief, was *Edward B. O'Connell*, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendant, D. G., appeals from the judgment of the trial court granting an application for a civil protection order filed pursuant to General Statutes § 46b-16a[1] by the plaintiff, S. A., an executive assistant to the first selectman of a Connecticut town. In her application, the plaintiff alleged that the defendant stalked her and caused her to fear for her safety at work and at home. On appeal, the defendant claims that the court improperly (1) excluded evidence on the ground of lack of relevance, (2) issued the protection order despite the fact that the defendant was not

[1] General Statutes § 46b-16a provides in relevant part: "(a) Any person who has been the victim of sexual abuse, sexual assault or stalking may make an application to the Superior Court for relief under this section, provided such person has not obtained any other court order of protection arising out of such abuse, assault or stalking and does not qualify to seek relief under section 46b-15. As used in this section, 'stalking' means two or more wilful acts, performed in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to another person directly, indirectly or through a third person, by any method, device or other means, that causes such person to reasonably fear for his or her physical safety.

"(b) . . . Such orders may include, but are not limited to, an order enjoining the respondent from: (1) Imposing any restraint upon the person or liberty of the applicant; (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking the applicant; and (3) entering the dwelling of the applicant.

"(c) No order of the court shall exceed one year, except that an order may be extended by the court upon proper motion of the applicant . . . ."

arrested for violating any of the statutory provisions set forth in General Statutes § 54-1k,[2] (3) issued the protection order partly on the basis of the defendant's having videotaped the plaintiff performing her duties as a public employee, which did not constitute stalking, (4) issued the protection order on the basis of actions that implicated the defendant's exercise of free speech and his right to access public records, and (5) engaged in ex parte communications with the plaintiff. We disagree and affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history.[3] The defendant is a town resident. On at least two occasions, once on an unspecified date in the summer of 2018, and again on December 26, 2018, the defendant visited the office of the town's first selectman where the plaintiff worked. The second visit ended with a call to the police, who arrested the defendant for breach of the peace.[4]

[2] General Statutes § 54-1k, titled "Issuance of protective orders in cases of stalking, harassment, sexual assault, risk of injury to or impairing morals of a child," provides in relevant part: "(a) Upon the arrest of a person for a violation of subdivision (1) or (2) of subsection (a) of section 53-21, section 53a-70, 53a-70a, 53a-70c, 53a-71, 53a-72a, 53a-72b or 53a-73a, or any attempt thereof, or section 53a-181c, 53a-181d or 53a-181e, the court may issue a protective order pursuant to this section . . . ."

[3] The trial court, in granting the application for a protection order, made minimal findings of facts in its oral ruling, stating, in relevant part, the following: "The court finds that the defendant has acted in two or more fashions, once in December of 2018, and earlier that year during the summer in a fashion that would cause a reasonable person to fear for their physical safety." After filing this appeal, the defendant did not file a notice pursuant to Practice Book § 64-1, indicating that the trial court's oral ruling failed properly to set forth the factual and legal basis for its decision, nor did he request an articulation in accordance with Practice Book § 66-5. In the absence of any indication to the contrary, we infer from the court's granting of the application that the court credited the evidence presented at the hearing in support of the factual allegations contained in the application, including the relevant testimony of the plaintiff.

[4] The transcript of the hearing on the protection order application shows that the trial court took judicial notice of the defendant's December 26, 2018 arrest and the resulting criminal action in which, according to the case detail, the defendant was charged with breach of the peace in the second

The next day, on December 27, 2018, the plaintiff filed with the court an application for a civil protection order. The affidavit accompanying the application averred that the plaintiff had been working at the office of the first selectman on December 26, 2018, when the defendant presented himself seeking documentation related to a proposed public safety complex in the town. He asked the plaintiff to issue him "a waiver of fees so that he could go to various town departments and request information without being charged the standard fee for copies or taking pictures/scanning information." When the plaintiff informed the defendant that she was not authorized to issue such a waiver but that she would have the first selectman contact him to discuss the matter, the defendant continued to demand the waiver.

The plaintiff began to "feel harassed and then threatened" by the defendant. She asked the defendant to leave, but he became "very agitated," and began yelling, swearing, and pointing at the plaintiff in an aggressive

degree in violation of General Statutes § 53a-181, a class B misdemeanor. See *Joe's Pizza, Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 865 n.4, 675 A.2d 441 (1996) (court may take judicial notice of file in related criminal docket).

General Statutes § 53a-181 (a) provides: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do. For purposes of this section, 'public place' means any area that is used or held out for use by the public whether owned or operated by public or private interests."

As noted by the defendant in his reply brief, however, the arrest report, a copy of which the plaintiff included in the appendix to her appellate brief, was not part of the record before the trial court. Accordingly, we do not rely on that report in reviewing the trial court's decision in this matter. See, e.g., *Li* v. *Yaggi*, 185 Conn. App. 691, 702 n.8, 198 A.3d 123 (2018).

manner. He called the plaintiff a "fucking retard" or said she was "fucking retarded" approximately one dozen times. The plaintiff became frightened and pushed a "panic button" on her desk, which alerted the police department that there was a problem at the town hall.

Employees in a nearby office heard the defendant yelling and called 911. When the defendant realized that the plaintiff had summoned the police, he became "even more agitated, yelling louder and continuing to call [the plaintiff] names and pacing and moving aggressively toward [the plaintiff]," pointing at her and telling her that "it was over for [her]" and that he would treat her in the same manner in the future. The defendant eventually left the office, but the plaintiff was unsure whether he remained elsewhere in the building and was frightened due to the defendant's "increasingly violent behavior."

The plaintiff stated in her affidavit that the defendant had been in her office "many times in the past couple of years." She indicated that she and her coworkers felt nervous and uncomfortable every time the defendant visited the building. She further indicated that she was scared that he would discover her home address and would come to her home because he had done so in the past to other town employees in order to demand information about town business. The plaintiff claimed that the defendant previously had "gotten in trouble" for allegedly assaulting an elderly town employee. Although the plaintiff was unsure whether the defendant owned any weapons, she averred that "he has spoken of the fact that he is a huge supporter of the [second] amendment so I am scared that he does have weapons and that he will use such weapons against me."

The court, *Hon. Emmet L. Cosgrove*, judge trial referee, conducted a hearing on the application on January 7, 2019. The plaintiff was represented by counsel, and the defendant appeared as a self-represented party. The

court first heard the testimony of the plaintiff in support of the allegations in her application. The defendant was permitted to cross-examine the plaintiff, although the court required him to direct his questions to the court, which then posed them to the plaintiff. The defendant did not object to this procedure.

The plaintiff called as additional witnesses both the first selectman and V, an employee of the tax collector's office located down the hall from the first selectman's office. V, who had been working at the time of the December 26, 2018 incident, indicated that she knew of the defendant because she had seen him at the town hall on multiple occasions, including one time when she had spotted him videotaping the activities of the tax collector's office. She testified that, on December 26, 2018, she heard the defendant cursing and screaming at the plaintiff from down the hallway and was concerned enough that she called 911.

The first selectman testified that the defendant was a frequent visitor to the town hall and to town meetings and that "there's an ongoing conflict between [the defendant] and the town no matter what the business is." The first selectman also testified that the plaintiff was frightened of the defendant because of the December 26, 2018 altercation and confirmed that the defendant previously had engaged in a "pushing/shoving match" with another town employee at the town community center. The defendant cross-examined both V and the first selectman.

The defendant waived his privilege against self-incrimination[5] and testified briefly on his own behalf but did not call any other witnesses. During his direct

[5] On cross-examination, when asked whether he owned any firearms, the defendant refused to answer, citing "safety concerns." After the court indicated that safety concerns were not a privilege that it acknowledged, the defendant stated: "Well, I would like to take the fifth amendment claim on that." The court responded: "Okay."

testimony, the defendant also sought to play and to admit into evidence audio and/or video recordings of interactions that he purportedly had with the first selectman and with other town employees. The court, after hearing the defendant's offer of proof regarding the content of these recordings and his reasons for offering them, concluded that the recordings involved matters unrelated to the issues before the court and, thus, they were not relevant to its adjudication of the protection order application. The court also declined to admit into evidence a purported transcript that the defendant had created of an audio recording he had made of the December 26, 2018 incident. The court, nevertheless, permitted the defendant to play the recording in open court.[6]

On cross-examination by the plaintiff, the defendant admitted that he had videotaped town employees in the past, and it was "quite possible" this included the plaintiff. He acknowledged having been asked to leave the town hall on previous occasions. He also stated that he understood the town's policy with respect to copying fees and knew that the plaintiff did not have the authority to grant him a waiver.

In his closing summation, the plaintiff's counsel argued that all statutory requirements for the issuance of a protection order had been met and asked the court to order that the defendant not behave in any physically abusive or threatening manner toward the plaintiff and

[6] The content of the recording was not transcribed as part of the transcript of the hearing on the application for a protection order, although the court stated on the record, presumably to the court monitor: "There's no need for you to transcribe this, I'll have the transcript." It is unclear from this statement whether the court intended to admit the transcript offered by the defendant at this point, but such a ruling is not apparent from the hearing transcript. The defendant has included what purports to be a redacted version of this transcript as part of his appendix to his appellate brief.

to stay away from her residence. Recognizing that the town hall was a public building, counsel asked that any protection order issued by the court require the defendant to call and "make an appointment with a specific person or department so that an escort can be arranged to make sure that the visit goes smoothly, and that [the defendant] does not violate, accidentally, any orders that the court might fashion."

The defendant argued in his closing summation that he read § 54-1k as limiting the court's authority to issue a protection order to those instances in which a person has been arrested for violating one of the statutes enumerated in § 54-1k, which he noted did not include an arrest for breach of the peace. Further, he argued that he believed that his interactions with the plaintiff fell "under the umbrella of free speech" or, alternatively, did not constitute either a threat of actual physical harm or stalking, which he asserted was a prerequisite for the issuance of a protection order.

On the basis of its review of the application and accompanying affidavit, and after hearing from the parties, the court found that the requirements of § 46b-16a (a) had been satisfied. See footnote 3 of this opinion. The court then issued the following protection order effective for a period of one year: "[Y]ou will have to surrender any licenses that you hold to own or possess a firearm, or to surrender any firearms that you possess or control. . . . [Y]ou may not threaten, harass, stalk, interfere with, [or] abuse the [plaintiff]. . . . You must stay away from her home, or anywhere that she may reside . . . . In light of the fact that she works in a public building . . . before you enter the town hall, you must have an appointment set up with an individual in [the] town hall ahead of time [so] that you may be escorted to that particular town hall office. You may contact the first selectman's office in writing or by e-mail or by telephone . . . . If you violate this order

. . . it is a separate crime that's punishable by up to five years in prison." This appeal followed.[7]

"We apply the same standard of review to civil protection orders under § 46b-16a as we apply to civil restraining orders under General Statutes § 46b-15. Thus, we will not disturb a trial court's orders unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion . . . 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. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to

[7] After the appeal was filed, the defendant filed a motion with this court that he captioned a "motion to dismiss." He argued in his motion that the plaintiff's application for a protection order failed "to allege sufficient facts to provide *the original trial court* with subject matter or personal jurisdiction over [him]." (Emphasis added.) By way of relief, the motion asked this court to overturn the trial court's decision and to negate its orders. A motion to dismiss pursuant to Practice Book § 66-8, however, is not the proper vehicle for raising a claim that the *trial court* lacked jurisdiction; such a claim is properly raised as an issue on appeal. A motion to dismiss is properly used only to challenge the jurisdiction of *the reviewing court* or to assert that an appeal is untimely or suffers from some other defect warranting a dismissal of the appeal. Practice Book § 66-8. Accordingly, we denied the defendant's motion, although we did so "without prejudice to the panel that hears the merits of the appeal considering the issues raised in the motion to dismiss." Having reviewed the defendant's argument, we find no merit in his assertion that the trial court lacked personal jurisdiction over him or subject matter jurisdiction over the application for a protection order, and, accordingly, we now reject those claims on their merits.

Additionally, after the current appeal was briefed and argued, the trial court granted a motion filed by the plaintiff to extend the protection order. The defendant filed an amended appeal challenging that ruling as well as the trial court's earlier denial of the defendant's motion seeking a stay of execution of the original protection order pending a final resolution of the appeal. We ordered the amended appeal severed and treated as a separate appeal. See *S. A.* v. *D. G.*, Docket No. AC 43863 (Conn. App.) (pending appeal filed January 7, 2020).

support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that [an issue] of law is entitled to plenary review on appeal." (Internal quotation marks omitted.) *Kayla M.* v. *Greene*, 163 Conn. App. 493, 504, 136 A.3d 1 (2016).

I

The defendant first claims that the court abused its discretion by excluding evidence of certain audio and videotape recordings that he offered, even though the court determined they did not relate to his interactions with the plaintiff and thus were not relevant. The defendant contends that this evidence was relevant to "attack the credibility of the plaintiff's witnesses" and thus the court improperly excluded it. We are not persuaded.

The following additional facts are relevant to this claim. After hearing from the plaintiff's witnesses in support of the application for a protection order, the court asked the defendant if he had any witnesses that he would like to call on his behalf. The defendant responded, "Well, only myself, Your Honor." After conducting a canvass regarding his waiver of certain rights, the court indicated that it was prepared to hear what the defendant had to say. Rather than offer testimony, however, the defendant attempted to play an audiotape. The court indicated that it would need "some foundation first" and asked the defendant to explain what was on the recording. The defendant indicated that he had a short recording of the first selectman "cursing at me and making derogatory statements toward me." The court told the defendant that it did not know how this was relevant to the pending application but allowed the defendant an opportunity to persuade the court

otherwise. The defendant then argued that the recording would demonstrate that the first selectman had used offensive language at the office and, therefore, the fact that the defendant called the plaintiff offensive names could not have caused her fear as she claimed in her application. The court then stated: "I just want to redirect you toward the complaint that we have today . . . . I really can't—I take it from [the first selectman's] testimony that there are at least several areas where you have some disputes with the [town] or its employees. . . . The only one I'm concerned about today is the dispute with the issue raised by [the plaintiff's] complaint." The defendant said nothing further to press the admission of the recording of his conversation with the first selectman. Instead, he turned to a different recording, as reflected in the following colloquy with the court:

"[The Defendant]: Well, I think that as far as rebuttal testimony in reference to what [V] said, I think I should be able to provide evidence to rebut her testimony.

"The Court: Okay, her testimony indicated that she could hear you yelling and screaming in a very loud voice using some profanity, but that she couldn't recall the precise words that were used while you were in [the plaintiff's] office on December 26th.

"[The Defendant]: However, she also testified in reference to a recording in the tax collector's office as well. I would like to play a recording—

"The Court: The video recording.

"[The Defendant]: Yes, sir. I would like to—I was also audio recording with this audio recorder; I would like to play that and put it into evidence.

"The Court: If I listen to it, what would I hear?

"[The Defendant]: You would hear the tax—one of the tax collector employees running up to me and demanding $20 for my video recording session, and you will understand my behavior in response to that was mute. . . .

"The Court: Okay, so you're telling me that I would hear that a town employee, other than [the plaintiff], came up to you and demanded that you pay her $20 for your recording of her?

"[The Defendant]: Just in the office, Your Honor, in a public space.

"The Court: Just recording in the public space.

"[The Defendant]: So the whole premise—one of the premises of the [plaintiff's] case here is that I act inappropriately, that I have always—you know, it's an escalating thing. This is a most recent one in July of this year. I think I should be able to produce evidence to counter the claim that I'm—

"The Court: The only claim that I'm really concerned about today, and I've let—taken some testimony that didn't relate to December 26th, but relates to earlier conduct as it relates to you and [the plaintiff].

"[The Defendant]: I understand that, Your Honor.

"The Court: Ms.—the other witness doesn't have a complaint on file today, [the first selectman] has not filed a complaint. So I don't think that's going to lead me to any relevant evidence for me to consider about whether or not to issue a civil protection order in this case.

"[The Defendant]: Well, I would think it would go to the veracity of the witness[es'] statements that they make at this hearing. If she said that I was inappropriate—acting inappropriately at the tax collector's office—

"The Court: Let me just ask you this. This videotape, this recording, is it of [V]?

"[The Defendant]: No, but it relates to the testimony that the witness gave.

"The Court: Okay, I'm not going to listen to it."

Our standard of review regarding evidentiary rulings is well settled. "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Perez* v. *Minore*, 147 Conn. App. 704, 709, 84 A.3d 460 (2014).

"[T]he right to confront witnesses and the right to present a defense are fundamental to a fair trial. . . . Those rights, however, are subject to reasonable limitations, such as the trial court's right, indeed, duty, to exclude irrelevant evidence. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . [T]o establish an abuse of discretion, [the defendant] must show that [any] restriction imposed . . . [was] clearly prejudicial. . . .

"Relevance does not exist in a vacuum. . . . Relevant evidence, according to § 4-1 of the Connecticut Code of 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. . . . To determine whether a fact is material . . . it is necessary to examine the issues in the case, as defined by the

underlying substantive law, the pleadings, applicable pretrial orders, and events that develop during the trial. Thus, the relevance of an offer of evidence must be assessed against the elements of the cause of action, crime, or defenses at issue in the trial. The connection to an element need not be direct, so long as it exists. Once a witness has testified to certain facts, for example, his credibility is a fact that is of consequence to [or material to] the determination of the action, and evidence relating to his credibility is therefore relevant—but only if the facts to which the witness has already testified are themselves relevant to an element of a crime, cause of action, or defense in the case." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Fasano*, 88 Conn. App. 17, 35–37, 868 A.2d 79, cert. denied, 274 Conn. 904, 876 A.2d 15 (2005), cert. denied, 546 U.S. 1101, 126 S. Ct. 1037, 163 L. Ed. 2d 873 (2006).

Here, having reviewed the available record,[8] we conclude that the court properly determined that the audio and/or video recordings offered by the defendant at the hearing were not relevant to the court's determination of whether to grant the application for the protection order. The recording of the conversation between the defendant and the first selectman purportedly contained audio evidence of the first selectman using coarse language at the town hall and calling the defendant inappropriate names. The recording, even if it contained what the defendant purported, would not have aided the court because it would not have made "the existence of any fact that [was] material to the determination of the proceeding more probable or less probable than it would [have been] without the evidence." Conn.

[8] It is important to note that the defendant never sought to have any of the recordings that he sought to admit at the hearing marked for identification or otherwise preserved for appellate review. Accordingly, our review is somewhat circumscribed because it is limited to a consideration of the defendant's proffer to the trial court.

Code Evid. § 4-1. The issue before the court was not the behavior of the first selectman toward the defendant but, rather, whether the defendant's behavior toward the plaintiff reasonably could have caused her to fear for her physical safety. Furthermore, to the extent that the defendant sought to argue that the first selectman's use of vulgar or inappropriate language at his office made it less likely that the defendant's use of similar language would have caused the plaintiff to have feared for her safety, he never proffered that the plaintiff was present for the conversation on the recording.[9]

With respect to the recording purporting to contain evidence of an unidentified employee of the tax collector's office demanding that the defendant pay $20 for his video recording, the defendant failed to explain to the court how this was relevant to the proceeding before it. It was not in dispute that the defendant and the town had ongoing issues related to the defendant paying for copies or recordings of public records or other docu-

[9] Even if the defendant were able to convince us that the first selectman's use of coarse language toward him was relevant for the reasons he asserted at the hearing, the defendant would also have to demonstrate that he was harmed by the court's refusal to admit the recording into evidence. See *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 161, 971 A.2d 676 (2009) ("[E]ven if a court has acted improperly in connection with the introduction of evidence, reversal of a judgment is not necessarily mandated because there must not only be an evidentiary [impropriety], there also must be harm. . . . In the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless." (Citation omitted; internal quotation marks omitted.)). As the trial court explained to the defendant at the hearing, he was free to testify about his encounter with the first selectman and to make whatever argument to the court he believed that testimony supported. Unless his account was somehow contested, the recording would have been merely cumulative and its exclusion therefore harmless.

He also could have asked the first selectman about the purported encounter during cross-examination, or recalled him as a witness. Because he never did so, the recording was also not relevant regarding the credibility of the first selectman as argued by the defendant on appeal, even if such extrinsic evidence would have been admissible for that purpose. See Conn. Code Evid. § 6-10 (c).

ments. The recording did not purport to involve either V, who had testified earlier in the hearing about her own encounters with the defendant, or the plaintiff. As proffered by the defendant to the court, the recording would not have aided the court in the matter before it, and, therefore, like the other recording, the court properly excluded it.

Contrary to the defendant's claim, our review of the hearing transcript shows that the court gave the defendant every opportunity to cross-examine witnesses, including to impeach their credibility; to present his own testimony; and to call any additional witnesses or to offer *relevant* evidence in support of his defense. The defendant's claims to the contrary simply are unsupported by the record.

II

Next, the defendant claims that the court improperly issued the protection order despite the fact that he was never arrested for violating any of the statutory provisions set forth in § 54-1k. This claim, which is premised on a fundamental misunderstanding of the applicable law, is entirely unavailing.

There are a number of statutory provisions granting the court the authority to issue protective or restraining orders. See, e.g., General Statutes § 46b-15 (family violence restraining orders); General Statutes § 46b-16a (civil protection orders); General Statutes § 46b-38c (family violence protective orders); General Statutes § 53a-40e (standing criminal protective orders); General Statutes § 54-1k (criminal protective orders); General Statutes § 54-82q (temporary restraining order regarding witnesses); General Statutes § 54-82r (protective orders for witnesses). Each provision contains its own set of specific requirements and procedures.

The defendant is correct that § 54-1k governs the issuance of criminal protective orders in cases involving stalking, sexual assault, and risk of injury to a child,

and that it limits a court's authority to issue a protection order to instances in which a person has been arrested "for a violation of subdivision (1) or (2) of subsection (a) of section 53-21, section 53a-70, 53a-70a, 53a-70c, 53a-71, 53a-72a, 53a-72b or 53a-73a, or any attempt thereof, or section 53a-181c, 53a-181d or 53a-181e . . . ."[10] The defendant also correctly asserts that his arrest following the December 26, 2018 incident was for breach of the peace in the second degree in violation of § 53a-181, a violation that did not trigger the court's authority to render a protective order under § 54-1k because breach of the peace is not among the statutory violations enumerated in § 54-1k. Our agreement with the defendant, however, ends there.

The court in the present case did not issue the protection order pursuant to § 54-1k, but upon consideration of an application for a civil protection order that the plaintiff filed pursuant to § 46b-16a. The application, a copy of which was served on the defendant, contains an express citation to § 46b-16a. Section 46b-16a contains no reference to § 54-1k, nor does it limit the court's authority to issue a protection order to individuals arrested under any particular enumerated statute. Rather, § 46b-16a provides that a protection order is available to "[a]ny person who has been the victim of sexual abuse, sexual assault or stalking" and does not have any requirement that the perpetrator be arrested prior to issuance of a protection order.[11]

The defendant has cited to no other relevant statutory provision or case law that supports his claim that the

[10] Protective orders are also authorized upon an arrest for a violation of General Statutes § 53a-182b or 53a-183 provided that the court also finds that "such violation caused the victim to reasonably fear for his or her physical safety." General Statutes § 54-1k (a).

[11] Although not applicable here, § 46b-16a does expressly limit its application to those persons who have not obtained any other type of protective order arising out of the same alleged abuse, assault or stalking and who do not qualify to seek relief under § 46b-15.

restrictions of § 54-1k are applicable in the present case. In short, the fact that the defendant was not arrested for violating one of the statutes listed in § 54-1k did not preclude the court from issuing the protection order in this case, and, accordingly, we reject the defendant's claim.

III

The defendant next claims that the court's decision to issue a protection order was improper because it was based, in part, on evidence that the defendant videotaped the plaintiff while she was in the course of performing her duties as a public employee. According to the defendant, because he had a legal right to act as he did, his actions could not legally constitute stalking as required for a civil protection order. We disagree.

We view the defendant's claim as one that implicates evidentiary sufficiency. "If the factual basis of the court's decision is challenged, our review includes determining whether the facts set out in the memorandum of decision are supported by the record or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . Moreover, it is the exclusive province of the [court as the] trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Thus, if the court's dispositive finding . . . was not clearly erroneous, then the judgment must be affirmed." (Internal quotation marks omitted.) *Stacy B.* v. *Robert S.*, 165 Conn. App. 374, 386–87, 140 A.3d 1004 (2016).[12]

The defendant's claim hinges on his contention that there is no statute in this state that makes it a crime to video record municipal employees in a public place

[12] We note that, "[t]o the extent that our review requires us to construe statutory provisions, this presents a legal question over which our review also is plenary." *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 288, 145 A.3d 408, cert. denied, 323 Conn. 939, 151 A.3d 387 (2016).

such as a town hall. Regardless of whether someone legally may video record the actions of a public employee performing his or her duties in a public setting,[13] the mere existence of such a right or privilege does not automatically mean that an individual is permitted to exercise that right entirely unfettered and without adhering to reasonable legal restrictions. The defendant, after all, was not arrested and made subject

[13] Courts in this state have not directly addressed the parameters of a "right to record" the public acts of public employees, including the police, although such a right has been deemed by some federal circuit courts to exist under the first amendment. See, e.g., *Glik* v. *Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) ("we have previously recognized that the videotaping of public officials is an exercise of [f]irst [a]mendment liberties"). Although the defendant invokes the state constitution as a potential source of his asserted right to record public officials in the course of their fulfilling their public duties, he has not engaged in the type of independent analysis required to obtain review of a state constitutional claim. See *State* v. *Saturno*, 322 Conn. 80, 113 n.27, 139 A.3d 629 (2016), citing *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992).

With respect to a first amendment right to record, the First Circuit has stated as follows: "It is firmly established that the [f]irst [a]mendment's aegis extends further than the text's proscription on laws abridging the freedom of speech, or of the press, and encompasses a range of conduct related to the gathering and dissemination of information. As the Supreme Court has observed, the [f]irst [a]mendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. . . . An important corollary to this interest in protecting the stock of public information is that [t]here is an undoubted right to gather news from any source by means within the law. . . .

"The filming of government officials engaged in their duties in a public place . . . fits comfortably within these principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal [f]irst [a]mendment interest in protecting and promoting the free discussion of governmental affairs. . . . Moreover, as the [United States Supreme] Court has noted, [f]reedom of expression has particular significance with respect to government because [i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. . . . Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally . . . ." (Citations omitted; internal quotation marks omitted.) *Glik* v. *Cunniffe*, supra, 655 F.3d 82–83. To the extent that the defendant claims that his first amendment rights are implicated by the issuance of a protection order, we conclude that this claim is inadequately briefed, as discussed in part IV of this opinion.

to an application for a protection order solely on the basis of his act of videotaping the plaintiff but because, when doing so, he failed to comport himself in a reasonable manner as required by law.[14]

The defendant argues that in order for the court to issue a civil protection order on the basis of stalking, the court would have had to found with respect to the June, 2018 encounter that he had followed or laid in wait for the plaintiff. Proof of such acts are an element of stalking in the third degree in violation of General Statutes § 53a-181e[15] and, thus, would be necessary to obtain a criminal conviction under that statute. Stalking for purposes of obtaining a civil protection order, however, is sui generis, and covers a far broader range of prohibited actions. Section 46b-16a (a) provides in relevant part: "As used in this section, 'stalking' means two or more wilful acts, performed in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to another person directly, indirectly or through a third person, by any method, device or other means, that causes such person to reasonably fear for his or her physical safety." Thus, although following and lying in wait are among the actions that could trigger a civil protection order, the plaintiff needed only to allege and prove that, on two occasions, the defendant harassed, surveilled or monitored her in a manner that reasonably caused her to fear for her physical safety.

[14] The plaintiff never disputed before the trial court or on appeal that the defendant was a public invitee to town hall and, as such, was permitted to be there for "a purpose for which the [building was] held open to the public." (Internal quotation marks omitted.) *Sevigny* v. *Dibble Hollow Condominium Assn., Inc.*, 76 Conn. App. 306, 320, 819 A.2d 844 (2003). It was his *behavior* while at town hall, not merely his *presence* there, that is at issue in this case.

[15] General Statutes § 53a-181e (a) provides: "A person is guilty of stalking in the third degree when such person recklessly causes another person to reasonably (1) fear for his or her physical safety, or (2) suffer emotional distress, as defined in section 53a-181d, by wilfully and repeatedly following or lying in wait for such other person."

The court issued the underlying protection order on the basis of its findings that "the defendant ha[d] acted in two or more fashions, once in December of 2018, and earlier that year during the summer in a fashion that would cause a reasonable person to fear for their physical safety." We cannot conclude, on the basis of our review of the evidence before the court, that its findings are clearly erroneous. With respect to the videotaping incident that occurred in June, 2018, the plaintiff testified that the defendant had harassed her by surveilling her and aggressively placing a video camera within one foot of her face while interrogating her about freedom of information requirements. Such actions, when coupled with his threatening behavior during the subsequent December 26, 2018 encounter with the plaintiff, were sufficient to satisfy the requirements of stalking necessary to support the issuance of a protection order in this case.

IV

The defendant next claims that the court improperly issued the protection order on the basis of actions that implicated his exercise of his rights of free speech and access to public records. We decline to review this claim because it is not adequately briefed.

"We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [Simply put, we] do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *Starboard Fairfield Development, LLC* v. *Gremp*, 195 Conn. App. 21, 31, 223 A.3d 75 (2019).

Our Supreme Court has recognized that adequate briefing is of particular importance whenever the appellant is asserting a violation of his first amendment

rights because of the analytical complexity of such claims. See *State* v. *Buhl*, 321 Conn. 688, 726, 138 A.3d 868 (2016) (upholding Appellate Court's decision not to review first amendment and due process claims because they were inadequately briefed). In *Buhl*, the court quoted federal precedent for the proposition that "[f]irst [a]mendment jurisprudence is a vast and complicated body of law that grows with each passing day and involves complicated and nuanced constitutional concepts." (Internal quotation marks omitted.) Id., citing *Schleifer* v. *Charlottesville*, 159 F.3d 843, 871–72 (4th Cir. 1998), cert. denied, 526 U.S. 1018, 119 S. Ct. 1252, 143 L. Ed. 2d 349 (1999). In considering the adequacy of briefing, it is proper for this court to consider, among other factors, (1) whether the claim is stated "clearly and succinctly" such that its contours can be understood by the court and the opposing party, (2) the "relative sparsity" of any analysis, meaning how much of the brief is dedicated to the claim, (3) whether the analysis is "confusing, repetitive [or] disorganized," and (4) whether the appellant has cited, analyzed and applied relevant legal authority." (Internal quotation marks omitted.) *State* v. *Buhl*, supra, 726–27.[16]

Here, we are left to guess at the precise contours of the defendant's first amendment claim. It is unclear whether the defendant is asserting that the issuance of the protection order constitutes an unconstitutional

[16] The fact that the plaintiff attempted to respond to the defendant's first amendment claim in her appellate brief in no way diminishes the inadequacy of the defendant's briefing. See *State* v. *Buhl*, supra, 321 Conn. 728–29 ("appellant cannot . . . rely on the appellee to decipher the issues and explain them to the Appellate Court"). Rather, in some ways, the response only highlights the problem. In her appellate brief, the plaintiff attempts to answer the defendant's first amendment claim by interpreting it as a claim that the defendant's actions did not constitute "true threats" and thus was speech protected by the first amendment. See *Virginia* v. *Black*, 538 U.S. 343, 359–60, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). The plaintiff's analysis, however, may be too narrow of a reading of the defendant's claim.

restriction on his future speech or conduct. Conversely, it is not clear whether he is asserting that the issuance of the protection order impermissibly punished him for engaging in constitutionally protected activities.[17] We cannot define the defendant's claim for him and will not attempt to blindly navigate our way through the thorny thicket of first amendment jurisprudence with only a vague and bareboned claim to guide us.

Moreover, in the sparse briefing devoted to this claim, the defendant cites only two cases. The defendant makes no attempt to discuss applicable first amendment jurisprudence. Despite baldly urging us to "follow" the two decisions cited, he provides no analysis of those cases and fails even to state how he believes they may be applicable.[18]

[17] We note that to the extent the defendant's claim is that his constitutional right to free speech has been violated because he is being punished for constitutionally protected activities, he has failed to explain how the imposition of the protection order, which is strictly prospective in its scope, amounted to a punishment for his prior acts.

[18] One of the cases cited by the defendant, *State* v. *Linares*, 232 Conn. 345, 655 A.2d 737 (1995), in fact, reasonably might be viewed as undermining the defendant's claim. "The protections afforded by the [f]irst [a]mendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution." (Internal quotation marks omitted.) *State* v. *Moulton*, 310 Conn. 337, 348–49, 78 A.3d 55 (2013). "[S]o-called content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." (Internal quotation marks omitted.) *Morascini* v. *Commissioner of Public Safety*, 236 Conn. 781, 791, 675 A.2d 1340 (1996). In *Linares*, our Supreme Court upheld against a first amendment challenge the defendant's conviction for intentionally interfering with the legislative process when she, along with other activists, unfurled a large banner during the governor's budget address to the state house of representatives and chanted or shouted in loud voices. *State* v. *Linares*, supra, 353. Thus, *Linares* stands for the proposition that statutory limitations on physical or verbal expressions of speech, even if that speech occurs in a public forum, can be properly restricted provided any limitations are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (Internal quotation marks omitted.) Id., 367.

Stated succinctly, the defendant's analysis of his first amendment claim is muddled, unfocused, and fails to place his arguments into any readily discernable legal parameters. In *Stacy B.* v. *Robert S.*, supra, 165 Conn. App. 384, this court concluded that it could not review a first amendment challenge to a civil protection order because "[m]any of the standards for first amendment analysis are highly fact specific" and "[w]ithout adequate briefing, [the court could not] determine the applicable legal standard for the first amendment claim . . . ." That same deficiency is present here. The defendant does not directly challenge the constitutionality of § 46b-16a, either facially or as applied, nor does he expressly assert that the protection order issued by the court prospectively infringes on any particular first amendment right. To the extent he is attempting to make such claims, however, they are inadequately briefed and, accordingly, we decline to review them.

V

Finally, the defendant claims that the court violated his right to due process by improperly engaging in ex parte communications with the plaintiff. We do not review this claim because it is unpreserved and the record is not adequate for review.[19]

Judges, with limited exception, ordinarily must refrain from engaging in ex parte contacts with parties. See Code of Judicial Conduct, Rule 2.9.[20] The defendant, in support of his claim that such an impropriety

[19] To the extent that the defendant also seeks to challenge other actions or procedures taken by the court during the hearing, none of these additional claims has been adequately briefed and, therefore, they are deemed abandoned. See *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 711, 900 A.2d 498 (2006) ("[a]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed" (internal quotation marks omitted)).

[20] Rule 2.9 of the Code of Judicial Conduct provides in relevant part: "(a) A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

occurred in the present case, never raised the issue before the trial court and does not direct us toward any evidence in the record of an actual ex parte communication by the court. Instead, he asks us to assume that one occurred solely on the basis of statements the court made on the record at the hearing. We decline the defendant's invitation to engage in what amounts to pure speculation.

The defendant directs our attention to the hearing transcript and what he describes as a " 'smoking gun' statement by the trial judge." Specifically, he points to the following colloquy that occurred during the plaintiff's direct examination by her counsel:

"[The Plaintiff's Counsel]: All right. You mentioned that you hit a panic button; why does the [town] have a panic button?

"[The Plaintiff]: Those panic buttons were put in so that the employees within the town hall could alert the police department, primarily because of [the defendant's] behavior to other people in the office.

"[The Plaintiff's Counsel]: How has he behaved toward other people in town hall?

"The Court: Listen, she doesn't know. Call [the first selectman], he'll testify."

The defendant argues that the *only* way the judge could have known that the first selectmen was at the hearing "to give testimony as opposed to just moral sup-

"(1) When circumstances require it, ex parte communications for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

"(A) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

"(B) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond. . . ."

port" was because "the trial judge ha[d] ex parte communications with the opposing party . . . ." A logical leap is necessary, however, in order to assume that the court's statement, without more, demonstrated the court's knowledge of either the first selectman's presence in the courtroom, or, more importantly, that the plaintiff would in fact call the first selectman to testify. The statement, read in context, could as easily be viewed as an expression of the court's belief that the first selectman would be the more appropriate person to answer questions regarding the defendant's past behavior toward other town hall employees whom he supervised.

If the defendant believed that the court's statement had implied some improper ex parte communication with the plaintiff or her counsel, he could have asked for clarification at that time, requested that the court recuse itself, or asked that the hearing on the application for a protection order be continued. The defendant did none of those things.

Although an unpreserved due process claim may be addressed by this court under the doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[21] such a claim necessarily will fail if the record simply is inadequate to review the alleged violation. Here, the record is inadequate to

[21] "Under this familiar test, [a] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; internal quotation marks omitted.) *State* v. *Dunbar*, 188 Conn. App. 635, 644–45, 205 A.3d 747, cert. denied, 331 Conn. 926, 207 A.3d 27 (2019).

ascertain whether an ex parte communication happened at all, let alone the nature of any such communication or its harm to the defendant. Accordingly, we cannot review the defendant's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHEN W. SCHOLZ *v.* JUDA J. EPSTEIN (AC 42419)

Alvord, Elgo and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, an attorney, for alleged statutory theft arising from the defendant's conduct during prior judicial proceedings involving the foreclosure of the plaintiff's property. The defendant, acting as attorney for B Co., brought an action against the plaintiff to foreclose a municipal lien that B Co. had purchased from the city of Bridgeport. The plaintiff thereafter commenced this action alleging that the defendant, in the course of the foreclosure proceeding, made false representations to the court with the intent to default the plaintiff for failure to appear and to render a judgment of strict foreclosure. The plaintiff alleged that the defendant intended to deprive the plaintiff of his property and/or to appropriate the property to B Co., committing theft pursuant to statute (§ 52-564). The court granted the defendant's motion to dismiss the action for lack of subject matter jurisdiction on the ground that the defendant was protected by absolute immunity pursuant to the litigation privilege, and, from the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The trial court properly granted the defendant's motion to dismiss, this court having determined, as a matter of first impression, that the defendant was protected by absolute immunity from the plaintiff's action for statutory theft under § 52-564: following an evaluation of the competing public policy considerations, including the underlying purpose of judicial proceedings, the similarity between statutory theft and claims of fraud and defamation, which are protected by the privilege, and the availability of other remedies, this court reasoned that the plaintiff's claim of statutory theft did not require a consideration of whether the underlying purpose of the foreclosure litigation was improper, rather, the plaintiff's claim raised the issue of whether an attorney's conduct, while representing a client during a judicial proceeding brought for a proper purpose, was entitled to absolute immunity; moreover, a claim of statutory theft under § 52-564 is more analogous to a claim of fraud, as opposed to a

claim of vexatious litigation or abuse of process, because the plaintiff had to prove that the defendant obtained the property in the foreclosure action through false representations made to the court in the foreclosure action, and, because the privilege protected the defendant's communications, they were shielded by absolute immunity, regardless of the nature of the plaintiff's cause of action; furthermore, the required elements of statutory theft do not contain inherent safeguards against inappropriate retaliatory litigation, public policy does not support permitting claims of statutory theft against attorneys, as it would inhibit candor in judicial proceedings, and attorneys who engage in serious misconduct, such as that alleged by the plaintiff, are subject to a number of possible sanctions, and the availability of these alternative remedies serves as a deterrent to attorney misconduct.

2. The plaintiff could not prevail on his claim that, even if the litigation privilege applied to the defendant's conduct during the foreclosure proceeding, the trial court improperly granted the defendant's motion to dismiss where some of the defendant's alleged conduct was perpetrated outside the scope of judicial proceedings: although the plaintiff claimed that the defendant delayed the recording of the certificate of foreclosure, in light of the fact that the litigation privilege applies to documents prepared in connection with a judicial proceeding, the defendant's action was clearly conducted in connection with the foreclosure proceeding and fell within the scope of the litigation privilege; this court rejected the plaintiff's claim that the subsequent sale of the foreclosed property constituted conduct by the defendant outside the scope of the privilege, as the complaint did not contain any allegations of wrongdoing by the defendant with respect to the sale of the property, rather, the complaint alleged that the defendant's misconduct eventually resulted in the sale of the property by B Co., and, as the complaint did not allege that the defendant was involved in wrongdoing with respect to the sale after title had vested in B Co., or that the sale was procured through the services of the defendant, the plaintiff's claim lacked merit; moreover, even construing the allegations of the complaint as alleging a claim for statutory theft on the basis of the defendant's conduct concerning the sale of the property, the sale of the foreclosed property was an integral step in the foreclosure process, and the defendant's conduct in assisting B Co. with that sale was relevant to that proceeding and, thus, fell within the scope of the litigation privilege.

Argued January 13—officially released June 16, 2020

Procedural History

Action to recover damages for statutory theft, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Bellis*, *J.*, granted the defendant's motion to dismiss and rendered

judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jonathan J. Klein, for the appellant (plaintiff).

Daniel J. Krisch, with whom, on the brief, were *Joshua M. Auxier* and *Stephen P. Fogerty*, for the appellee (defendant).

Opinion

EVELEIGH, J. This appeal concerns an issue of first impression in Connecticut: whether an attorney is protected by absolute immunity under the litigation privilege from a claim of statutory theft[1] arising from the attorney's conduct during prior judicial proceedings. The plaintiff, Stephen W. Scholz, appeals from the judgment of the trial court granting the motion of the defendant, Attorney Juda J. Epstein, to dismiss the plaintiff's action for statutory theft for lack of subject matter jurisdiction on the ground that the defendant was protected by absolute immunity pursuant to the litigation privilege. On appeal, the plaintiff claims that the court erred in (1) granting the defendant's motion to dismiss and determining that the litigation privilege affords the defendant absolute immunity from the plaintiff's action for statutory theft, which was brought pursuant to General Statutes § 52-564, (2) ruling that the public policy considerations underlying the litigation privilege are served by affording the defendant absolute immunity from civil liability for his alleged criminal conduct that was the basis for the statutory theft claim, (3) its application of the balancing of interests test set forth in *Simms* v. *Seaman*, 308 Conn. 523, 543–44, 69 A.3d 880 (2013), and (4) granting the motion to dismiss and determining that the defendant was absolutely immune from

[1] The parties use the terms civil theft, statutory civil theft and statutory theft to refer to the plaintiff's cause of action under General Statutes § 52-564. For consistency, we refer to the plaintiff's cause of action in this opinion as a claim for statutory theft.

liability for statutory theft where some of the defendant's alleged criminal conduct was perpetrated outside the scope of judicial proceedings. We affirm the judgment of the trial court.

The following facts, as alleged in the plaintiff's complaint, and procedural history are relevant to our review of the claims on appeal. The plaintiff, who resides at 405 Helen Street in Bridgeport, became the owner of an adjacent lot located at 744 Stillman Street in Bridgeport (Stillman property). When the plaintiff failed to pay the real property taxes on the Stillman property in the amount of $1018.74 that were owed to the city of Bridgeport (city), the city recorded a certificate of lien on the land records on April 7, 2014, for the unpaid taxes, interest and related charges. The lien was thereafter sold to Benchmark Municipal Tax Services, Ltd. (Benchmark), pursuant to an assignment that was recorded on the land records on April 29, 2014. Benchmark is a client of the defendant, who is an attorney licensed to practice law in the state of Connecticut. Pursuant to a writ of summons and complaint dated April 22, 2016, the defendant, acting as Benchmark's attorney, commenced a civil action against the plaintiff to foreclose the lien. According to the complaint in the present case, "[t]he summons recited the address of the owner of the [Stillman] property, [the plaintiff], as '69 Settlers Farm Road, Monroe, CT 06468,' " and "[t]he state marshal's return of service, dated April 26 and 29, 2016 . . . does not reflect that service was made on [the plaintiff], nor does it describe any effort made by the state marshal to locate [the plaintiff] or to attempt to effect service on him."

The plaintiff further alleged in his complaint that "throughout his prosecution of the foreclosure action, [the defendant] knew that [the plaintiff] resided at 405 Helen Street . . . not 69 Settlers Farm Road" in Monroe by virtue of certain facts. Those facts include the

following: (1) a tax bill for the property that was issued by the city and included the plaintiff's correct address, which was a matter of public record; (2) a demand letter written by the defendant to the plaintiff, addressed to the plaintiff at 405 Helen Street in Bridgeport; (3) a letter written by the defendant to the plaintiff rejecting a payment the plaintiff tendered, which also was addressed to the plaintiff at 405 Helen Street in Bridgeport; (4) a marshal's return of service from a previous tax lien foreclosure action brought against the plaintiff by the defendant on behalf of Benchmark regarding real property taxes that were due on the property at 405 Helen Street, which stated that service was made on the plaintiff at his usual place of abode, 405 Helen Street in Bridgeport; and (5) evidence showing that the defendant had served the plaintiff with other documents at that address as well.

According to paragraph 12 of the complaint, the defendant filed a motion to cite in the plaintiff as a defendant in the civil action to foreclose the lien "on the basis of six specific representations he made to the court, all of which were materially false and which [the defendant] knew were materially false when he made them, namely, that: [1] at the time the action was commenced, he believed that . . . [the plaintiff] had been properly served; [2] [the plaintiff] was unable to be served; [3] [the defendant] directed a state marshal to effectuate service upon [the plaintiff], but [the plaintiff] was not at any of the 'possible locations'; [4] [the defendant] had done his due diligence in trying to locate [the plaintiff] but 'all possible locations' had been exhausted . . . [5] the notice most likely to come to the attention of [the plaintiff] was the publication of an order of notice of the institution of the foreclosure action in the Connecticut Post, a newspaper circulated in the Bridgeport area, once a week for two successive weeks; and [6] 'the last known address of [the plaintiff] is unknown.' " Paragraph 13 of the complaint alleged that

the defendant "knew that those six representations he made to the court were materially false when he made them" for a number of reasons, including that the defendant knew that the marshal's return of service did not reflect that any service was made on the plaintiff and that the return of service did not describe any effort made by the marshal to locate the plaintiff, and that the defendant knew the possible locations where the plaintiff could have been found, and knew that the plaintiff resided, and could have been properly served, at 405 Helen Street in Bridgeport. In paragraph 16, the plaintiff further alleged that the defendant perpetrated "a fraud upon the court" through his conduct in "knowingly making materially false representations to the court with the intent to induce and cause the court to rely on those statements to order notice by publication and, ultimately, to default [the plaintiff] for failure to appear and to enter a judgment of strict foreclosure . . . ."

On November 9, 2016, the defendant filed a motion to default the plaintiff for failure to appear in the foreclosure action, which was granted, and, on December 2, 2016, the defendant filed a motion for a judgment of strict foreclosure. According to the complaint, the defendant sought a judgment of strict foreclosure, rather than a foreclosure by sale, by misleading "the court to believe that [the plaintiff's] equity in the property was tens of thousands of dollars less than it truly was by procuring and filing with the court an appraisal report . . . [that] was flawed on its face . . . ." The court granted the motion for a judgment of strict foreclosure on January 9, 2017. The plaintiff alleged that "[b]y wrongfully misleading the court into entering a judgment of strict foreclosure, rather than a judgment of foreclosure by sale, [the defendant] purposefully evaded the requirement of posting a sign on the property within a few feet of the front door of [the plaintiff's] residence at 405 Helen Street . . . announcing a scheduled foreclosure auction sale, and thereby purposefully

deprived [the plaintiff] of notice that a foreclosure of the property was pending, and purposefully deprived him of the opportunity to redeem the property from the foreclosure or otherwise to act to protect his ownership interest in the property."

The plaintiff further alleged that "[a]s a result of the conduct of [the defendant] [as] alleged . . . [the plaintiff] was unaware . . . that the tax lien foreclosure action had even been commenced, let alone that it had gone to judgment, that the law days had run, that Benchmark had taken title to the property by strict foreclosure and that Benchmark had sold the property to third parties for a windfall profit . . . ." Because the plaintiff operated a business on both the property at 405 Helen Street and the Stillman property, he was suddenly faced with the realization that he no longer owned the Stillman property and that his business and livelihood might be destroyed by the loss of the Stillman property. Therefore, he alleged that he was "forced to buy back the [Stillman] property . . . ." Accordingly, in paragraph 38 of the complaint the plaintiff alleged that the defendant "wrongfully engaged in the conduct alleged . . . with the intent to deprive [the plaintiff] of his property and/or to appropriate the property to Benchmark, thereby committing [statutory] theft in violation of . . . § 52-564, and causing [the plaintiff] great financial loss."

On June 19, 2018, the defendant filed a motion to dismiss the plaintiff's action for lack of subject matter jurisdiction on the basis of the litigation privilege. In support of his motion, the defendant claimed that because all of the acts alleged in the complaint were committed by the defendant in connection with the litigation process in the foreclosure action, and because he was "acting within the litigation process as counsel for the lienholder in the foreclosure action," he was shielded by the litigation privilege from the plaintiff's

claim for statutory theft. On July 17, 2018, the plaintiff filed a memorandum of law in opposition to the defendant's motion to dismiss, claiming that "[t]he absolute immunity of the litigation privilege does not apply to a complaint [that] sounds in [statutory] theft."

In a memorandum of decision dated December 11, 2018, the trial court granted the defendant's motion to dismiss, stating: "Connecticut appellate courts have not yet determined whether the litigation privilege provides attorneys with absolute immunity from claims of statutory theft based on their conduct in judicial proceedings." After undertaking the balancing analysis set forth in *Simms* v. *Seaman*, supra, 308 Conn. 543–44, the court found that the allegations of the complaint were "more akin to a claim of fraud than a claim of abuse of process or vexatious litigation," "the elements of statutory theft do not incorporate protections for attorneys against unwarranted litigation," there were "other available remedies to address the conduct complained of by the plaintiff," and "other decisions of the Superior Court have extended the privilege to claims of statutory theft." Accordingly, the court determined that, in "[b]alancing the policy considerations, the plaintiff's claim of statutory theft stemming from the defendant's alleged conduct during the judicial proceeding is barred by absolute immunity." From the judgment rendered dismissing the action, the plaintiff appealed to this court.

Before turning to the merits of the plaintiff's claims on appeal, we first set forth our standard of review of a court's decision on a motion to dismiss, which is well settled. See *Ion Bank* v. *J.C.C. Custom Homes, LLC*, 189 Conn. App. 30, 37, 206 A.3d 208 (2019). "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Iino* v. *Spalter*, 192 Conn. App. 421, 425, 218 A.3d 152 (2019). "When a . . . court decides a jurisdictional question raised by a pretrial

motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Traylor* v. *State*, 332 Conn. 789, 792–93 n.6, 213 A.3d 467 (2019); see also *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014); *Connecticut Center for Advanced Technology, Inc.* v. *Bolton Works, LLC*, 191 Conn. App. 842, 844–45, 216 A.3d 813, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019). "In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary." (Internal quotation marks omitted.) *Board of Education* v. *Bridgeport*, 191 Conn. App. 360, 366, 214 A.3d 898 (2019); see also *Walenski* v. *Connecticut State Employees Retirement Commission*, 185 Conn. App. 457, 464, 197 A.3d 443, cert. denied, 330 Conn. 951, 197 A.3d 390 (2018).

I

The plaintiff's first three claims on appeal concern the issue of whether the trial court improperly granted the defendant's motion to dismiss and determined that the litigation privilege affords the defendant absolute immunity from the plaintiff's action for statutory theft under § 52-564. We conclude that the court properly granted the defendant's motion to dismiss and determined that the defendant was protected by absolute immunity from such a claim.

A

Before we address the merits of that claim, we begin with a discussion of the history of the litigation privilege in Connecticut, which developed in the context of defamation claims. See *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 725, 161 A.3d 630 (2017). "Connecticut has long recognized the litigation privilege . . . [and has extended it] to judges, counsel and witnesses participating in judicial proceedings." (Internal quotation marks omitted.) Id. "The principle that defamatory statements by attorneys during judicial proceedings are absolutely privileged when they are pertinent and material to the controversy is . . . well established in American jurisprudence. The formulation of the rule in the Restatement (Second) of Torts, which has been adopted in nearly every state . . . provides: 'An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.' 3 Restatement (Second), supra, § 586, p. 247; see also W. Prosser & W. Keeton, [Torts (5th Ed. 1984)] § 114, p. 817. One of the comments to § 586 of the Restatement (Second) further provides that the privilege 'protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity.' 3 Restatement (Second), supra, § 586, comment (a), p. 247.

"Three rationales have been articulated in support of the absolute privilege. . . . First, and most important, it 'protects the rights of clients who should not be imperiled by subjecting their legal advisors to the constant fear of lawsuits arising out of their conduct in the course of legal representation. The logic is that an attorney preparing for litigation must not be hobbled

by the fear of reprisal by actions for defamation . . . which may tend to lessen [counsel's] efforts on behalf of clients.' . . . This includes protection from intrusive inquiries into the motives behind an attorney's factual assertions . . . and, in the case of alleged omissions or the concealment of evidence, from having to resist or defend against attempts to uncover information that arguably could have been produced at trial but might be subject to the attorney-client privilege. Second, the privilege furthers 'the administration of justice by preserving access to the courts. If parties could file retaliatory lawsuits and cause the removal of their adversary's counsel on that basis, the judicial process would be compromised.' . . . Third, there are remedies other than a cause of action for damages that can be imposed by the court under court rules, the court's inherent contempt powers and the potential for disciplinary proceedings through state and local bar associations." (Citations omitted; footnotes omitted.) *Simms* v. *Seaman*, supra, 308 Conn. 534–36.

In *Rioux* v. *Barry*, 283 Conn. 338, 343–44, 927 A.2d 304 (2007), our Supreme Court explained the purpose and public policy underlying the doctrine of absolute immunity: "The doctrine of absolute immunity as applied to statements made in the context of judicial and quasi-judicial proceedings is rooted in the public policy of encouraging witnesses, both complaining and testimonial, to come forward and testify in either criminal or civil actions. The purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons

whom the common-law doctrine was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward with complaints or to testify." (Citations omitted; internal quotation marks omitted.)

Our Supreme Court has expanded the doctrine of absolute immunity afforded to statements made during judicial proceedings to bar retaliatory civil actions beyond defamation claims. For example, in *Peytan* v. *Ellis*, 200 Conn. 243, 250–55, 510 A.2d 1337 (1986), the court determined that absolute immunity barred a claim of intentional infliction of emotional distress that was based on an allegedly defamatory statement made by the defendant employer in a fact-finding form that had been submitted to the defendant by the Employment Security Division of the Department of Labor in connection with the processing of the plaintiff's claim for unemployment compensation benefits. See also *Simms* v. *Seaman*, supra, 308 Conn. 569–70. In *Rioux* v. *Barry*, supra, 283 Conn. 350, the court held that the plaintiff's claim of intentional interference with contractual or beneficial relations was barred by absolute immunity, and, in *Simms* v. *Seaman*, supra, 308 Conn. 545, the court determined that attorneys are protected by absolute immunity under the litigation privilege for claims of fraud based on their conduct during judicial proceedings. See also *Tyler* v. *Tatoian*, 164 Conn. App. 82, 83–84, 93, 137 A.3d 801 (affirming trial court's determination that defendant trustee was shielded by absolute immunity for claims of fraud and violations of Connecticut Unfair Trade Practices Act, General Statutes

§ 42-110a et seq., and rejecting assertion that such claims fell under exception to absolute immunity for causes of action alleging improper use of judicial system), cert. denied, 321 Conn. 908, 135 A.3d 710 (2016). "[I]n expanding the doctrine of absolute immunity to bar claims beyond defamation, [our Supreme Court] has sought to ensure that the conduct that absolute immunity is intended to protect, namely, participation and candor in judicial proceedings, remains protected regardless of the particular tort alleged in response to the words used during participation in the judicial process. Indeed, [the court] recently noted that [c]ommentators have observed that, because the privilege protects the *communication*, the nature of the theory [on which the challenge is based] is irrelevant." (Emphasis in original; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 628, 79 A.3d 60 (2013); see also *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 726–27.

"In expanding the scope of the litigation privilege . . . our Supreme Court has recognized a distinction between attempting to impose liability upon a participant in a judicial proceeding for the words used therein and attempting to impose liability upon a litigant for his improper use of the judicial system itself. . . . In this regard, [it has] refused to apply absolute immunity to causes of action alleging the improper use of the judicial system. . . . *MacDermid, Inc.* v. *Leonetti*, [supra, 310 Conn. 629]; see also, e.g., id., 625–26 (litigation privilege did not shield claim by employee against employer alleging that employer had brought action against employee solely in retaliation for employee exercising his rights under Workers' Compensation Act); *Rioux* v. *Barry*, supra, 283 Conn. 343 (in the context of a quasi-judicial proceeding, absolute immunity does not attach to statements that provide the ground for the tort of vexatious litigation); *Mozzochi* v. *Beck*, 204 Conn. 490, 495, 529 A.2d 171 (1987) (an attorney may

be sued for misconduct by those who have sustained a special injury because of an unauthorized use of legal process). . . .

"In *Rioux*, [our Supreme Court] emphasized that whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests. . . . [It] also observed that, in previous cases that . . . presented a question of the applicability of the doctrine of absolute immunity, [it] applied the general principles underlying that doctrine to the particular context of those cases. . . . Furthermore, the cases following *Rioux* have not relied exclusively or entirely on the factors enumerated therein, but instead have considered the issues relevant to the competing interests in each case." (Internal quotation marks omitted.) *Tyler* v. *Tatoian*, supra, 164 Conn. App. 88–90. "In examining the competing interests and public policies at stake, our Supreme Court has focused on the need to ensure candor from all participants in the judicial process." Id., 90. Finally, the court also has noted that federal precedent "weighs in favor of applying the privilege to state law claims alleging fraud"; *Simms* v. *Seaman*, supra, 308 Conn. 562; and that "courts in many jurisdictions have followed an approach that has strengthened the litigation privilege, not abrogated it. As commentators and scholars have observed, [a]s new tort theories have emerged, courts have not hesitated to expand the privilege to cover theories, actions, and circumstances never contemplated by those who formulated the rule in medieval England." (Internal quotation marks omitted.) Id., 566.

B

With this backdrop in mind, we turn to the plaintiff's claim in the present case that the trial court improperly concluded that the litigation privilege affords the defendant absolute immunity from the plaintiff's action for statutory theft under § 52-564. In support of his claim,

the plaintiff raises a number of arguments. Specifically, he claims that the trial court erred in ruling that the public policy considerations underlying the litigation privilege are served by absolutely immunizing the defendant from liability for statutory theft. In that vein, the plaintiff argues that the defendant's actions amounted to larceny; that "[a]cts of theft have nothing whatsoever to do with advancing the right or need to advocate to speak out the whole truth, freely and fearlessly"; that "[t]heft committed by an attorney, especially when committed in court or in his filings in the publicly accessible docket, does grievous public harm and denigrates and brings shame upon the profession"; and that "the defendant engaged in conduct which is closely akin to a claim of abuse of process to which the litigation privilege does not apply, as his theft constituted the improper use of litigation to accomplish a purpose for which it was not designed. *Mozzochi* v. *Beck*, [supra, 204 Conn. 494]." (Internal quotation marks omitted.)

Neither party has cited, nor are we aware of, any appellate authority determining whether absolute immunity protects an attorney from a claim of statutory theft based on the attorney's conduct during judicial proceedings.[2] Accordingly, this court must begin its

[2] Although there is no appellate authority on this issue, a number of Superior Court cases have concluded that absolute immunity is a bar to a claim against an attorney for statutory theft. See *Vossbrinck* v. *Cheverko*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-17-5016825-S (February 20, 2018) (attorney who had represented party in foreclosure action was protected by absolute immunity from claim of statutory theft premised on attorney's conduct in ordering removal of plaintiff's personal property from foreclosed property following order of ejectment by court; court found that intentional tort of statutory theft was similar to other intentional torts that are barred by absolute immunity); *Gordon* v. *Eckert Seamans Cherin & Mellott, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-17-5038333-S (February 6, 2018) (65 Conn. L. Rptr. 893, 899–901) (absolute immunity barred cause of action for statutory theft against defendant law firm, which represented foreclosing mortgagee in foreclosure action, where personal property stored on foreclosed property was removed by defendant in pursuit of lawful execution of ejectment and possession following lawful foreclosure); *Stradinger* v. *Griffin Hospital*, Superior Court, judicial district of Waterbury, Docket No. CV-15-6026406-S

analysis by applying the public policy underlying the litigation privilege to a cause of action for statutory theft to determine whether the protection of absolute immunity should extend to such an action. In making that determination, we are guided by the principle that the issue of whether to recognize a claim for statutory theft against an attorney as one to which the litigation privilege does not apply "is a matter of policy for the court to determine based on the changing attitudes and needs of society." *Craig* v. *Driscoll*, 262 Conn. 312, 339, 813 A.2d 1003 (2003); see also *Simms* v. *Seaman*, supra, 308 Conn. 545.

In the present case, we must decide whether a cause of action for statutory theft may be brought against an attorney arising out of actions taken by the attorney during judicial proceedings. A determination of this issue, therefore, requires this court to evaluate the competing public policy considerations, including the underlying purpose of judicial proceedings, the similarity between statutory theft and claims of fraud and defamation, which are protected by the privilege, and the availability of other remedies. See *Simms* v. *Seaman*, supra, 308 Conn. 545–54.[3]

1

Underlying Purpose of Judicial Proceedings

The first factor that our Supreme Court in *Simms* considered in evaluating whether claims of fraud against an attorney are precluded by absolute immunity was whether such claims "challenge the underlying purpose of the litigation rather than an attorney's role as

(December 11, 2015) (court applied public policy analysis underlying absolute immunity to cause of action for statutory theft and determined that, on balance, protection of immunity should extend to such actions).

[3] The court in *Simms* also considered, as a fourth factor, whether fraudulent conduct by an attorney has been protected by the litigation privilege in federal courts. See *Simms* v. *Seaman*, supra, 308 Conn. 545-46. We have not discovered any federal precedent on the issue presented in the present case and, therefore, we do not include an analysis of this factor.

an advocate for his or her client." Id., 546; see also *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 629 (our Supreme Court has "refused to apply absolute immunity to causes of action alleging the improper use of the judicial system"). Claims that challenge the underlying purpose of litigation, for which attorneys are not protected by absolute immunity, include claims of abuse of process, which "must allege the improper use of litigation to accomplish a purpose for which it was not designed." (Internal quotation marks omitted.) *Simms* v. *Seaman*, supra, 308 Conn. 546; see also *Mozzochi* v. *Beck*, supra, 204 Conn. 495 ("attorney may be sued for misconduct by those who have sustained a special injury because of an unauthorized use of legal process"). Likewise, attorneys are not shielded by absolute immunity from claims of vexatious litigation, which must allege, inter alia, that the defendant acted without probable cause, primarily for a purpose other than that of bringing an offender to justice. *Rioux* v. *Barry*, supra, 283 Conn. 347.

The primary reason for excluding claims that challenge the underlying purpose of litigation from the ambit of the litigation privilege is that they contain inherent safeguards against inappropriate retaliatory litigation. For instance, our Supreme Court in *Rioux* explained that "the tort of vexatious litigation is treated differently because of [the] restraints built into it by virtue of its stringent requirements. . . . [W]ere we to provide absolute immunity for the communications underlying the tort of vexatious litigation, we would effectively eliminate the tort. Unlike the communications underlying the tort of defamation, virtually any initiation or procurement of a previous lawsuit would necessarily be part of any judicial proceeding. Thus, the tort of vexatious litigation would virtually always be subject to absolute immunity." (Citations omitted.) Id., 347–48. As the court observed, "the requisite elements of the tort of vexatious litigation effectively strike

the balance between the public interest of encouraging complaining witnesses to come forward and protecting the private individual from false and malicious claims [and, thus] [i]t is unnecessary and undesirable to extend the additional protection afforded by the doctrine of absolute immunity to defendants in vexatious litigation claims." Id., 348-49.

In concluding that attorneys subject to claims of fraud for their conduct in the course of litigation are entitled to absolute immunity, the court in *Simms* explained that such claims do not require a consideration of whether the underlying purpose of litigation was improper. See *Simms* v. *Seaman*, supra, 308 Conn. 546-47. With respect to such claims, what is being challenged is the conduct of an attorney in his or her role as an advocate for his or her client in a judicial proceeding. Id.; see also *Barrett* v. *United States*, 798 F.2d 565, 573 (2d Cir. 1986) (fact that counsel may or may not have engaged in questionable or harmful conduct during course of representation in litigation is irrelevant; immunity attaches to function, not in how counsel performed). Consequently, our Supreme Court concluded that the "reasons for precluding use of the litigation privilege in cases alleging abuse of process and vexatious litigation have no application to claims of fraud." *Simms* v. *Seaman*, supra, 547. That reasoning applies equally to the plaintiff's claim of statutory theft in the present case that the defendant made material misrepresentations to the court in the foreclosure action and misled the court to render a judgment of strict foreclosure, rather than a foreclosure by sale. Such a claim does not require a consideration of whether the underlying purpose of the litigation was improper. Instead, the plaintiff's claim concerns the issue of whether an attorney's conduct, while representing a client during a judicial proceeding that was brought for a proper purpose, is entitled to absolute immunity. We conclude,

therefore, that the plaintiff's claim of statutory theft against the defendant attorney does not subvert the underlying purpose of a judicial proceeding. See id., 545–47.

Applying these considerations to the present case, we conclude that a statutory theft action against an attorney for the attorney's conduct in the course of representing his or her client in litigation does not implicate a challenge to the propriety of the underlying litigation. Like fraud and defamation claims in the context of a judicial proceeding, a statutory theft action focuses on the allegedly improper conduct of an attorney in the role of advocate for a client. In the present case, the statutory theft claim concerned the conduct of the defendant attorney in a foreclosure proceeding. For example, the plaintiff alleged that, by fraudulent and knowing misrepresentations in effecting notice and securing a judgment of strict foreclosure, rather than a foreclosure by sale, the defendant misappropriated the plaintiff's property on behalf of his client, Benchmark.[4] The underlying litigation was brought by Benchmark, which was assigned by the city the right to initiate foreclosure proceedings with respect to its tax lien against the plaintiff. As evident in the present case, the statutory theft action challenges the conduct of the defendant attorney during the underlying foreclosure litigation, but not the propriety of the foreclosure action itself. Therefore, there is no basis for precluding the application of absolute immunity to a statutory theft claim that does not challenge the underlying purpose of the litigation but, instead, challenges the alleged misconduct of the defendant in his role as an attorney on behalf of his client.

[4] Notably, the plaintiff's allegations of statutory theft make clear that the effect of the defendant's claimed misconduct resulted in title vesting in Benchmark, rather than any direct benefit accruing to the defendant himself.

Statutory Theft as Compared to Fraud and Defamation

With respect to the second factor, our Supreme Court in *Simms* compared common-law fraud with the elements of defamation, and distinguished those claims from claims alleging vexatious litigation and abuse of process, for which the litigation privilege does not apply, explaining that the latter claims challenge the underlying purpose of the litigation, whereas the former claims challenge an attorney's role as an advocate for his or her client. See id., 546-51. The court in *Simms* further explained that "a claim of fraud is similar to a claim of defamation. A defamation action is based on the unprivileged communication of a false statement that tends either to harm the reputation of another by lowering him or her in the estimation of the community or to deter others from dealing or associating with him or her. . . . To establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. . . .

"The essential elements of an action in [common-law] fraud . . . are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act [on] it; and (4) the other party did so act [on] that false representation to his injury. . . . [T]he party to whom the false representation was made [must claim] to have relied on that representation and to have suffered harm as a result of the reliance. . . .

"As indicated by this comparison, claims of defamation and fraud during a judicial proceeding contemplate allegations that a party suffered harm because of a

falsehood communicated by the opponent's attorney, namely, the publication of a false statement that harms the other party's reputation in the case of defamation, and a false representation made as a statement of fact that induces the other party to act to his detriment in the case of fraud. . . .

"Claims of defamation and fraud are also similar because they are difficult to prove but easy for a dissatisfied litigant to allege. . . . [A]ttorneys are entitled to absolute immunity for allegedly defamatory statements in part because of the difficulty of ascertaining their truth." (Citations omitted; internal quotation marks omitted.) Id., 547–49. Finally, the court in *Simms* observed that "abrogation of the litigation privilege to permit claims of fraud could open the floodgates to a wave of litigation in this state's courts challenging an attorney's representation, *especially in foreclosure* and marital dissolution actions in which emotions run high and there may be a strong motivation on the part of the losing party to file a retaliatory lawsuit. Abrogation of the privilege also would apply to the claims of pro se litigants who do not understand the boundaries of the adversarial process, which could give rise to much unnecessary and harassing litigation." (Emphasis added.) Id., 568.

Accordingly, the court in *Simms* ultimately concluded that the similarities between common-law fraud and defamation warranted extending absolute immunity to claims of fraud against an attorney. Id., 547-51. In particular, it noted that because "the communication of a falsehood is an essential element of both defamation and fraud, the litigation privilege provides a complete defense to both causes of action." Id., 548-49. In the present case, in considering the elements of statutory theft, we conclude that, as applied to the defendant's alleged misconduct, a statutory theft cause of action similarly warrants the application of the privilege.

The tort of statutory theft is codified in § 52-564. This court has noted that, according to § 52-564, "[a]ny person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages. We consistently have held that statutory theft under § 52-564 is synonymous with larceny under General Statutes § 53a-119. . . . A person commits larceny within the meaning of . . . § 53a-119 when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. An owner is defined, for purposes of § 53a-119, as any person who has a right to possession superior to that of a taker, obtainer or withholder. General Statutes § 53a-118 (a) (5)." (Emphasis omitted; internal quotation marks omitted.) *Bongiorno* v. *Capone*, 185 Conn. App. 176, 198–99, 196 A.3d 1212, cert. denied, 330 Conn. 943, 195 A.3d 1134 (2018). Section 53a-119 sets forth a nonexhaustive list of acts that constitute larceny and provides that larceny includes, but is not limited to, "[o]btaining property by false pretenses. A person obtains property by false pretenses when, by any false token, pretense or device, he obtains from another any property, with intent to defraud him or any other person." General Statutes § 53a-119 (2). "[O]ur state has a well defined public policy against theft." *Private Healthcare Systems, Inc.* v. *Torres*, 84 Conn. App. 826, 832, 855 A.2d 987 (2004), appeal dismissed, judgment vacated on other grounds, 278 Conn. 291, 898 A.2d 768 (2006); see also *Metropolitan District Commission* v. *AFSCME, Council 4, Local 184*, 89 Conn. App. 680, 685, 874 A.2d 839, cert. denied, 275 Conn. 912, 882 A.2d 673 (2005); *Board of Education* v. *Local 566, Council 4, AFSCME*, 43 Conn. App. 499, 505, 683 A.2d 1036 (1996), cert. denied, 239 Conn. 957, 688 A.2d 327 (1997).

Given that "[s]tatutory theft under § 52-564 is synonymous with larceny under . . . § 53a-119"; (internal quotation marks omitted) *Bongiorno* v. *Capone*,

supra, 185 Conn. App. 198–99; and that a person commits larceny under § 53a-119 (2) when property is obtained by false pretenses, that is, when, by any false token, pretense or device, the party "obtains from another any property, with intent to defraud him or any other person"; General Statutes § 53a-119 (2); we conclude that a claim of statutory theft is more analogous to a claim of fraud, as opposed to a claim of vexatious litigation or abuse of process.[5] Like fraud, statu-

[5] As our Supreme Court has recognized, to establish a claim for fraud, "a plaintiff must be able to show by clear and convincing evidence that: (1) a false representation was made [by the defendant] as a statement of fact; (2) the statement was untrue and known to be so by [the defendant]; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . *Nazami* v. *Patrons Mutual Ins. Co.*, 280 Conn. 619, 628, 910 A.2d 209 (2006); see *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 819, 955 A.2d 15 (2008) (standard of proof for claim of common-law fraud is clear and convincing evidence)." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 821, 116 A.3d 1195 (2015). "In contrast to a negligent misrepresentation, [a] fraudulent representation . . . is one that is knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it." (Internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010).

In the present case, the allegations in support of the claim of statutory theft are as follows: (1) the defendant made a number of misrepresentations in the foreclosure action; (2) the representations were materially false and known by the defendant to be false at the time they were made; (3) the false representations were made with the intent to induce and cause the court in the foreclosure action to rely on them; and (4) the court did so rely on those misrepresentations in defaulting the plaintiff in the foreclosure action and rendering the judgment of strict foreclosure, which ultimately deprived the plaintiff of the opportunity to protect his ownership interest in the property and thereby caused him financial loss. Accordingly, even though the allegations of the complaint are strikingly similar to a claim of fraud, the plaintiff's claim satisfies only the first two elements of common-law fraud, as the six allegedly false representations set forth in the complaint were made by the defendant to the court, not to the plaintiff, and were intended to induce reliance thereon by the court in defaulting the plaintiff and rendering the judgment of strict foreclosure. We are mindful of this distinction and conclude only that in comparing a claim of statutory theft to other claims to determine whether it is one for which the litigation privilege applies, it is more akin to a claim of fraud, which is protected by absolute immunity, rather than a claim of vexatious litigation or abuse of process, to which such immunity does not apply.

tory theft is an intentional tort. See *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 771, 905 A.2d 623 (2006). In order to prove his claim of statutory theft, the plaintiff had to prove that the defendant obtained the property in the foreclosure action through false pretenses, namely, through a number of false representations made to the court in the underlying foreclosure proceeding. Thus, essential to the plaintiff's statutory theft claim in the present case was the communication of a falsehood by the defendant. In *Simms* v. *Seaman*, supra, 308 Conn. 548–49, our Supreme Court addressed similar circumstances and stated: "[B]ecause the privilege protects the *communication*, the nature of the theory [on which the challenge is based] is irrelevant. . . . Accordingly, because the communication of a falsehood is an essential element of both defamation and fraud, the litigation privilege provides a complete defense to both causes of action." (Citations omitted; emphasis in original; internal quotation marks omitted.)

The statutory theft claim in the present case falls squarely within that analysis. The plaintiff essentially alleges that the defendant's false communications to the court in the foreclosure action led to the theft of his property. Because the privilege protects the defendant's communications, they are shielded by absolute immunity, regardless of the nature of the plaintiff's cause of action. See *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 628; *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 727.

Furthermore, the required elements of statutory theft do not contain inherent safeguards against inappropriate retaliatory litigation as do the elements of a claim for vexatious litigation. The elements required to prove a claim for vexatious litigation—that the plaintiff was a defendant in a prior action that was decided in his or her favor and that was commenced without probable cause and for an improper purpose—"establish a very

high hurdle that minimizes the risk of inappropriate litigation while still providing an incentive to report wrongdoing, thus protecting 'the injured party's interest in being free from unwarranted litigation.' " *Simms* v. *Seaman*, supra, 308 Conn. 549. Even though fraud must be proven by a more exacting standard of clear and convincing evidence; *Stuart* v. *Freiberg*, 316 Conn. 809, 821, 116 A.3d 1195 (2015); the burden of proof for a claim of statutory theft is the preponderance of the evidence standard. *Fernwood Realty*, *LLC* v. *AeroCision*, *LLC*, 166 Conn. App. 345, 359–60, 141 A.3d 965, cert. denied, 323 Conn. 912, 149 A.3d 981 (2016). Nevertheless, our Supreme Court in *Simms* determined that the heightened burden of proof for fraud was not sufficient to reduce the risk of inappropriate litigation. Specifically, the court explained: "[T]he required elements of fraud, like the required elements of defamation and interference with contractual or beneficial relations that the court discussed in *Rioux*, do not provide the same level of protection against the chilling effects of a potential lawsuit as the required elements of vexatious litigation . . . [which] requires proof that the plaintiff was the defendant in a prior lawsuit decided in his favor and that the lawsuit was commenced without probable cause and for an improper purpose. . . . These requirements establish a very high hurdle that minimizes the risk of inappropriate litigation while still providing an incentive to report wrongdoing, thus protecting the injured party's interest in being free from unwarranted litigation. . . . The clear and convincing burden of proof required for a claim of fraud, however, is not an equivalent safeguard, and we do not agree with those who argue that this heightened standard alone would reduce the risk of retaliatory litigation to the same degree as the elements of vexatious litigation." (Citations omitted; internal quotation marks omitted.)

Simms v. *Seaman*, supra, 549. Accordingly, given our Supreme Court's determination that the heightened burden of proof for proving fraud alone does not provide a sufficient safeguard against the risk of inappropriate litigation, it necessarily follows that a claim of statutory theft, with its lesser standard of preponderance of the evidence, suffers the same infirmity.

In the present case, the plaintiff alleges that the defendant made a number of representations to the court in the foreclosure proceeding that were materially false and which the defendant knew were false when he made them, and that the defendant made the representations with the intent to induce the court to act on them to the plaintiff's detriment. The court in *Simms*, in addressing similar circumstances with respect to a claim of fraud, which requires a false representation that was known to be untrue at the time it was made and that was made with the intent to induce the party to act, stated: "[B]ecause opinions might differ on those questions, allowing them to be submitted to a jury could have . . . deleterious effects . . . including judgments against innocent attorneys. Moreover, it would be relatively easy to file a spurious claim of fraud because attorneys must be selective in deciding what information to disclose in the course of representing their clients and a litigant could well believe that undisclosed information later discovered to have been in the attorney's possession should have been disclosed, thus giving rise to a claim of fraud based on misrepresentation. Finally, the mere possibility of such claims, which could expose attorneys to harassing and expensive litigation, would be likely to inhibit their freedom in making good faith evidentiary decisions and representations and, therefore, negatively affect their ability to act as zealous advocates for their clients." (Footnote omitted.) Id., 550–51.

The allegations in the present case similarly involve open questions on which opinions could differ. We conclude that public policy does not support permitting claims of statutory theft against attorneys, as it would inhibit participation and candor in judicial proceedings, as well as "have a chilling effect on the attorney-client relationship and on an attorney's zealous representation of his or her client." *Simms* v. *Seaman*, 129 Conn. App. 651, 672, 23 A.3d 1 (2011), aff'd, 308 Conn. 523, 69 A.3d 880 (2013). As this court has explained previously: "If opposing counsel is not protected by immunity as explained in *Rioux*, there would be little or no disincentive to stop a disgruntled or unhappy opposing party from suing counsel for fraud for failing to disclose [the] information." Id. In the context of foreclosure proceedings, where emotions run high because parties stand to lose property on which a home or business may be located, if counsel are not protected by absolute immunity, such a result could open the floodgates to a rash of claims against opposing counsel for fraud or statutory theft where a disgruntled party is dissatisfied with the loss of the foreclosed property. That would be contrary to the public policy underlying the litigation privilege. See id., 674 ("There is a strong public policy that seeks to ensure that attorneys provide full and robust representation to their clients and that they provide such clients with their unrestricted and undivided loyalty. See *Mozzochi* v. *Beck*, supra, 204 Conn. 497. A cause of action that might inhibit such representation must have built-in restraints to prevent unwarranted litigation."); see also *Simms* v. *Seaman*, supra, 308 Conn. 562–63 ("the privilege is not intended to protect counsel who may be motivated by a desire to gain an unfair advantage over their client's adversary from subsequent prosecution for bad behavior but, rather, to encourage robust representation of clients and to protect the vast majority of attorneys who are innocent

of wrongdoing from harassment in the form of retaliatory litigation by litigants dissatisfied with the outcome of a prior proceeding"); *Perugini* v. *Giuliano*, 148 Conn. App. 861, 873, 89 A.3d 358 (2014) ("the law protects attorneys from suit in order to encourage zealous advocacy on behalf of their clients, unrestrained by the fear of exposure to tort liability").

3

Other Remedies

We next examine whether claims of statutory theft against attorneys may be adequately addressed by other available remedies. In *DeLaurentis* v. *New Haven*, 220 Conn. 225, 264, 597 A.2d 807 (1991), our Supreme Court stated: "While no civil remedies can guard against lies, the oath and the fear of being charged with perjury are adequate to warrant an absolute privilege for a witness' statements. . . . [C]ounsel who behave outrageously are subject to punishment for contempt of the court. Parties and their counsel who abuse the process by bringing unfounded actions for personal motives are subject to civil liability for vexatious suit or abuse of process." (Footnote omitted.) In *Simms*, in determining whether the defendant attorneys were protected by the litigation privilege against a claim of fraud, the court further explained that "safeguards other than civil liability exist to deter or preclude attorney misconduct or to provide relief from that misconduct. A dissatisfied litigant may file a motion to open the judgment . . . or may seek relief by filing a grievance against the offending attorney under the Rules of Professional Conduct, which may result in sanctions such as disbarment. . . . Additionally, [j]udges of the Superior Court possess the inherent authority to regulate attorney conduct and to discipline members of the bar. . . . The range of sanctions available to the court include those

set forth in Practice Book §§ 2-37[6] and 2-44,[7] and General Statutes § 51-84,[8] including fines, suspension and disbarment. Courts also may dismiss a case or impose lesser sanctions for perjury or contempt. . . . Accordingly, a formidable array of penalties, including referrals to the statewide grievance committee for investigation into alleged misconduct, is available to courts and dissatisfied litigants who seek redress in connection with an attorney's fraudulent conduct." (Citations omitted; footnotes in original; internal quotation marks omitted.) *Simms* v. *Seaman*, supra, 308 Conn. 552–54. Therefore,

[6] "Practice Book § 2-37 provides in relevant part: (a) A reviewing committee or the statewide grievance committee may impose one or more of the following sanctions and conditions in accordance with the provisions of Sections 2-35 and 2-36:

"(1) reprimand;

"(2) restitution;

"(3) assessment of costs;

"(4) an order that the respondent return a client's file to the client;

"(5) a requirement that the respondent attend continuing legal education courses, at his or her own expense, regarding one or more areas of substantive law or law office management;

"(6) an order to submit to fee arbitration;

"(7) in any grievance complaint where there has been a finding of a violation of Rule 1.15 of the Rules of Professional Conduct or Practice Book Section 2-27, an order to submit to periodic audits and supervision of the attorney's trust accounts . . . .

"(8) with the respondent's consent, a requirement that the respondent undertake treatment, at his or her own expense, for medical, psychological or psychiatric conditions or for problems of alcohol or substance abuse. . . .

* * *

"(c) Failure of the respondent to comply with any sanction or condition imposed by the statewide grievance committee or a reviewing committee may be grounds for presentment before the superior court." (Internal quotation marks omitted.) *Simms* v. *Seaman*, supra, 308 Conn. 553–54 n.17.

[7] "Practice Book § 2-44 provides in relevant part: 'The [S]uperior [C]ourt may, for just cause, suspend or disbar attorneys . . . .' " *Simms* v. *Seaman*, supra, 308 Conn. 554 n.18.

[8] "General Statutes § 51-84 provides: '(a) Attorneys admitted by the Superior Court shall be attorneys of all courts and shall be subject to the rules and orders of the courts before which they act.

" '(b) Any such court may fine an attorney for transgressing its rules and orders an amount not exceeding one hundred dollars for any offense, and may suspend or displace an attorney for just cause.' " *Simms* v. *Seaman*, supra, 308 Conn. 554 n.19.

attorneys who engage in serious misconduct, such as the misconduct alleged by the plaintiff here, are subject to a number of possible sanctions, including disbarment. The availability of these remedies serves as a deterrent to attorney misconduct with respect to a claim of statutory theft as equally as it does with respect to a claim of fraud.

II

The plaintiff also claims that, even if the litigation privilege applies to the defendant's conduct during the foreclosure proceeding, the trial court improperly granted the defendant's motion to dismiss and determined that the defendant was absolutely immune from liability for statutory theft where some of the defendant's alleged criminal conduct was perpetrated outside the scope of judicial proceedings. We disagree.

As stated previously, "[i]n ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Because a challenge to the jurisdiction of the court presents a question of law, our review of the court's legal conclusion is plenary." (Internal quotation marks omitted.) *Romeo* v. *Bazow*, 195 Conn. App. 378, 385, 225 A.3d 710 (2020).

In his brief, the plaintiff claims that "[s]ome of the injurious acts alleged in the complaint to have been committed by the defendant took place subsequent to and outside the confines of the judicial proceedings of the foreclosure action." Specifically, the plaintiff references the defendant's delayed recording of the certificate of foreclosure six months after the litigation had ended and ten days after the property was sold by Benchmark to third parties. According to the plain-

tiff, by so doing, the defendant caused the tax bill for the property to be issued to the plaintiff, further concealed the fact that the plaintiff had lost the property in a foreclosure action, and violated the one month recording requirement of General Statutes § 49-16. The plaintiff further claims in his brief that "[t]he final act of the defendant's scheme occurred when Benchmark, acting by the defendant, sold the property on July 28, 2017 . . . for the sum of $22,000, nearly triple the amount that the defendant had represented to the court just six months earlier was the fair market value of the property." Thus, the actions alleged by the plaintiff to have taken place outside of the scope of the judicial proceedings were the defendant's recording of the certificate of foreclosure on the land records and the subsequent sale of the property.

It is well settled that "communications uttered or published in the course of judicial proceedings are [protected by the litigation privilege] so long as they are in some way pertinent to the subject of the controversy. . . . [W]e must first determine whether the proceedings [in question] were [judicial or] [quasi-judicial] in nature. The judicial proceeding to which [absolute] immunity attaches has not been [exactly] defined . . . . It includes any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether the hearing is public or not. It includes for example, lunacy, bankruptcy, or naturalization proceedings, and an election contest. It extends also to the proceedings of many administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial or quasi-judicial, in character. . . .

"[Once we have] concluded that the statements of the defendant were made in the context of a judicial or quasi-judicial process, we must next determine whether the alleged defamatory statements were made in the

course of that proceeding and whether they related to its subject matter. . . . In making [the] determination [of whether a particular statement is made in the course of a judicial proceeding], the court must decide as a matter of law whether the . . . statements [at issue] are sufficiently relevant to the issues involved in a proposed or ongoing judicial [or quasi-judicial] processing, so as to qualify for the privilege. The test for relevancy is generous . . . ." (Citations omitted; internal quotation marks omitted.) *Kruger* v. *Grauer*, 173 Conn. App. 539, 547–48, 164 A.3d 764, cert. denied, 327 Conn. 901, 169 A.3d 795 (2017).

"[L]ike the privilege which is generally applied to pertinent statements made in formal judicial proceedings, an absolute privilege also attaches to relevant statements made during administrative proceedings which are quasi-judicial in nature. . . . Once it is determined that a proceeding is [quasi-judicial] in nature, the absolute privilege that is granted to statements made in furtherance of it extends to every step of the proceeding until final disposition." (Internal quotation marks omitted.) *Craig* v. *Stafford Construction, Inc.*, 271 Conn. 78, 84, 856 A.2d 372 (2004); *Kelley* v. *Bonney*, 221 Conn. 549, 565-66, 606 A.2d 693 (1992) (same); *Petyan* v. *Ellis*, supra, 200 Conn. 246 ("[t]his privilege extends to every step of the proceeding until final disposition"); see also *Hopkins* v. *O'Connor*, 282 Conn. 821, 839, 925 A.2d 1030 (2007) (in making determination of whether statement was made in course of judicial proceeding, court must decide as matter of law whether allegedly defamatory statements are sufficiently relevant to issues involved, test for relevancy is generous and "judicial proceeding has been defined liberally to encompass much more than civil litigation or criminal trials" (internal quotation marks omitted)); *Cohen* v. *King*, 189 Conn. App. 85, 89, 206 A.3d 188 (2019) (same).

Our Supreme Court has further explained that "[t]he scope of privileged communication extends not merely to those made directly to a tribunal, but also to those preparatory communications that may be directed to the goal of the proceeding. . . . To make such preparations . . . effective, there must be an open channel of communication between the persons interested and the forum, unchilled by the thought of subsequent judicial action against such participants; provided always, of course, that such preliminary meetings, conduct and activities are directed toward the achievement of the objects of the litigation or other proceedings." (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, supra, 282 Conn. 832. That court has "consistently . . . held that a statement is absolutely privileged if it is made in the course of a judicial proceeding and relates to the subject matter of that proceeding. E.g., [id.], 830–31; *DeLaurentis* v. *New Haven*, supra, 220 Conn. 264; *Petyan* v. *Ellis*, supra, 200 Conn. 245–46." *Gallo* v. *Barile*, 284 Conn. 459, 470, 935 A.2d 103 (2007). The litigation privilege "applies to statements made in pleadings or other documents prepared in connection with a court proceeding." *Petyan* v. *Ellis*, supra, 251–52.

There is no dispute in the present case that the foreclosure proceeding that forms the basis for the allegations of the complaint is a judicial proceeding to which the litigation privilege may apply. In light of the fact that the litigation privilege applies to documents prepared in connection with a judicial proceeding; see id.; and that the privilege extends to every step of the proceeding until its final disposition; see *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 84; we are not persuaded by the plaintiff's attempts to characterize certain of the defendant's actions as being outside the scope of the privilege. With respect to the defendant's recording of the certificate of foreclosure on the land

records, which was done by the defendant in his capacity as Benchmark's attorney in the foreclosure proceeding, pursuant to the requirements of § 49-16,[9] that action was clearly conducted in connection with, and was related and relevant to, the foreclosure proceeding. As such, it falls within the scope of the litigation privilege.

We equally reject the plaintiff's claim that the subsequent sale of the foreclosed property concerned conduct by the defendant that was outside the scope of the privilege. First, the complaint does not contain any allegations of wrongdoing by the defendant with respect to the sale of the property; instead, the plaintiff alleges that the defendant's allegedly wrongful conduct up to and including his delayed filing of the certificate of foreclosure eventually resulted in the sale of the property by *Benchmark*. Paragraph 31 of the complaint alleges that "[p]ursuant to a quitclaim deed dated July 28, 2017 . . . Benchmark sold the property" to certain individuals as joint tenants. Paragraph 32 further states that, "[a]s a result of the conduct of [the defendant] alleged above, [the plaintiff] was unaware . . . that the tax lien foreclosure action had even commenced, let alone that it had gone to judgment, that the law days had run, that Benchmark has taken title to the property by strict foreclosure and that *Benchmark* had sold the property to third parties for a windfall profit . . . ." (Emphasis added.) We must decide this case on the basis of the allegations of the complaint, which simply do not allege that the defendant was involved in wrongdoing with respect to the actual sale of the property

[9] General Statutes § 49-16 provides in relevant part: "When any mortgage of real estate has been foreclosed, and the time limited for redemption has passed, and the title to the mortgaged premises has become absolute in the mortgagee, or any person claiming under him, he shall, either in person or by his agent or attorney, forthwith make and sign a certificate describing the premises foreclosed, the deed of mortgage on which the foreclosure was had, the book and page where the same was recorded and the time when the mortgage title became absolute. The certificate shall be recorded in the land records of the town where the premises are situated . . . ."

after title had vested in Benchmark, or even that the sale was procured through the services of the defendant. Accordingly, the plaintiff's claim lacks merit.

Second, even if we were to construe the allegations of the complaint as alleging a claim for statutory theft on the basis of the defendant's conduct concerning the sale of the foreclosed property, the plaintiff's claim that such conduct falls outside the scope of the privilege, nevertheless, still fails. The test for whether the defendant's conduct was protected by absolute immunity depends on the relationship and relevancy of that conduct to the foreclosure proceeding. As our Supreme Court has noted, "[t]he test for relevancy is generous, and judicial proceeding has been defined liberally to encompass much more than civil litigation or criminal trials." (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, supra, 282 Conn. 839. We conclude that the subsequent sale of the foreclosed property was an integral step in the foreclosure process, and the defendant's alleged conduct in assisting Benchmark with that sale was relevant to that proceeding. See id., 832 (privilege extends to "communications that may be directed to the goal of the proceeding" and to "such preliminary meetings, conduct and activities [that] are directed toward the achievement of the objects of the litigation or other proceedings" (internal quotation marks omitted)). For these reasons, we reject the plaintiff's claim.

III

On the basis of our examination of the public policies and competing interests at stake, and after applying the public policy analysis under absolute immunity to the plaintiff's claim of statutory theft, we conclude that absolute immunity bars the plaintiff's claim of statutory theft against the defendant.

In summary, statutory theft is clearly distinguishable from claims of vexatious litigation and abuse of process,

to which the litigation privilege does not apply, as the plaintiff's claim of statutory theft against the defendant attorney for conduct that occurred during a judicial proceeding does not challenge the underlying purpose of the litigation but, rather, concerns the defendant's role as an advocate for his client. Similar to a claim of fraud, a claim of statutory theft does not contain inherent safeguards against inappropriate retaliatory litigation, as with claims of vexatious litigation and abuse of process; see *Simms* v. *Seaman*, supra, 308 Conn. 549 ("the required elements of fraud, like the required elements of defamation and interference with contractual or beneficial relations . . . do not provide the same level of protection against the chilling effects of a potential lawsuit as the required elements of vexatious litigation"); and a claim of statutory theft does not contain the same type of stringent elements found in the claim of vexatious litigation, which provide adequate protection against unwarranted litigation. Instead, applying the balancing test set forth in *Simms*, we conclude that statutory theft is more akin to claims of fraud and defamation, to which the litigation privilege applies, and, thus, the underlying purpose of absolute immunity applies equally to statutory theft as it does to claims of defamation or fraud. Our determination that the litigation privilege protects the defendant from the plaintiff's claim of statutory theft also furthers the public policy underlying absolute immunity of encouraging participation and candor in judicial proceedings, while at the same time limiting the exposure of attorneys to harassing and expensive litigation, which would likely inhibit their freedom in making good faith evidentiary decisions and representations, and have a negative effect on their ability to advocate zealously for their clients. See id., 550–51. We also note that an array of alternatives to civil liability exists to deter an attorney from engaging in misconduct or to provide relief to a

dissatisfied litigant in connection with an attorney's alleged misconduct. Finally, we reject the plaintiff's attempts to characterize certain of the defendant's actions as being outside the scope of the privilege. The defendant's recording of the certificate of foreclosure on the land records, as well as the defendant's alleged conduct in assisting Benchmark with the subsequent sale of the foreclosed property, were related and relevant to the foreclosure proceeding and, thus, fall within the scope of the litigation privilege. Accordingly, the court properly granted the defendant's motion to dismiss and concluded that the plaintiff's claim of statutory theft against the defendant for his conduct during the foreclosure proceeding was barred by absolute immunity.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL RUBEN PECK *v.* STATEWIDE GRIEVANCE COMMITTEE
(AC 42700)

Alvord, Bright and Bear, Js.

Syllabus

The plaintiff attorney appealed to this court from the judgment of the trial court dismissing, for lack of subject matter jurisdiction, his appeal from the decision of the defendant Statewide Grievance Committee, which had denied his request to vacate a prior decision by a reviewing committee of the defendant that imposed a disciplinary sanction against him. The plaintiff, who had represented L in a real estate transaction, introduced L to one of the plaintiff's then law partners, O, who was looking to secure a loan for the law firm. In 2001, L loaned the plaintiff's law firm $70,000, and, by 2008, when the law firm had not repaid the loan, the plaintiff and O each executed new notes for repayment of the loan by 2013. In 2011, L filed a grievance complaint against the plaintiff. The reviewing committee concluded in its 2013 decision that the plaintiff violated rule 1.8 (a) of the Rules of Professional Conduct by failing to advise L that he should seek the advice of independent counsel in

connection with the loan, and by failing to advise L in writing that he was not acting as his lawyer in connection with the loan and to establish in writing the precise nature of the plaintiff's role in the transaction. The reviewing committee ordered the plaintiff to attend a continuing education course in legal ethics. The defendant thereafter denied the plaintiff's request for review, in which he stated that he accepted the discipline that was imposed and waived any appeal to the Superior Court. Four years later, the defendant declined to act on a motion that the plaintiff filed in 2017, pursuant to *Disciplinary Counsel* v. *Elder* (325 Conn. 378), in which he sought to vacate the disciplinary sanction on the ground that the six year time period in the applicable rule of practice (§ 2-32 (a) (2) (E)) for filing a grievance mandated the dismissal of L's grievance. The defendant also declined to act on the plaintiff's subsequent motion for reconsideration. In granting the defendant's motion to dismiss and rendering judgment for the defendant, the trial court concluded that it lacked subject matter jurisdiction over the appeal because the plaintiff had waived his right to appeal from the disciplinary decision. The court reasoned that the plaintiff could not circumvent his failure to appeal from the disciplinary decision by fashioning his appeal as one stemming from the defendant's denials of his motions to vacate and for reconsideration. On appeal to this court, *held* that the trial court properly granted the defendant's motion to dismiss the plaintiff's appeal as nonjusticiable, as it was an improper attempt to relitigate the defendant's 2013 decision, and the court therefore could afford the plaintiff no remedy; although the court in *Elder* stated that the six year limitation period in Practice Book § 2-32 (a) (2) (E) is mandatory and that untimely claims are barred, that limitation period did not deprive the defendant of subject matter jurisdiction over L's 2011 grievance, as the statutes (§ 51-90 et seq.) governing the filing of a grievance contained neither a period of limitation nor an indication that any limitation period set by the rules of practice could affect the defendant's subject matter jurisdiction, and the plaintiff's challenges to the defendant's rejections of his motions to vacate the 2013 disciplinary order and for reconsideration of that rejection were nothing more than an attempted, impermissible end run to avoid the consequences of his waiver of his right to appeal and failure to appeal four years earlier by using a procedure that is not contemplated by the relevant rules of practice or § 51-90 et seq.

Submitted on briefs March 17—officially released June 16, 2020

Procedural History

Appeal from the decision of the defendant denying the plaintiff's request for review and affirming the decision of the defendant's reviewing committee ordering the plaintiff to attend a legal ethics course as a result of the plaintiff's alleged violation of the Rules of Professional Conduct, brought to the Superior Court in the

judicial district of Hartford, where the court, *Sheridan*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James F. Sullivan filed a brief for the appellant (plaintiff).

Leanne M. Larson, assistant chief disciplinary counsel, filed a brief for the appellee (defendant).

Opinion

BRIGHT, J. The plaintiff attorney, Michael Ruben Peck, appeals from the judgment of the trial court dismissing his appeal from the decision of the defendant, the Statewide Grievance Committee, on the ground that it lacked jurisdiction to consider the merits of the plaintiff's appeal challenging the sanction imposed against him by the defendant's reviewing committee. The plaintiff claims that the court committed error. We affirm the judgment of dismissal.

The following facts, as revealed by the record, as well as the relevant procedural history, inform our review. On April 26, 2013, a local reviewing committee (committee) of the defendant issued a decision regarding a grievance complaint that had been filed against the plaintiff on December 29, 2011, by Michael Longo. The committee found that the plaintiff had represented Longo in various legal matters in 1999 and 2000, including the sale of real property in May, 2000. After Longo had informed the plaintiff that it was his intention to lend out the money from the sale, the plaintiff introduced Longo to one of his then law partners, John J. O'Brien, Jr., who was looking for someone to lend money to the law firm to fund a lobbying group. The plaintiff and O'Brien then met with Longo to discuss a loan. The plaintiff did not tell Longo that he was not acting as his attorney in this matter. On March 27, 2001, the law firm secured a $70,000 loan from Longo, which

came from the proceeds of the real estate sale in 2000. The loan matured on September 30, 2001, but, as of March 29, 2002, it had not been paid. New notes were executed by the law firm and Longo on March 29, 2002, and on December 15, 2004. The new maturity date was March 31, 2007. As of February 1, 2008, however, the law firm had not paid the loan. Attorney O'Brien then executed a new note with Longo in the amount of $34,335, which required monthly payments and had a maturity date of January 1, 2013. The plaintiff also executed a new note with Longo in March, 2008, in the amount of $32,070, which required monthly payments and had a maturity date of February 1, 2013. The plaintiff neither informed Longo in writing that he should consider seeking the advice of independent counsel nor obtained Longo's written consent. The plaintiff paid his loan on February 6, 2013.

On the basis of these facts, the committee, on April 26, 2013, concluded that the plaintiff's "failure to advise [Longo] in writing that he should consider seeking the advice of independent counsel in connection with the loan of [Longo's] money to the [plaintiff's] law firm constituted a violation of rule 1.8 (a) of the Rules of Professional Conduct. The [plaintiff's] failure to establish in writing the precise nature of his role in this transaction and the [plaintiff's] failure to advise [Longo] in writing that he was not acting as his lawyer in connection with the March, 2001 loan constituted further violations of rule 1.8 (a) of the Rules of Professional Conduct. . . . We have considered the [plaintiff's] payment of the March, 2008 note as a mitigating factor." The committee, pursuant to Practice Book § 2-37 (a) (5), ordered the plaintiff to attend a continuing legal education course in legal ethics.

The plaintiff timely requested that the defendant review the committee's decision, stating in his request that he "accepts the discipline imposed . . . [and] waives any appeal to the Superior Court." The plaintiff's

requested review asked that the defendant insert a finding in the committee's decision stating that, although the plaintiff had failed to inform Longo in writing that he should consider seeking the advice of independent counsel or obtain Longo's written consent, he did inform Longo orally and Longo did obtain such counsel. In a decision dated June 21, 2013, the defendant denied the plaintiff's request. The plaintiff did not appeal to the Superior Court.

On April 30, 2017, nearly four years after the defendant denied the plaintiff's request for review, the plaintiff filed a motion with the defendant asking that it vacate the sanction imposed in its April 26, 2013 decision pursuant to *Disciplinary Counsel* v. *Elder*, 325 Conn. 378, 159 A.3d 220 (2017) (*Elder*). See id., 393 (six year time period for person to file grievance under Practice Book § 2-32 (a) (2) (E) is mandatory; committee must dismiss grievance filed more than six years after attorney's last act or omission forming basis for complaint unless exception in § 2-32 (a) (2) (E) (i) or (ii) applies).[1] On May 9, 2017, the defendant sent a letter to the plaintiff explaining that it would not take action on his motion to vacate. On May 16, 2017, the plaintiff filed a request for review with the defendant, arguing that *Elder* controls this matter. On June 21, 2017, the defendant, again, declined to vacate the sanction. On July 1, 2017, the plaintiff requested that the defendant reconsider its decision, arguing that *Elder* should have retroactive application. On July 26, 2017, the defendant responded that it would "have no further comment on the matter."

On August 21, 2017, the plaintiff filed an appeal with the Superior Court, stating that he was appealing "from

[1] The plaintiff's motion to vacate consisted of one paragraph, which provided: "The [plaintiff] hereby requests that the discipline imposed in the decision of the reviewing committee of the [defendant] in the above-captioned matter be vacated pursuant to the recently published case of *Disciplinary Counsel* v. [*Elder*, supra, 325 Conn. 378]."

the decision of the reviewing committee of the [defendant] and the denial of the [r]equest for [r]eview by the [defendant] in accordance with Practice Book § 2-38 . . . .”[2] The defendant filed a motion to dismiss the

[2] Practice Book § 2-38 provides: “(a) *A respondent may appeal to the Superior Court a decision by the Statewide Grievance Committee or a reviewing committee imposing sanctions or conditions against the respondent, in accordance with Section 2-37 (a). A respondent may not appeal a decision by a reviewing committee imposing sanctions or conditions against the respondent if the respondent has not timely requested a review of the decision by the Statewide Grievance Committee under Section 2-35 (k)*. Within thirty days from the issuance, pursuant to Section 2-36, of the decision of the Statewide Grievance Committee, the respondent shall: (1) file the appeal with the clerk of the Superior Court for the judicial district of Hartford and (2) mail a copy of the appeal by certified mail, return receipt requested or with electronic delivery confirmation, to the Office of the Statewide Bar Counsel as agent for the Statewide Grievance Committee and to the Office of the Chief Disciplinary Counsel.

“(b) Enforcement of a final decision imposing sanctions or conditions against the respondent pursuant to Section 2-35 (i) or Section 2-35 (m), including the publication of the notice of a reprimand in accordance with Section 2-54, shall be stayed for thirty days from the issuance to the parties of such decision. If within that period the respondent files with the Statewide Grievance Committee a request for review of the reviewing committee’s decision, the stay shall remain in effect for thirty days from the issuance by the Statewide Grievance Committee of its final decision pursuant to Section 2-36. If the respondent timely commences an appeal pursuant to subsection (a) of this section, such stay shall remain in full force and effect until the conclusion of all proceedings, including all appeals, relating to the decision imposing sanctions or conditions against the respondent. If at the conclusion of all proceedings, the decision imposing sanctions or conditions against the respondent is rescinded, the complaint shall be deemed dismissed as of the date of the decision imposing sanctions or conditions against the respondent. An application to terminate the stay may be made to the court and shall be granted if the court is of the opinion that the appeal is taken only for delay or that the due administration of justice requires that the stay be terminated.

“(c) Within thirty days after the service of the appeal, or within such further time as may be allowed by the court, the statewide bar counsel shall transmit to the reviewing court a certified copy of the entire record of the proceeding appealed from, which shall include the grievance panel’s record in the case, as defined in Section 2-32 (i), and a copy of the Statewide Grievance Committee’s record or the reviewing committee’s record in the case, which shall include a transcript of any testimony heard by it or by a reviewing committee which is required by rule to be on the record, any decision by the reviewing committee in the case, any requests filed pursuant to Section 2-35 (k) of this section, and a copy of the Statewide Grievance Committee’s decision on the request for review. By stipulation of all parties

appeal on the ground that the court did not have subject matter jurisdiction because the plaintiff's appeal was an attempt to circumvent his failure to appeal from the defendant's 2013 decision. The plaintiff objected to the defendant's motion to dismiss, arguing that he was appealing from the defendant's denials of his motions to vacate and to reconsider. The Superior Court, in a February 25, 2019 memorandum of decision, granted

to such appeal proceedings, the record may be shortened. The court may require or permit subsequent corrections or additions to the record.

"(d) The appeal shall be conducted by the court without a jury and shall be confined to the record. If alleged irregularities in procedure before the Statewide Grievance Committee or reviewing committee are not shown in the record, proof limited thereto may be taken in the court. The court, upon request, shall hear oral argument.

"(e) The respondent shall file a brief within thirty days after the filing of the record by the statewide bar counsel. The disciplinary counsel shall file his or her brief within thirty days of the filing of the respondent's brief. Unless permission is given by the court for good cause shown, briefs shall not exceed thirty-five pages.

"(f) Upon appeal, the court shall not substitute its judgment for that of the Statewide Grievance Committee or reviewing committee as to the weight of the evidence on questions of fact. The court shall affirm the decision of the committee unless the court finds that substantial rights of the respondent have been prejudiced because the committee's findings, inferences, conclusions, or decisions are: (1) in violation of constitutional provisions, rules of practice or statutory provisions; (2) in excess of the authority of the committee; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, rescind the action of the Statewide Grievance Committee or take such other action as may be necessary. For purposes of further appeal, the action taken by the Superior Court hereunder is a final judgment.

"(g) In all appeals taken under this section, costs may be taxed in favor of the Statewide Grievance Committee in the same manner, and to the same extent, that costs are allowed in judgments rendered by the Superior Court. No costs shall be taxed against the Statewide Grievance Committee, except that the court may, in its discretion, award to the respondent reasonable fees and expenses if the court determines that the action of the committee was undertaken without any substantial justification. 'Reasonable fees and expenses' means any expenses not in excess of $7500 which the court finds were reasonably incurred in opposing the committee's action, including court costs, expenses incurred in administrative proceedings, attorney's fees, witness fees of all necessary witnesses, and such other expenses as were reasonably incurred." (Emphasis added.)

the defendant's motion to dismiss, concluding that it did not have jurisdiction. The court reasoned that although the plaintiff was fashioning his appeal as one stemming from the defendant's denial of his motions to vacate and to reconsider, because the plaintiff had failed to timely appeal from the committee's sanction order and the defendant's 2013 denial of his motion for review, in which the plaintiff expressly waived his right to appeal to the Superior Court, he could not circumvent this failure by attempting to seek the same relief he could have claimed had he properly and timely appealed in 2013. Accordingly, the court concluded that it had no jurisdiction over the matter. This appeal followed.

The plaintiff claims that the court had jurisdiction because he was timely appealing from the defendant's 2017 refusal to vacate its 2013 sanction order or to reconsider its refusal to vacate that order, rather than from the original 2013 order itself. He argues, as an alternative ground for reversing the judgment of the Superior Court, that the defendant did not have jurisdiction to consider the original 2011 grievance complaint because it alleged wrongdoing that occurred beyond the six year mandatory limitation period set forth in Practice Book § 2-32 (a) (2) (E), as more fully explained in *Elder*.[3] Further, he argues that the authority to open and vacate a prior order is within the defendant's inherent authority and that its refusal to do so is an appealable final judgment, especially when the defendant

[3] The plaintiff argues in both his appellate brief and his reply brief that "[t]here is no dispute in this case that the misconduct alleged occurred more than six years before the subject grievance complaint was filed." The defendant, however, clearly addressed this matter in its appellate brief: "Although the plaintiff alleges . . . [in] his brief that '[t]here is no dispute in this case that the misconduct alleged occurred more than six years before the subject grievance complaint was filed,' the defendant does not concede that there is no such dispute, as there may, arguably, exist circumstances which tolled the six year statute of limitations." We note, for example, that the plaintiff's interactions with Longo regarding the money originally loaned in 2001 continued into 2013, more than one year after Longo filed his grievance complaint.

lacked jurisdiction to enter the original order. We conclude that the period of limitation set forth in § 2-32 (a) (2) (E) is not jurisdictional. Additionally, we agree with the Superior Court that it did not have jurisdiction to consider the plaintiff's appeal because it was an improper attempt to circumvent the fact that the plaintiff waived his right to appeal from the defendant's 2013 sanction order, and he, in fact, failed to appeal from that decision.

Practice Book § 2-32 (a) provides in relevant part: "Any person, including disciplinary counsel, or a grievance panel on its own motion, may file a written complaint, executed under penalties of false statement, alleging attorney misconduct whether or not such alleged misconduct occurred in the actual presence of the court. Complaints against attorneys shall be filed with the statewide bar counsel. Within seven days of the receipt of a complaint, the statewide bar counsel shall review the complaint and process it in accordance with subdivisions (1), (2) or (3) of this subsection as follows . . . (2) refer the complaint to the chair of the Statewide Grievance Committee or an attorney designee of the chair and to a nonattorney member of the committee, and the statewide bar counsel in conjunction with the chair or attorney designee and the nonattorney member shall, if deemed appropriate, dismiss the complaint on one or more of the following grounds . . . (E) the complaint alleges that the last act or omission constituting the alleged misconduct occurred more than six years prior to the date on which the complaint was filed;

"(i) Notwithstanding the period of limitation set forth in this subparagraph, an allegation of misconduct that would constitute a violation of Rule 1.15, 8.1 or 8.4 (2) through (6) of the Rules of Professional Conduct may still be considered as long as a written complaint is filed within one year of the discovery of such alleged misconduct.

"(ii) Each period of limitation in this subparagraph is tolled during any period in which: (1) the alleged misconduct remains undiscovered due to active concealment; (2) the alleged misconduct would constitute a violation of Rule 1.8 (c) and the conditions precedent of the instrument have not been satisfied . . . ."

The plaintiff argues that our Supreme Court in *Elder* held that the six year period of limitation set forth in Practice Book § 2-32 (a) (2) (E) was not only mandatory "but [was] jurisdictional in nature." We disagree.

In *Elder*, on the basis of a 2014 grievance complaint filed pursuant to Practice Book § 2-32, disciplinary counsel brought a presentment against the defendant attorney in the Superior Court, alleging that he had impersonated another attorney in 2004. See *Elder*, supra, 325 Conn. 384. The defendant filed a motion to dismiss the presentment on the ground that it was barred by the six year period of limitation set forth in Practice Book § 2-32 (a) (2) (E). Id., 385. The trial court denied the motion, concluding that the rule neither affected the court's jurisdiction nor operated as a mandatory period of limitation. Id. Following the court's judgment finding the defendant in violation of the Rules of Professional Conduct, the defendant appealed. Id., 382. On appeal, our Supreme Court determined that the six year period of limitation set forth in Practice Book § 2-32 (a) (2) (E) was mandatory and that a "defendant is not barred from seeking review of those decisions at a later stage of the proceedings, that is, in the proceedings before the grievance panel or reviewing committee, in an appeal of the ultimate decision on the grievance complaint pursuant to Practice Book § 2-38, or in a presentment action brought pursuant to Practice Book § 2-47." Id., 389. The court, however, never stated that the period of limitation is jurisdictional but only that it is mandatory unless one of the exceptions applies.

Although no appellate court in our state has addressed directly whether the period of limitation set forth in Practice Book § 2-32 is jurisdictional, we find instructive the Supreme Court's decision in *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 777 A.2d 645 (2001). See id., 271 (although time limit set forth in General Statutes § 46a-82 is mandatory, it is not subject matter jurisdictional). In *Williams*, our Supreme Court considered whether the statutory 180 day period set forth in § 46a-82 (e) for filing a discrimination complaint with the Commission on Human Rights and Opportunities is subject matter jurisdictional. Id., 259–60. The court held that, although mandatory, "the 180 day time requirement for filing a discrimination petition pursuant to § 46a-82 (e) is not jurisdictional, but rather, is subject to waiver and equitable tolling." Id., 264. The court thoroughly explained the process to be undertaken in analyzing whether a period of limitation is jurisdictional; id., 266; and, therefore, that is where we begin.

"[T]here is a presumption in favor of subject matter jurisdiction, and we require a strong showing of legislative intent that such a time limit is jurisdictional." Id. "In [some] cases, the court, in discerning the intent of the legislature, at times [has] *equated* the intent of the legislature to create a mandatory limitation with the intent to create a subject matter jurisdictional limit." (Emphasis in original.) Id., 268. In some other cases, the court "implicitly [has held] that a conclusion that a time limit is mandatory does not necessarily mean that it is also subject matter jurisdictional, because the notions of waiver and consent are fundamentally inconsistent with the notion of subject matter jurisdiction." Id., 269. "[M]andatory language may be an indication that the legislature intended a time requirement to be jurisdictional, [however] such language alone does not overcome the strong presumption of jurisdiction, nor

does such language alone prove strong legislative intent to create a jurisdictional bar. In the absence of such a showing, mandatory time limitations must be complied with absent an equitable reason for excusing compliance, including waiver or consent by the parties. Such time limitations do not, however, implicate the subject matter jurisdiction of the agency or the court." Id., 269–70.

Whether the period of limitation in Practice Book § 2-32 (a) (2) (E) implicates the defendant's subject matter jurisdiction is a question of statutory interpretation. See *Elder*, supra, 325 Conn. 386. "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]." (Citation omitted; internal quotation marks omitted.) Id. In considering the text of § 2-32 (a) (2) (E), our Supreme Court already has determined that the six year limitation period set forth in § 2-32 (a) (2) (E) is mandatory and that, "[i]f there is no claim that one of the enumerated exceptions to § 2-32 (a) (2) (E) applies . . . then, even though § 2-32 (a) (2) does not expressly provide that the screening panel [of the defendant] must dismiss a claim that is untimely under § 2-32 (a) (2) (E), untimely claims are categorically barred." Id., 388. The plaintiff contends that this means that the defendant has no subject matter jurisdiction over an untimely complaint. We disagree.

"Rules of practice . . . do not ordinarily define subject matter jurisdiction. . . . General Statutes § 51-14 (a) authorizes the judges of the Superior Court to promulgate rules regulating pleading, practice and procedure in judicial proceedings . . . . *Such rules shall not*

abridge, enlarge or modify any substantive right nor the jurisdiction of any of the courts." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Psaki* v. *Karlton*, 97 Conn. App. 64, 70, 903 A.2d 224 (2006). Although the Supreme Court, in *Elder*, stated that the six year period of limitation in Practice Book § 2-32 (a) (2) (E) is "mandatory"; *Elder*, supra, 325 Conn. 389; and that "untimely claims are categorically barred"; id., 388; General Statutes § 51-90 et seq. contains neither a period of limitation nor an indication that any period of limitation set by the rules of practice could affect the subject matter jurisdiction of the defendant.[4] Although the court certainly has the inherent authority to regulate attorney conduct, it also has authority and jurisdiction granted to it by the legislature pursuant to § 51-90 et seq. Because the legislature did not establish any time constraint on the filing of a grievance complaint with the defendant in § 51-90 et seq., we conclude that the period of limitation imposed

[4] In particular, General Statutes § 51-90e provides: "(a) Any person may file a written complaint alleging attorney misconduct. A grievance panel may, on its own motion, initiate and file a written complaint alleging attorney misconduct. A complaint against an attorney shall be filed with the State-Wide Bar Counsel. Within five working days of the receipt of a complaint the State-Wide Bar Counsel shall:

"(1) Forward the complaint to the appropriate grievance panel as determined under rules of court; and

"(2) Notify the complainant and the respondent, by certified mail, return receipt requested, of the panel to which the complaint was forwarded. The notification to the respondent shall be accompanied by a copy of the complaint.

"(b) The respondent shall have the right to respond within ten days of receipt of notification to the grievance panel to which the complaint has been referred.

"(c) The State-Wide Bar Counsel shall keep a record of all complaints filed with him. The complainant and the respondent shall notify the State-Wide Bar Counsel of any change of address or telephone number during the pendency of the proceedings on the complaint.

"(d) If for good cause shown, a grievance panel declines, or is unable pursuant to sections 51-90 to 51-91b, inclusive, to investigate a complaint referred to the panel, such panel shall forthwith return the complaint to the State-Wide Bar Counsel to be referred by him immediately to another panel. The State-Wide Bar Counsel shall give notice of such referral to the complainant and the respondent by certified mail, return receipt requested."

by the rules of practice does not act as a subject matter jurisdictional bar.[5] See *Williams* v. *Commission on Human Rights & Opportunities*, supra, 257 Conn. 270. Accordingly, the plaintiff's claim that the defendant did not have subject matter jurisdiction over the 2011 grievance complaint filed against him fails.

Having determined that the period of limitation in Practice Book § 2-32 (a) (2) (E) is not subject matter jurisdictional, we next address the plaintiff's claim that the Superior Court improperly concluded that it did not have jurisdiction to consider the merits of the plaintiff's appeal from the defendant's refusal to vacate the 2013 sanction order. The defendant argues that the plaintiff's appeal, although fashioned as an appeal from its refusal to vacate the 2013 sanction order, ultimately was an attempt to circumvent the plaintiff's waiver of his right to appeal, and his failure to appeal, from that order in 2013. It also contends that there is no procedural mechanism for an attorney to file a motion to vacate a decision of the defendant four years after its decision becomes final, that the plaintiff did not have standing to appeal from the letters sent by the defendant, and that the issues the plaintiff sought to raise in the Superior Court were moot. Additionally, the defendant argues that because the plaintiff did not timely appeal from the defendant's 2013 order and explicitly waived his right to do so, the Superior Court could afford him no relief, and the issues raised by the plaintiff in the Superior Court were nonjusticiable. We agree that the plaintiff's claims submitted to the Superior Court were nonjusticiable. Consequently, the Superior Court did not have jurisdiction to consider the plaintiff's appeal.

[5] General Statutes § 51-90a provides: "In addition to any other powers and duties set forth in sections 51-90 to 51-91b, inclusive, the State-Wide Grievance Committee shall have the power and duty to: (1) Adopt rules for procedure not inconsistent with the general statutes or rules of court; (2) investigate and present to the court of proper jurisdiction any person deemed in contempt under section 51-88; and (3) adopt rules for grievance panels to carry out their duties which are not inconsistent with the general statutes or rules of court."

"[I]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Similarly, an issue regarding justiciability implicates this court's subject matter jurisdiction and raises a question of law over which our review is plenary.

"[S]ubject matter jurisdiction and justiciability are closely related concepts. Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . Justiciability involves the authority of the court to resolve actual controversies. . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . As we have recognized, justiciability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine. . . . Consequently, a court may have subject matter jurisdiction over certain types of controversies in general, but may not have jurisdiction in any given case because the issue is not justiciable." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Burton*, 282 Conn. 1, 6–7, 917 A.2d 966 (2007).

"Collateral attacks on judgments are disfavored. . . . Unless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid, he or she must resort to direct proceedings to correct perceived wrongs in the tribunal's conclusive decision. . . . A collateral attack on a judgment

is a procedurally impermissible substitute for an appeal. . . . The recurrent theme in our collateral attack cases is that the availability of an appeal is a significant aspect of the conclusiveness of a judgment." (Citations omitted.) *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 200–201, 544 A.2d 604 (1988). Consequently, a party who fails to appeal from an agency decision may not use a different action as a substitute for that appeal "to achieve a de novo determination of a matter upon which they failed to take a timely appeal." *Honis* v. *Cohen*, 18 Conn. App. 80, 84, 556 A.2d 1028 (1989). A court properly may dismiss a case that constitutes an improper collateral attack on a judgment. *Glemboski* v. *Glemboski*, 184 Conn. 602, 605–606, 440 A.2d 242 (1981) (Superior Court properly dismissed case in which plaintiff attempted to mount procedurally impermissible collateral attack on prior decision of Probate Court). The reason for this is that the court can offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable. See *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 527, 187 A.3d 1154 (2018).

Although the plaintiff's appeal to the Superior Court was not a "collateral attack" in the traditional meaning of that phrase because he did not seek to challenge the defendant's 2013 decision in an entirely different proceeding,[6] his attempt to challenge that decision by means of a motion to vacate and a motion for review, filed four years after the defendant's decision became final and the plaintiff chose not to appeal, has the same

[6] "A collateral attack is an attack upon a judgment, decree or order offered *in an action or proceeding other than that in which it was obtained*, in support of the contentions of an adversary in the action or proceeding, as where the judgment is offered in support of a title or as a foundation for applying the doctrine of res judicata. 46 Am. Jur. 2d, Judgments § 630 [1969]; see also F. James, Civil Procedure § 11.5, pp. 533–34." (Emphasis in original.) *Gennarini Construction Co.* v. *Messina Painting & Decorating Co.*, 15 Conn. App. 504, 511–12, 545 A.2d 579 (1988).

effect. See *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 853–58, 74 A.3d 1192 (2013) (defendant's claims that Superior Court lacked jurisdiction over motion to revive were in fact *or effect* collateral attacks on original judgment in same case); *Vogel* v. *Vogel*, 178 Conn. 358, 364, 422 A.2d 271 (1979) (plaintiff's attack, during 1978 contempt hearing, on subject matter jurisdiction of court to render 1959 judgment in same case, was impermissible collateral attack on 1959 judgment). This attempt to relitigate the validity of the defendant's 2013 decision is the functional equivalent of a collateral attack because the plaintiff is using a procedure not contemplated by the rules of practice to avoid the effects of his failure to appeal pursuant to the rules. Moreover, not only does Practice Book § 2-38 neither provide for the filing of a motion to vacate nor require that the defendant consider such a motion, the rules of practice also do not provide a right or mechanism for an attorney to appeal from the defendant's action or inaction on such a motion. See footnote 2 of this opinion.

"The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . *Unless it is entirely invalid and that fact is disclosed by an inspection of the record itself the judgment is invulnerable to indirect assaults upon it.*" (Emphasis in original; internal quotation marks omitted.) *Investment Associates* v. *Summit Associates, Inc.*, supra, 309 Conn. 858.

"It has long been accepted that a system of laws upon which individuals, governments and organizations rely

to resolve disputes is dependent upon according finality to judicial decisions. Indefinite continuation of a dispute is a social burden. It consumes time and energy that may be put to other use, not only of the parties, but of the community as a whole. It rewards the disputatious. It renders uncertain the working premises upon which the transactions of the day are to be conducted. . . . The convention concerning finality of judgments has to be accepted if the idea of law is to be accepted, certainly if there is to be practical meaning to the idea that legal disputes can be resolved by judicial process. 1 Restatement (Second), Judgments, [i]ntroduction, p. 11 (1982). [A] party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest. . . .

"As noted in the Restatement, the trial court may entertain a request for relief from judgment based upon a change in law occurring during the appeal period. 2 Restatement (Second), supra, § 71, comment (f). This power is, however, not a substitute for an appeal." (Citations omitted; internal quotation marks omitted.) *Marone* v. *Waterbury*, 244 Conn. 1, 11–12, 707 A.2d 725 (1998); see also *Investment Associates* v. *Summit Associates, Inc.*, supra, 309 Conn. 855.[7]

The plaintiff acknowledged that he could have appealed from the defendant's 2013 decision when he

[7] We recognize that neither the defendant nor the court used the phrase "collateral attack" in analyzing whether the Superior Court had jurisdiction over the plaintiff's appeal. Nevertheless, the court concluded that it lacked jurisdiction because the plaintiff did not timely appeal from the 2013 decision of the defendant, and his appeal from the defendant's actions or inactions on his motion to vacate and motion for review was "the functional equivalent of an appeal from the underlying decision," i.e., an attempt to mount the equivalent of a collateral attack on the underlying judgment. See *Vogel* v. *Vogel*, supra, 178 Conn. 364. Similarly, the defendant argues that the plaintiff's appeal to the Superior Court was nonjusticiable because he did not timely appeal from the defendant's 2013 order but is attempting, instead, to use a

specifically waived that right as part of the disposition of that proceeding. Although there is no statutory right to appeal pursuant to § 51-90 et seq. from a decision of the defendant, the right to take such an appeal stems from the court's inherent authority to regulate the conduct of the attorneys who practice before it. See *Pinsky* v. *Statewide Grievance Committee*, 216 Conn. 228, 232, 578 A.2d 1075 (1990) ("there is no statutory right of appeal from a reprimand, but . . . the trial court has authority to review such an order by virtue of its inherent supervisory authority over attorney conduct"). "Appeals to the court from the determinations of administrative, legislative, and quasi-judicial bodies are limited to a review of the record to determine if the facts as found are supported by the evidence contained within the record and whether the conclusions that follow are legally and logically correct. . . . Although there is no statutory provision for an appeal from [a] reprimand ordered by the defendant, [there is] no reason why the right of an attorney to judicial review in a disciplinary matter should be any different than the process accorded other professionals in disciplinary matters before licensing and/or disciplinary boards." (Citations omitted.) Id., 234–35.

"Judges of the Superior Court possess the inherent authority to regulate attorney conduct and to discipline members of the bar. . . . It is their unique position as officers and commissioners of the court . . . which casts attorneys in a special relationship with the judiciary and subjects them to its discipline. . . . [Section] 51-90 et seq. and Practice Book § 27B et seq. [now § 2-29 et seq.] are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct. . . . [D]isciplinary [proceedings] are taken primarily for the purpose of preserving the courts of justice

nonexistent procedure to challenge that order. In so arguing, the defendant has described an impermissible collateral attack, even though it has not attached that label to its argument.

from the official ministration of persons unfit to practice in them. . . . The end result of these proceedings is a judgment from which an appeal lies to this court." (Citations omitted; internal quotation marks omitted.) Id., 232–33. "Although the statewide grievance committee is not an administrative agency . . . the court's review of its conclusions is similar to the review afforded to an administrative agency decision." (Citation omitted.) *Weiss* v. *Statewide Grievance Committee*, 227 Conn. 802, 811, 633 A.2d 282 (1993).

In the present case, the plaintiff claims that the court committed error in determining that it did not have jurisdiction because the plaintiff was attempting to relitigate the defendant's 2013 disciplinary order. He argues that he is not appealing from the order of discipline imposed by the defendant in 2013 but, rather, that he is appealing from the defendant's refusal to vacate the 2013 order or to reconsider its refusal to vacate that order. We are not persuaded.

The relief the plaintiff requested from both the defendant and the Superior Court was the vacatur of the 2013 disciplinary order from which he had failed to appeal, and as to which he, in fact, had waived his right to appeal. His motions filed with the defendant in 2017 and his attempted appeal from the defendant's rejection of those motions are nothing more than an attempted, impermissible end run to avoid the consequences of the waiver of his right to appeal, and his failure to appeal, four years earlier, using a procedure not contemplated by the relevant rules of practice or § 51-90 et seq. We, therefore, conclude that the court properly dismissed the plaintiff's appeal because it was an improper attempt to relitigate the 2013 decision of the defendant, and the court, therefore, could afford no remedy to the plaintiff. The matter was nonjusticiable.

The judgment is affirmed.

In this opinion the other judges concurred.