IN RE JA'MAIRE M.*
(AC 43710)

Lavine, Alvord and Cradle, 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 child had previously been adjudicated neglected, but the father was not a party to the neglect petition filed by the petitioner, the Commissioner of Children and Families, and did not participate in the neglect proceeding because the mother claimed another man was the father of the child. Following the results of a paternity test, the trial court joined the father into the case and, thereafter, the trial court ordered specific steps for the father and the Department of Children and Families amended its permanency plan to focus on reunification with the father. The father did not fulfill the court-ordered steps and subsequently, the petitioner sought termination of the father's parental rights pursuant to statute (§ 17a-112), which the trial court granted. On appeal, the father claimed that the trial court erred by predicating its termination of parental rights judgment on the prior neglect adjudication, which he claimed was rendered improperly because the child was adjudicated neglected in his absence and he had no opportunity to plead. *Held* that the trial court did not err in terminating the respondent father's parental rights by relying on a finding that the child was neglected, which was made at a previous proceeding at which the father was not a party, as the father's unpreserved claim was an impermissible collateral attack on a validly rendered final judgment of neglect; the father's absence from the neglect proceeding did not deprive him of any due process because, although the father was immediately joined into the case and advised of the remedies available to him to contest the neglect adjudication, the father acquiesced in the judgment of neglect and did not at any time avail himself of the avenues to challenge it, by filing a motion to open the judgment or to revoke commitment, and the important public policy interests inherent in juvenile cases reinforced the need for timely resolutions of disputed issues; furthermore, the department attempted to work with the father with the goal of reunification through satisfaction of court-ordered specific steps, but the father failed to fully meet the criteria

* 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.

in the specific steps and then failed to appear both at his plea date and at the termination of parental rights trial.

Argued September 8—officially released November 20, 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 Haven, Juvenile Matters, and tried to the court, *Marcus, J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Albert J. Oneto IV, assigned counsel, for the appellant (respondent father).

Seon Bagot, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent father, Randy F., appeals from the judgment of the trial court terminating his parental rights with respect to his minor child pursuant to General Statutes § 17a-112 (j). On appeal, the respondent claims that, in terminating his parental rights, the trial court improperly relied on a finding that the child was neglected, which was made at a previous proceeding at which the respondent was not present.[1] Because the respondent's appeal constitutes an impermissible collateral attack on the neglect judgment, we affirm the judgment of the trial court terminating his parental rights.

** November, 20, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The court also terminated the parental rights of the child's mother, E, finding that she had been unavailable to the Department of Children and Families since 2017 and had abandoned the child. Because she has not appealed, we refer in this opinion to the respondent father as the respondent.

The following facts and procedural history set forth in the court's memorandum of decision and the record are relevant to this appeal. The child was born in November, 2016, to the respondent and E, the child's mother. E indicated to agents of the Department of Children and Families (department) that the man with whom the child was living, J, was his biological father. In August, 2017, when the child was nine months old, a department investigation into the child's circumstances resulted in an adjudication that the child was neglected.

Prior to the neglect proceeding, on August 10, 2017, the department received a report that the child had been admitted to Yale New Haven Hospital for emergency medical treatment. E's whereabouts were unknown and the putative father, J, who was not named on the child's birth certificate, lacked medical decision-making authority. After investigating the child's circumstances and instituting a ninety-six hour hold on the child, the petitioner, the Commissioner of Children and Families (commissioner),[2] obtained temporary custody of the child and filed a neglect petition.

On October 19, 2017, the court held a hearing to address the commissioner's neglect petition. The court dismissed J from the case on the basis of a department ordered paternity test, which established that he was not, in fact, the child's biological father. E testified that the respondent was the child's father. She entered a plea of nolo contendere to the neglect petition, which the court accepted. Finding that the child was neglected and had been permitted to live in conditions injurious to his well-being, the court determined on the record that it was in the best interest of the child for him to be committed to the custody of the commissioner. The court thus adjudicated the child neglected at the October 19, 2017 hearing and committed him to the custody

[2] The attorney for the minor child submitted a statement, pursuant to Practice Book § 67-13, adopting the commissioner's brief.

of the commissioner pending further order of the court. After the neglect adjudication, the commissioner moved to cite the respondent into the case as a party on October 27, 2017. The court granted the motion. The commissioner filed a petition seeking commitment of the child to the commissioner's custody, and, after efforts to locate the respondent were unavailing, the department gave notice by publication in the New Haven Register.

On December 28, 2017, the department and the respondent appeared before the court for a hearing on the respondent's status. The court informed the respondent that the child had been adjudicated neglected and was in the care of the department. The court also informed the respondent that "[y]ou have the right to have a hearing moving forward on any future changes in the case. . . . Your lawyer is the one you need to talk to about the case. . . . You have a right to have any dispositional hearing at this point as to the issue of neglect and then on any new petitions that may be forthcoming in the future. You understand your rights I've just explained them to you?" The respondent replied in the affirmative. Subsequently that day, the court appointed an attorney for the respondent. The court ordered a paternity test pursuant to the commissioner's outstanding motion.

On April 10, 2018, the court found, on the basis of the paternity test, that the respondent was, in fact, the child's father. A permanency plan hearing was held on June 28, 2018, before the court, at which the commissioner proposed termination of parental rights and adoption. The respondent objected. Subsequently, in July, 2018, the commissioner moved to amend the permanency plan with a new focus on reunification and to order specific steps for the respondent. The court granted the commissioner's motion on August 2, 2018, and ordered specific steps for the respondent.[3]

[3] The newly amended permanency plan of reunification remained concurrent with the plan of termination of parental rights and adoption.

The department took measures to facilitate visitation between the child and the respondent pursuant to the permanency plans and specific steps, but the respondent failed to satisfy the specific steps set out for him. As a result, following a preliminary hearing, the commissioner filed a petition on July 1, 2019, seeking the termination of the respondent's parental rights pursuant to § 17a-112. The commissioner alleged that the child had been found in a prior proceeding to have been neglected, that the father had failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and the needs of the child, he could assume a responsible position in the child's life, and that it was in the child's best interest for the respondent's parental rights to be terminated. In its social study, the department detailed the reasonable efforts it had made to reunify the child with the respondent.[4]

The respondent defaulted on the commissioner's petition for the termination of his parental rights. Following abode service on July 10, 2019, the respondent failed to appear on his plea date of July 30, 2019. The court scheduled a trial for September 5, 2019, to consider the termination of parental rights petition. The respondent failed to attend the trial. At trial, James Roth, a social worker for the department, testified as to the department's repeated efforts to reach the respondent. Roth characterized the respondent's progress as follows: "As far as [the] father, he would take about a step forward and twenty steps back. He would go to these fatherhood programs and then the next thing you know he would be arrested for a larceny or he would all of a sudden

[4] The department asserted that the respondent "has shown an inability to be rehabilitated. . . . [The respondent] has not complied with the expectations set by the [d]epartment regarding employment, housing, and creating a strong bond with his son. [The respondent] has also shown an inability to fully comprehend the situation regarding his son and [has not taken] responsibility."

not show up or not show up to a visit and then—so he showed very minimal progress up until now, which has been no progress at all." Roth testified that he did not see any improvement from either parent and that the respondent had not demonstrated any stability. Roth opined that termination of parental rights and adoption were in the child's best interest.

On November 7, 2019, the court signed a transcript of its September 9, 2019 oral decision terminating the respondent's paternal rights pursuant to § 17a-112 (j) (3) (B) (i). In the adjudicative portion of its decision, the court found that "the child has been found in a prior proceeding to have been neglected or uncared for." The court found that the department had made reasonable efforts to reunify the respondent and the child through visits and counseling services, but "[t]he [respondent] is also unable or unwilling to benefit from those reunification efforts."[5] The court further found, by clear and convincing evidence, that the respondent had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and the needs of the child, he could assume a responsible position in the child's life. Finally, the court found that the respondent did not appear in the termination of parental rights case, despite having been notified by both Roth and the department during its last contact with the respondent in early August, 2019.

In the dispositional portion of its decision, the court considered and made findings as to each of the seven factors in § 17-112 (k) on the basis of clear and convincing evidence. The court found that the department had

[5] The record reveals that following the respondent's April, 2018 incarceration, the department arranged a total of nine monthly visits with the child pursuant to the amended permanency plan, and that these visits became weekly upon the respondent's release from incarceration in February, 2019. The respondent exhibited inconsistent attendance, as he was "habitually . . . late to visits and has missed at least [two] visits without notice."

made reasonable efforts to reunify the child and the respondent, had complied with all court orders, and had timely offered the respondent "services in accordance with the specific steps," but that the respondent "did not successfully engage in any services offered to [him] and failed to comply with [his] specific steps." The court found that providing additional time for the respondent to rehabilitate would be unavailing because the respondent had not made sufficient efforts "to adjust [his] situation in order to parent [the child]," or "to conform [his] conduct to even minimally acceptable parental standards." The court concluded that termination of the respondent's parental rights as to the child would serve the best interest of the child, and appointed the commissioner as statutory parent. This appeal followed.

On appeal, the respondent claims that the trial court erred by predicating its judgment terminating his parental rights as to the child on the prior neglect adjudication, which he contends was entered improperly. Specifically, he objects to the fact that the underlying neglect proceeding took place in his absence, as he first appeared in the case as a party more than two months later. He argues that because § 17a-112 (j) (3) (B) (i) requires a finding that the child "has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding" and because he was denied an opportunity to participate or plead in response to the prior neglect proceeding, the neglect adjudication was invalid and that the trial court erred by relying on it as a predicate for its judgment terminating his parental rights as to the child. The respondent has not otherwise challenged the court's termination of his parental rights or its factual underpinnings.

In response, the commissioner argues that the respondent's appeal is unreviewable because it constitutes an impermissible collateral attack on the underlying neglect judgment. The commissioner contends that the appeal

effectively targets a previous final judgment, and because the neglect judgment was rendered validly and the respondent failed to capitalize on avenues available to him to challenge it, he cannot now attack it collaterally. We agree with the commissioner that the respondent's appeal is an impermissible collateral attack on the validly rendered neglect judgment, which, as noted, was rendered before the respondent's paternity had even been established.

We begin our analysis by setting forth the relevant legal principles and applicable standard of review. "[A] claim that a trial court may not reconsider the issue of neglect during a termination of parental rights proceeding presents a mixed question of fact and law because it involves the application of factual determinations to the statutory scheme for the protection of the well-being of children. In such circumstances, an appellate court employs the de novo standard of review." *In re Stephen M.*, 109 Conn. App. 644, 658, 953 A.2d 668 (2008). We will not, however, review claims that are collateral attacks on prior judgments. With regard to the statutory scheme set forth in § 17a-112, the child's need for stability places an emphasis on the need for litigants to follow proper procedural avenues in order to obtain review. *See In re Shamika F.*, 256 Conn. 383, 406–407, 773 A.2d 347 (2001) (permitting late collateral attack would be procedurally impermissible because it would "interfere seriously with [children's] ability to experience any kind of family stability with either a biological or a foster family" and undermine "the purpose of the collateral attack rule as well as the goal of our state agencies in protecting the neglected children of Connecticut").

Section 17a-112 (j) provides, as one of its threshold statutory grounds, that "[t]he Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child (i) has been found by the Superior Court or the Probate 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 . . . 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 . . . ."[6]

"A neglect petition and a petition for the termination of parental rights present distinct and separate claims." *In re Stephen M.*, supra, 109 Conn. App. 657 n.21. A judgment finding that a child is neglected is an immediately appealable final judgment; id., 665; and as a final judgment, it must be challenged via *direct* appeal. As a key principle, "[i]f no appeal is filed in a timely fashion, the parents may not collaterally attack those findings during a termination of parental rights trial, and the trial court adjudicating the termination of parental rights is bound by the findings made in the prior proceeding." Id. "[O]ur child welfare laws are designed in such a way that subsequent proceedings are predicated on findings made and orders issued in prior proceedings." Id., 663. In a termination of parental rights trial, "the issue to

[6] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, 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 locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate 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 . . . 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 . . . ."

be litigated with respect to [a parent's] failure to achieve personal rehabilitation . . . is whether the respondent . . . can be restored to a constructive useful role as a parent within a reasonable time considering the age and needs of the child . . . . " (Citations omitted.) Id., 665 n.25. The public policy interests inherent in juvenile cases reinforce this need for timely resolutions of disputed issues. *See In re Shamika F.*, supra, 256 Conn. 406–407; *see also In re Jonathan M.*, 255 Conn. 208, 231, 764 A.2d 739 (2001) ("as parens patriae, the state is also interested in the accurate and speedy resolution of termination litigation in order to promote the welfare of the affected child"); *In re Stephen M.*, supra, 664 ("[t]he best interests of the children, especially their interests in family stability and permanency, support the conclusion that findings in earlier child welfare proceedings cannot be attacked collaterally in later proceedings"). Because the judgment of neglect is a final judgment, "under § 17a-112 (j) (B) (i), the petitioner did not have to prove at the termination hearing that the [child was] neglected but only that the [child] *had been found* to be neglected in a prior proceeding."[7] (Emphasis added.) Id., 659.

The respondent argues that the neglect adjudication could not be relied on to satisfy the requirements of § 17a-112 (j) (3) (B) (i) because the child was adjudicated neglected in his absence and he had no opportunity to plead. He argues that he was entitled to be a party to the proceeding, even though his paternity had not yet been established. He further argues that because he was not made a party and "[a]t no time did the court . . . canvass him about whether he wished to contest the existing neglect adjudication," the commissioner

[7] After the commissioner establishes that the child has been found neglected in a prior proceeding, the commissioner still has the burden to show in the dispositional phase, by clear and convincing evidence, that the "continuation of the respondent's parental rights is not in the best interest of the child." *In re Alison M.*, 127 Conn. App. 197, 211, 15 A.3d 194 (2011).

cannot use the judgment of neglect against him in a subsequent termination proceeding. We disagree that there was any due process violation in the respondent's case. The respondent's claim is unavailing because his paternity was not established until after the neglect proceeding, at which time he was immediately joined into the case and was advised of the remedies available to him to contest the neglect adjudication, but he failed to take advantage of any of them. Acceptance of his argument would permit a collateral attack on a valid final judgment and would undermine important public policy.

A finding that a child is neglected is not a finding of fault against the parent but a fact relating to the status of the child. See *In re T.K.*, 105 Conn. App. 502, 505–506, 939 A.2d 9, cert. denied, 286 Conn. 914, 945 A.2d 976 (2008) ("[A]n adjudication of neglect relates to the status of the child . . . . Although [General Statutes] § 46b-129 requires both parents to be named in the petition, the adjudication of neglect is not a judgment that runs against a person or persons so named in the petition; [i]t is not directed against them as parents, but rather is a finding that the children are neglected . . . ." (Emphasis omitted; internal quotation marks omitted.)); see also *In re Zamora S.*, 123 Conn. App. 103, 110, 998 A.2d 1279 (2010) ("[a] neglect petition is sui generis and, unlike a complaint and answer in the usual civil case, does not lead to a judgment for or against the parties named" (internal quotation marks omitted)); *In re David L.*, 54 Conn. App. 185, 193, 733 A.2d 897 (1999) ("[t]he statutes and rules of practice . . . do not afford a parent in a neglect proceeding the right to require the trial court to adjudge each parent's blameworthiness for a child's neglect"). Consequently, a parent who is absent from neglect proceedings is not denied due process when his or her parentage of the child is not yet known.[8]

[8] The respondent relies principally on *In re Joseph W.*, 301 Conn. 245, 21 A.3d 723 (2011), for his argument that the trial court had an obligation to

Here, the commissioner reasonably believed that a different man was the child's father. At the neglect hearing, E identified the respondent as the father. A court-ordered paternity test confirmed E's assertion in April, 2018, at which point the court found that the respondent was the child's father. Thus, although the respondent was not a party to the neglect proceeding in October, 2017, he was not legally required to be a party because the proceeding centered on the status of the child. See *In re T.K.*, supra, 105 Conn. App. 505–506; see also *In re Zoey H.*, 183 Conn. App. 327, 346–47, 192 A.3d 522 (father's subsequent entry into case did not invalidate previous neglect adjudication and obligate court to afford him fitness hearing), cert. denied, 330 Conn. 906, 192 A.3d 425 (2018).

The case on which the commissioner relies, *In re Zoey H.*, supra, 183 Conn. App. 327, features strikingly

canvass him when he first appeared in the case, so as to ensure that he had a fair opportunity to contest the neglect adjudication. *In re Joseph W.*, does not advance the respondent's argument. In that case, the court improperly entered a neglect adjudication where the father was present, yet was prevented from contesting it or subsequently opening the judgment. Id., 261–63. On appeal, this court concluded that the neglect judgment was improper because the father had no opportunity to contest it, and thus it could not be relied on to subsequently terminate the father's parental rights. See *In re Joseph W.*, 121 Conn. App. 605, 621, 997 A.2d 512 (2010), aff'd, 301 Conn. 245, 21 A.3d 723 (2011). In affirming this court's ruling, our Supreme Court rejected the commissioner's argument that the appeal was an impermissible collateral attack on the denial of the motion to open, concluding that the ruling was not an appealable final judgment because the court did not "categorically deny" the motion to open. *In re Joseph W.*, supra, 301 Conn. 264.

This case does not feature the due process problems that were present in *In re Joseph W.* The respondent in the present case was unknown to the commissioner when the underlying neglect adjudication took place, unlike the respondent in *In re Joseph W.*, who was a party to the proceeding and who attempted to enter a plea at that time. The respondent in the present case was not compelled to stand silent because the court advised him of his rights when he first appeared. Thus, the neglect adjudication in the present case was a proper final judgment. The respondent simply did not exercise his right to file a motion to open the judgment or otherwise act to challenge the underlying neglect adjudication directly.

similar facts to the present case. In *In re Zoey H.*, the commissioner filed a neglect petition on behalf of the child. Id., 337. The mother identified a man as the father. The putative father was named in the case and stood silent at the neglect hearing. Id., 337–38. The child was then adjudicated neglected and committed to the custody of the commissioner. Id., 338. The respondent appeared six months later and a judgment of paternity was entered. Id., 343. He subsequently filed two motions to revoke commitment, both of which were denied, and then appealed the denial of his second motion, asserting a due process right to an adjudicatory hearing on his fitness as a parent. Id., 343–44. This court rejected his request, concluding that the trial court did not need to hold a hearing to determine his fitness when the child already had been found uncared for prior to his entry into the case. This court explained that "[the child] was adjudicated uncared for by the Superior Court and committed to the care and custody of the petitioner before the respondent ever appeared and asserted that he was [the child's] father; indeed, a different man was purported to be her father, and he appeared at the hearing on the petition. The respondent's later appearance in the case and the results of his paternity test do not change the historical fact that, at the time of her commitment, [the child] was homeless and, therefore, uncared for within the meaning of our child protection statutes, regardless of parentage." Id., 338–39.

The same logic holds true in the present case. The respondent's absence at the neglect hearing is not legally significant because the child's father was undetermined at the time the child was adjudicated neglected. Just as in *In re Zoey H.*, the respondent in the present case was not known to be the child's biological father when the commissioner filed her preliminary neglect petition. See id., 337. As noted, when the department learned from E about the respondent and his alleged paternal status, the department took timely measures

to join him into the proceedings and to seek a judgment of his paternity. At the hearing on December 28, 2017, the respondent was advised by the court of the avenues he could take to challenge the finding of neglect. The court arranged for legal representation and advised him that "[t]he child's in the care and custody of the [department] already and has already been found neglected," but that the respondent had "the right to have a hearing moving forward on any future changes in the case" and "to have any dispositional hearing at this point as to the issue of neglect and then on any new petitions that may be forthcoming in the future." The respondent's absence from the neglect proceeding thus did not deprive him of any due process, because the department subsequently joined him to the proceeding and the court advised him of the avenues available to him to challenge the judgment. The respondent did not file a motion to open the neglect judgment, even though the statutory four month period for opening the judgment had not yet expired, nor did he file any motion to revoke commitment. His failure to do so renders his appeal an impermissible collateral attack.

"The department sets about to do its work pursuant to the findings made and steps ordered pursuant to a trial on a neglect petition. Those findings and orders place the respondent parents on notice as to what is expected of them if they are to regain custody of their children." *In re Stephen M.*, supra, 109 Conn. App. 665. The department worked with the respondent until mid-2019, with the goal of reunification through satisfaction of court-ordered specific steps. Throughout this process, the respondent acquiesced in the judgment of neglect and did not at any time avail himself of his opportunity to challenge it. The court found that the department made reasonable efforts to achieve its goal of reunification, but that the respondent failed to fully meet the criteria in his court-ordered specific steps and then failed to appear both at his plea date and at the termination of parental rights trial itself. In sum, the record

indicates that the respondent, after taking no action to challenge the adjudication that his child was neglected and acquiescing in that judgment, now seeks to collaterally attack that judgment following the termination of his parental rights. This he may not do.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHEN M. TUNICK ET AL. *v.* BARBARA TUNICK ET AL.
(AC 42031)

Keller, Elgo and Lavery, Js.

Syllabus

The plaintiff, who was a remainder beneficiary of a revocable trust, brought an action for damages against his sisters, B and R, and against D, the administrator of the estate of the plaintiff's mother, S, in connection with the administration of the trust. The plaintiff claimed, inter alia, that B and S, who had been cotrustees of the trust, had breached their fiduciary duties to him, and that S, D and R had fraudulently concealed, pursuant to statute (§ 52-595), facts that were necessary to his causes of action against them. In 2004, S and B filed an application with the Probate Court to remove the plaintiff as a trustee pursuant to statute (§ 45a-242 (a)). The court thereafter issued a written decree in which it found, inter alia, that the plaintiff had neglected to perform the duties of the trust and ordered his removal as a trustee. The court also issued orders pertaining to certain antique automobiles that were part of the trust. S and B thereafter acted as cotrustees until June, 2013, when the Probate Court issued an order removing them as cotrustees and appointing a successor trustee. After S died in 2015, the Probate Court appointed D the administrator of her estate. The plaintiff commenced his action against B, R and D in May, 2017. The trial court thereafter granted motions to strike that were filed by D and B as to certain counts of the complaint against them that alleged that the trust was a contract they had breached. R, D and B subsequently filed separate motions for summary judgment in May, 2018, in which they alleged that all counts of the complaint against them were time barred pursuant to the three year tort statute (§ 52-577) of limitations. While the three motions for summary judgment were pending, the plaintiff filed a revised complaint that added a count against B sounding in unjust enrichment, which was not thereafter adjudicated in the trial court's ruling on B's motion for

summary judgment. The trial court then granted the summary judgment motions filed by R, D and B. The court determined, inter alia, that the plaintiff's allegations of wrongdoing described conduct that occurred from 1997 to 2013, and that R, D and B had met their burden of showing that the plaintiff's claims were time barred by § 52-577. The court further determined that there was no evidentiary basis for the plaintiff's claims that the statute of limitations in § 52-577 was tolled by the continuous course of conduct doctrine or by fraudulent concealment, and it concluded that no genuine issues of material fact existed as to when the plaintiff's causes of action accrued and when his action was commenced. *Held*:

1. This court lacked subject matter jurisdiction over that portion of the plaintiff's appeal that concerned the partial summary judgment rendered in favor of B, as it was undisputed that his unjust enrichment count against her remained pending; the plaintiff did not request a written determination from the trial court regarding the significance of the issues resolved by the partial summary judgment, the record did not contain a withdrawal or an unconditional abandonment of the unjust enrichment count, and, as that count remained unadjudicated, it presented the possibility that B could be found liable to the plaintiff for damages; accordingly, the portion of the plaintiff's appeal as to B was dismissed.
2. The trial court properly granted D's motion to strike the breach of contract count in the plaintiff's complaint, as S, by having agreed to perform her duties as a trustee, did not enter into a contract to perform provisions of the trust that were enforceable by an action sounding in contract; the plaintiff provided no authority in which a court has held that a trust beneficiary may bring an action sounding in contract against a trustee, the plaintiff having disregarded several critical distinctions between a trust and a contract, including that a trust needs no consideration to support it.
3. The plaintiff could not prevail on his claim that his causes of action as a remainder beneficiary did not become ripe until S's death, as that proposition contravened precedent that § 52-577 operates as a bar to tort claims irrespective of when they accrue; none of the conduct on the part of the defendants that the plaintiff detailed in his complaint was alleged to have occurred after June, 2013, when S and B were removed as trustees, and, because the dates alleged in the complaint were the metric for purposes of applying the limitation period of § 52-577, the trial court properly concluded that the defendants satisfied their burden of demonstrating the applicability of § 52-577 to the plaintiff's tort claims.
4. The plaintiff could not prevail on his claim that genuine issues of material fact existed as to whether § 52-577 was tolled by the pendency of a final accounting in the Probate Court, the continuing course of conduct doctrine and fraudulent concealment:

a. This court found unavailing the plaintiff's assertion that the trial court made a legal error when it concluded that the limitation period of § 52-577 commenced in 2013 because the Probate Court had not yet approved the accountings submitted by S and B: the plaintiff's reliance on the statute (§ 52-579) governing actions against a surety on a probate bond was misplaced, as the limitation period in § 52-579 expressly is conditioned on the Probate Court's approval of a final accounting, there was no allegation or evidence of the existence of a probate bond, the operative complaint contained no claim against the surety of a probate bond, and the only facts under § 52-577 that were material to the trial court's ruling were the date of the wrongful conduct alleged in the complaint and the date the action was filed; moreover, the plaintiff provided no authority, nor was this court aware of any, in which it has been held that the limitation period of § 52-577 automatically is tolled for tort claims against a trustee due to the pendency of a final accounting in the Probate Court, this court was not inclined to articulate such a per se rule, and the accounting issue, which implicated the fiduciary duty of a removed trustee, properly fell within the purview of the continuous course of conduct doctrine.

b. The trial court properly concluded that the continuing course of conduct doctrine did not apply to the plaintiff's claims against R; the plaintiff asserted in his complaint that he suffered money damages as a result of R's conduct from 1997 through 2013, he did not offer affidavits or other proof that R engaged in activity with respect to the trust after June, 2013, he did not allege that R owed a legal duty to him, and R never was a trustee and did not stand in a fiduciary relation to the plaintiff.

c. Although the plaintiff met his burden of establishing that S owed a continuing fiduciary duty to account for trust assets following her removal as a trustee in June, 2013, he failed to establish a genuine issue of material fact as to whether S and D continually breached that fiduciary duty to the remainder beneficiaries, which resulted in an enhanced injury to him following S's removal as a trustee that would toll the limitation period in § 52-577; contrary to the plaintiff's allegation that S and D engaged in a continuous course of conduct by failing to account for the automobiles and automobile parts, which was the only factual allegation in the plaintiff's pleadings of a continuing breach of the fiduciary duty owed to remainder beneficiaries subsequent to S's removal, that failure did not constitute a series of events that gave rise to a cumulative injury, and the subsequent injury the plaintiff allegedly sustained following S's removal as trustee, which was the failure to obtain an accounting of the automobile assets, was the same injury he allegedly incurred prior to her removal.

d. The trial court properly concluded that no genuine issue of material fact existed with respect to the plaintiff's claim that S, D and R fraudulently concealed his causes of action against them such that the limitation period for those causes of action was tolled by § 52-595: the plaintiff's

assertion that the defendants should bear the burden to demonstrate that they did not engage in fraudulent concealment was unavailing, as our Supreme Court has held that the burden of establishing fraudulent concealment belongs to the party seeking to avail itself of that tolling doctrine, and this court, as an intermediate appellate tribunal, was not at liberty to modify, reconsider or overrule precedent of the Supreme Court; furthermore, the plaintiff did not provide clear and unequivocal evidence that S, D or R had actual awareness of the facts necessary to establish the plaintiff's causes of action or that they intentionally concealed such facts from him, as the trial court carefully reviewed all of the materials that the plaintiff submitted in opposition to the defendants' motions for summary judgment, which did not show any intent on the part of the defendants to conceal facts or support a finding that their alleged concealment was directed toward delaying commencement of an action against them.

5. The plaintiff's appeal as to his claim that the trial court improperly denied his motion to open the judgment was moot; the plaintiff's request to submit what he asserted was newly discovered evidence that contravened D's contention that S had no continuing duty to the remainder trustees after her removal as a cotrustee in June, 2013, ostensibly supported this court's legal conclusion that S owed such a duty following her removal; accordingly, there was no practical relief that could be afforded to the plaintiff, and that portion of his appeal challenging the propriety of the denial of his motion to open the judgment was dismissed.

Argued February 10—officially released December 1, 2020

Procedural History

Action for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Truglia*, *J.*, granted the motions to strike filed by the defendant Richard S. DiPreta et al.; thereafter, the named plaintiff filed an amended complaint; subsequently, the court granted in part the motion for summary judgment filed by the named defendant, granted the motions for summary judgment filed by the defendant Roberta G. Tunick et al. and rendered judgment thereon, from which the named plaintiff appealed to this court; thereafter, the court, *Truglia*, *J.*, issued an articulation of its decision as to the named defendant; subsequently, the court, *Truglia*, *J.*, denied the named plaintiff's motion to open the judgment, and the named plaintiff filed an amended appeal. *Appeal dismissed in part*; *affirmed.*

William W. Taylor, for the appellant (named plaintiff).

Richard E. Castiglione, for the appellee (named defendant).

Steven M. Frederick, with whom, on the brief, was *Sarah Gleason*, for the appellee (defendant Roberta G. Tunick).

Robert C.E. Laney, with whom, on the brief, was *Karen L. Allison*, for the appellee (defendant Richard S. DiPreta).

Opinion

ELGO, J. This case concerns a dispute among family members over the administration of assets held in a trust created by the family patriarch. The plaintiff Stephen M. Tunick appeals from the judgment of the trial court rendered in favor of the defendants, Barbara Tunick, Roberta G. Tunick, and Richard S. DiPreta, administrator of the estate of Sylvia G. Tunick (estate).[1] On appeal, the plaintiff contends that (1) the court improperly granted DiPreta's motion to strike a breach of contract count, (2) the court improperly rejected the plaintiff's claim that his causes of action as a remainder beneficiary did not become ripe until the death of the primary

[1] In his complaint, the plaintiff named as defendants his two sisters, Barbara Tunick and Roberta Tunick, and Richard DiPreta, administrator of the estate of the plaintiff's mother, Sylvia Tunick, who died in 2015. For clarity, we refer to them collectively as the defendants, and to Barbara Tunick, Roberta Tunick, and Sylvia Tunick individually by their first names.

We note that the plaintiff properly named DiPreta as a party to this action in his capacity as the administrator of Sylvia's estate. But cf. *American Tax Funding, LLC* v. *Design Land Developers of Newtown, Inc.*, 200 Conn. App. 837, 845–48, A.3d (2020) (trial court lacked jurisdiction to render judgment against estate, which is not legal entity, where complaint named estate as defendant rather than executors of estate as parties in their representative capacities). We also note that, after commencing this litigation, the plaintiff subsequently moved to cite in Richard J. Margenot, successor trustee of the David H. Tunick revocable trust, as a plaintiff, which motion the court granted. Margenot has not participated in this appeal.

beneficiary, (3) genuine issues of material fact exist as to whether the plaintiff's claims are time barred under General Statutes § 52-577, and (4) the court abused its discretion in declining to grant the plaintiff's motion to open the judgment. We dismiss the appeal in part and affirm the judgment of the trial court in all other respects.

Mindful of the procedural posture of this case, we set forth the following facts as gleaned from the pleadings, affidavits, and other proof submitted, viewed in the light most favorable to the plaintiff. See, e.g., *Martinelli* v. *Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009). The settlor, David H. Tunick (settlor), established the David H. Tunick revocable trust (trust) in 1981. Among other things, the trust corpus included real property and antique automobiles. The settlor and his wife, Sylvia, were named as the primary beneficiaries of the trust, and their three children—the plaintiff, Barbara, and Roberta—were named as remainder beneficiaries. Although the plaintiff and Barbara initially were appointed cotrustees of the trust, it was amended in 1993 to include Sylvia as a third cotrustee.

The trust provided in relevant part that Sylvia would become the sole primary beneficiary of the trust upon the settlor's death and that all income and principal of the trust would be used for her benefit. The trust further provided that, upon Sylvia's death, the plaintiff, Barbara, and Roberta would receive equal shares of "the remaining trust property."

The settlor died in 1997, leaving Sylvia as the sole primary beneficiary of the trust. In 2004, Sylvia and Barbara filed an application with the Probate Court to remove the plaintiff as a trustee pursuant to General Statutes § 45a-242 (a). Following a hearing, the court issued a written decree, in which it found that the plaintiff "has neglected to perform the duties of the trust, has refused to account and has improperly distributed

and wasted [t]rust property in his charge, and that it would be in the best interests of the beneficiaries to remove him as [t]rustee." The court thus ordered the plaintiff to be removed as a trustee and to "deliver any and all property belonging to the trust [to] the remaining [t]rustees." In addition, the court issued a specific order regarding the antique automobile assets of the trust, stating in relevant part: "[I]n regard to . . . antique [automobiles], they are to be sold, and . . . any [automobiles] that are kept by the beneficiaries or remainder beneficiaries of the trust, the value of the [automobile] shall be taken against the beneficiary's share of the trust. Once the [automobiles] are sold, a corporate trustee will be appointed and the remaining [t]rustees will resign . . . ."

Sylvia and Barbara thereafter acted as cotrustees of the trust from July 7, 2004, until June 11, 2013. On June 11, 2013, the Probate Court issued an order removing Sylvia and Barbara as cotrustees and appointing Richard J. Margenot as the successor trustee. Sylvia died on July 24, 2015, and DiPreta was appointed as the administrator of her estate.

The plaintiff commenced this civil action by service of process on May 5, 2017. He filed a first amended complaint containing thirteen counts on July 6, 2017, which he further revised on September 13, 2017. In response, DiPreta moved to strike count thirteen of the complaint, which alleged in relevant part that the trust was a contract that Sylvia had breached. In his motion to strike, DiPreta argued that the plaintiff could not maintain a breach of contract claim because a trust is not a contract. The trial court agreed with DiPreta and granted the motion to strike.

On February 7, 2018, the plaintiff filed the operative complaint, his second revised complaint. It contains twelve counts, eleven of which sound in tort. Counts

one and two allege breach of fiduciary duty against Barbara and Sylvia, respectively. Counts three, four and five allege conversion against each defendant; counts six, seven and eight allege civil theft in violation of General Statutes § 52-564 against each defendant; and counts nine, ten and eleven allege fraudulent misrepresentation against each defendant. Last, count twelve asserts a breach of contract claim against Barbara.

On April 23, 2018, Barbara filed a motion to strike count twelve, claiming that it was legally insufficient because a trust is not a contract. While that motion was pending, Roberta and DiPreta filed separate motions for summary judgment on May 10, 2018, alleging that all counts against them were time barred pursuant to § 52-577.[2] One day later, Barbara moved for summary judgment as well, arguing that counts one, four, six and nine against her were time barred pursuant to § 52-577. Barbara further maintained that she was entitled to judgment as a matter of law on count twelve because a trust is not a contract. In response to the defendants' motions for summary judgment, the plaintiff filed an opposition on June 15, 2018, that was accompanied by numerous exhibits, including an affidavit from Margenot, who had been appointed as successor trustee to the trust on June 11, 2013. In his memorandum of law in opposition to the three motions for summary judgment, the plaintiff argued that (1) the statute of limitations contained in § 52-577 did not begin to run until Sylvia's death in 2015, (2) the statute of limitations did not begin to run due to the pendency of an accounting before the Probate Court, and (3) the statute of limitations was tolled by a continuing course of conduct and, alternatively, fraudulent concealment on the part of the defendants.

[2] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

On June 21, 2018, the court granted Barbara's motion to strike the breach of contract count. While the three motions for summary judgment remained pending, the plaintiff filed a third revised complaint on July 5, 2018. That complaint is largely identical to the operative complaint, with one exception—the plaintiff omitted the breach of contract count against Barbara and added an unjust enrichment count against her. On July 13, 2018, Barbara filed an objection to the plaintiff's third revised complaint, which the court overruled.

On July 16, 2018, the court rendered summary judgment in favor of all three defendants. In its memorandum of decision, the court stated in relevant part: "[T]he court agrees that all of the plaintiff's allegations of wrongdoing in the complaint describe conduct by the defendants from 1997 to 2013. . . . The plaintiff does not contest the defendants' assertions that [Barbara] and [Sylvia] ceased acting as trustees in June, 2013. Also, there is no evidence showing that [Roberta] took any action in concert with either [Barbara] or [Sylvia] after June 11, 2013. There is no evidence (and the plaintiff does not allege) that Roberta's duties extended to anything other than assisting her mother and sister with bookkeeping for the trust, and it [is] clear that the need for those services ceased to exist after June 11, 2013. In short, the defendants have met their preliminary burden of showing that the plaintiff's claims are time barred by the three year statute of limitations under § 52-577. The burden now shifts to the plaintiff to show that genuine issues of material fact exist upon which the trier of fact could conclude that the statute of limitations has been tolled to May 5, 2017, the date of service. . . . [T]he court rejects all the tolling arguments advanced by the plaintiff." (Citation omitted; footnote omitted.) The court then concluded: "[T]he court finds that no

genuine issues of material fact [exist] as to when the plaintiff's causes of action accrued and when the present action was commenced. The court also finds no evidentiary basis for the plaintiff's claims that the statute of limitations is tolled by the continuous course of conduct doctrine or by fraudulent concealment. The defendants' motions for summary judgment are granted as to all remaining counts in the complaint."

On August 6, 2018, the plaintiff filed a motion for reargument and reconsideration and a motion for articulation, which the court denied. On August 16, 2018, Barbara filed a motion for articulation, seeking clarification as to the unjust enrichment count contained in the plaintiff's third revised complaint that he had filed while the motions for summary judgment were pending. By order dated August 24, 2018, the court issued an articulation, stating, in relevant part: "The court entered judgment in favor of all three defendants on all counts remaining as of that date. Prior to that date, however, on July 5, 2018, the plaintiff filed a timely third revised complaint, adding a new count of unjust enrichment against [Barbara]. That new count was not addressed by the defendant's motion for summary judgment. Therefore, new count twelve of the plaintiff's third revised complaint was not included in the court's ruling on [Barbara's] motion for summary judgment. Judgment enters in favor of [Roberta] and [DiPreta] . . . on all counts . . . and in favor of [Barbara] on all counts against her except [the unjust enrichment count] of the plaintiff's third revised complaint." The plaintiff commenced this appeal days later.

On December 21, 2018, the plaintiff filed a motion to open the judgment, which was predicated on testimony provided by DiPreta during a November 20, 2018 probate proceeding. The court denied that motion. The plaintiff thereafter sought an articulation of that ruling, as

well as reconsideration thereon. The court denied those requests, and this amended appeal followed.[3]

I

Before addressing the claims advanced by the plaintiff in this appeal, we first consider a jurisdictional question regarding the plaintiff's action against Barbara. Prior to oral argument, this court sua sponte instructed the parties to be prepared to address "whether the portion of this appeal challenging the trial court's rulings as to [Barbara] should be dismissed for lack of a final judgment because the trial court has yet to render a final judgment as to [Barbara] by disposing of the unjust enrichment count directed against her. See Practice Book §§ 61-2 [and] 61-3." We now conclude that this portion of the appeal must be dismissed.

"The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law . . . . The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § [61-1] . . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear." (Internal quotation marks omitted.) *Mazurek* v. *Great American Ins. Co.*, 284 Conn. 16, 33, 930 A.2d 682 (2007); see also, e.g., *In re Santiago G.*, 325 Conn. 221, 229, 157 A.3d 60 (2017) (lack of final judgment constitutes jurisdictional defect that necessitates dismissal of appeal).

[3] On August 15, 2019, the plaintiff requested permission to file a late amended appeal for the purpose of challenging the propriety of the denial of his motion to open the judgment, which this court granted. The plaintiff thereafter filed this amended appeal.

Our precedent further instructs that "[a] judgment that disposes of only a part of a complaint is not a final judgment . . . unless the partial judgment disposes of all causes of action against a particular party or parties; see Practice Book § 61-3; or if the trial court makes a written determination regarding the significance of the issues resolved by the judgment and the chief justice or chief judge of the court having appellate jurisdiction concurs. See Practice Book § 61-4 (a)." (Internal quotation marks omitted.) *Tyler* v. *Tyler*, 151 Conn. App. 98, 103, 93 A.3d 1179 (2014). It is undisputed that the partial summary judgment rendered by the court on July 16, 2018, did not dispose of *all* causes of action against Barbara, as the unjust enrichment count remained pending. In addition, the plaintiff has not requested a written determination from the trial court regarding the significance of the issues resolved by the partial summary judgment entered against Barbara.

As a result, the plaintiff could appeal from the partial summary judgment "only if the remaining causes of action or claims for relief [were] withdrawn or unconditionally abandoned before the appeal [was] taken." *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 717, 183 A.3d 1164 (2018). The record before us does not contain a withdrawal or an unconditional abandonment of the unjust enrichment count by the plaintiff. To paraphrase our Supreme Court, not only does that second count remain unadjudicated, it also presents the possibility that Barbara could be found liable to the plaintiff for damages. See id., 726. In such instances, "it cannot be said that further proceedings could have no effect" on the parties. Id.; see also *State* v. *Ebenstein*, 219 Conn. 384, 389–90, 593 A.2d 961 (1991) (dismissing appeal from partial summary judgment for lack of final judgment and emphasizing that parties will still be before trial court for final determination of ancillary claim).

We conclude that the plaintiff has not appealed from a final judgment with respect to his action against Barbara, as the unjust enrichment count remains pending. Accordingly, this court lacks subject matter jurisdiction over that portion of the plaintiff's appeal concerning the partial summary judgment rendered in favor of Barbara.[4]

II

The plaintiff claims that the court improperly granted DiPreta's motion to strike the breach of contract count of his first amended complaint. We disagree.

The standard that governs our review of the granting of a motion to strike is well established. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Sepega* v. *DeLaura*, 326 Conn. 788, 791, 167 A.3d 916 (2017); see also *Parsons* v. *United Technologies Corp.*, 243 Conn. 66, 68, 700 A.2d 655 (1997) ("[a] determination regarding the legal sufficiency of a claim is . . . a conclusion of law, not a finding of fact").

In count thirteen of his first amended complaint, as revised on September 13, 2017, the plaintiff alleged in relevant part that the trust is a "contract" and that Sylvia had "breached the contract by her refusal to follow

[4] We reiterate that the plaintiff's operative complaint contained five counts against Barbara. Count one alleged breach of fiduciary duty; count four alleged conversion; count six alleged civil theft; count nine alleged "misrepresentation/fraud"; and count twelve alleged breach of contract against her. Appellate review of the partial summary judgment rendered in favor of Barbara on those counts must await resolution of the remaining unjust enrichment count that the plaintiff has alleged against her. See *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, 262 Conn. 240, 246–47, 811 A.2d 1272 (2002).

the [t]rust instrument, and [by] her unlawful actions as fiduciary to said [t]rust." In moving to strike that count, DiPreta argued that the plaintiff could not maintain a breach of contract claim because "a trust is not a contract, but rather a conveyance of an equitable interest in property . . . ." The trial court agreed and granted the motion to strike.

We conclude that the court's determination was proper. The plaintiff has provided this court with no authority in which a court has held that a trust beneficiary may bring an action sounding in contract against a trustee for breaching the terms of a trust. The overwhelming weight of authority indicates otherwise. As our Supreme Court has emphasized, "[a] trust may be created without notice to or acceptance by any beneficiary or trustee . . . and in the absence of consideration." (Citation omitted; internal quotation marks omitted.) *Palozie* v. *Palozie*, 283 Conn. 538, 545, 927 A.2d 903 (2007); cf. *Chiulli* v. *Chiulli*, Superior Court, judicial district of Hartford, Docket No. CV-12-6036511-S (July 8, 2014) ("[t]he essential terms of a valid contract are an offer, acceptance of that offer, and consideration" (internal quotation marks omitted)) (reprinted at 161 Conn. App. 638, 647, 127 A.3d 1146 (2015)); see also 1 R. Lord, Williston on Contracts (4th Ed. 2007) § 1:5, p. 38 (express contract requires "mutual assent or offer and acceptance, consideration, legal capacity, and a lawful subject matter"). The Restatement (Second) of Trusts likewise notes that "[a] trustee who fails to perform his duties as trustee is not liable to the beneficiary for breach of contract . . . . The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract. . . . The trustee by accepting the trust and agreeing to perform his duties as trustee does not make a contract to perform the trust enforceable in an action at law." 1 Restatement (Second), Trusts § 197, comment (b), pp. 433–34 (1959); accord *In re Naarden Trust*, 195 Ariz.

526, 530, 990 P.2d 1085 (App. 1999) ("[T]he undertaking between the settlor and trustee is not properly characterized as contractual and does not stem from the premise of mutual assent to an exchange of promises. . . . Therefore, although the trustee may be liable for a breach of fiduciary duties, its undertakings or promises in a trust instrument are not normally 'contractual.' "), review denied, Arizona Supreme Court (January 4, 2000); *Gibbons* v. *Anderson*, 575 S.W.3d 144, 148 (Ark. App. 2019) ("a trust agreement is not a contract"); *In re Calomiris*, 894 A.2d 408, 410 (D.C. 2006) ("an inter vivos trust is not a contract" (internal quotation marks omitted)); *In re Will of Allis*, 6 Wis. 2d 1, 6 n.1, 94 N.W.2d 226 (1959) ("a testamentary trust is not a contract").

The proposition advanced by the plaintiff disregards several critical distinctions between a trust and a contract. As one court observed, "[t]rusts are distinguishable from contracts in that the parties to a contract may decide to exchange promises, but a trust does not rest on an exchange of promises and instead merely requires a trustor to transfer a beneficial interest in property to a trustee who, under the trust instrument, relevant statutes, and common law, holds that interest for the beneficiary. The undertaking between the settlor and trustee is not properly characterized as contractual and does not stem from the premise of mutual assent to an exchange of promises. Although the trustee's duties may derive from the trust instrument, they initially stem from the special nature of the relation between trustee and beneficiary, and thus, the trustee's undertakings or promises in a trust instrument are normally not contractual. A trust is also distinguishable from a contract in that a trust is a fiduciary relationship with respect to property. The relation ordinarily created by a contract is that of promisor and promisee, obligor and obligee, or debtor and creditor; in most contracts of hire, a special confidence is reposed in each other

by the parties, but more than that is required to establish a fiduciary relation. An essential aspect of a trust is that the putative trustee has received property under conditions that impose a fiduciary duty to the grantor or a third person; a mere contractual obligation, including a contractual promise to convey property, does not create a trust. One of the major distinctions between a trust and contract is that in a trust, there is always a divided ownership of property, the trustee having usually a legal title and the beneficiary an equitable one, whereas in contract, this element of division of property interest is entirely lacking."[5] *Gibbons* v. *Anderson*, supra, 575 S.W.3d 149 n.3; see also G. Bogert, Trusts and Trustees (2020) § 17 ("[A] trust which is completely created needs no consideration to support it and make it enforceable . . . . Contracts are still dependent on consideration for their enforceability. This is a marked distinction between a trust and a contract." (Footnote omitted.)); 4 A. Scott et al., Scott and Ascher on Trusts (5th Ed. 2007) § 24.1.2, pp. 1657–58 ("[T]he fact that the trustee has expressly agreed to perform the trust

[5] In a similar action, the Rhode Island Supreme Court recently declined "the invitation to blur the distinction between gifting to a beneficiary directly and doing so through a trust instrument." *Glassie* v. *Doucette*, 157 A.3d 1092, 1099 (R.I. 2017). The appellant in that case was the executrix of the estate of a third-party beneficiary under a property settlement agreement entered into by her parents at the time that their marriage was dissolved, which required the appellant's father to create and fund a trust for her benefit. Id., 1094. Although it was undisputed that the father created and partially funded such a trust, the appellant brought an action sounding in breach of contract due to the father's alleged failure to fully fund the trust. Id., 1094–95. The trial court concluded that the appellant lacked standing to maintain that action and, on appeal, the Rhode Island Supreme Court framed the issue as "whether the law of contracts or the law of trusts [governed] the resolution of this dispute." Id., 1094. The court held that "once the [t]rust was created, the law of trusts became the governing law. From that point forward, [the appellant's] status was that of a trust beneficiary, not of a third-party beneficiary to a contract. Accordingly, [the appellant] lacked the requisite standing to [maintain an action sounding in contract against] her father's estate for benefits she would have received based on her status as the beneficiary of the [t]rust." Id., 1100.

adds nothing to the trustee's duties or liabilities. The trustee is not liable in an action for breach of contract merely for having agreed to act as trustee.").

In light of the foregoing, we conclude as a matter of law that Sylvia, by agreeing to perform her duties as trustee, did not enter into a contract to perform the provisions of the trust that was enforceable by an action sounding in contract. For that reason, the court properly granted DiPreta's motion to strike count thirteen of the plaintiff's first amended complaint.

III

The plaintiff also contends that the court improperly rejected his claim that his causes of action as a remainder beneficiary did not become ripe until the death of the primary beneficiary. He argues that the court "made a legal error in not finding [that] the [plaintiff's] action was triggered by the death of [Sylvia]." The plaintiff thus posits that the statute of limitations set forth in § 52-577 "did not begin to run until [her death] on July 24, 2015."[6] On our plenary review of that question of law; see *Pasco Common Condominium Assn., Inc.* v. *Benson*, 192 Conn. App. 479, 501, 218 A.3d 83 (2019); we disagree.

Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of *the act or omission complained of*." (Emphasis added.) As this court has observed, "[§] 52-577 is an

[6] In this appeal, the plaintiff does not dispute that § 52-577 governs tort claims brought by a beneficiary against a trustee. See generally 4 Restatement (Third), Trusts § 98, p. 48 (2012) ("[a] beneficiary may not maintain a suit against a trustee for breach of trust if the beneficiary is barred from doing so . . . by a statutory period of limitation"); 4 A. Scott et al., supra, § 23.24.2, p. 1785 ("[i]n actions at law . . . courts simply applied the relevant statute of limitations"); see also *Cone* v. *Dunham*, 59 Conn. 145, 158, 20 A. 311 (1890) ("[t]o exempt a trust from the bar of the statute of limitations . . . it must be of the kind belonging *exclusively* to the jurisdiction of a court of equity" (emphasis added; internal quotation marks omitted)).

occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs." (Internal quotation marks omitted.) *Pagan* v. *Gonzalez*, 113 Conn. App. 135, 139, 965 A.2d 582 (2009). For that reason, "[w]hen conducting an analysis under § 52-577, *the only facts* material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed." (Emphasis added; internal quotation marks omitted.) Id.

"Legal actions in Connecticut are commenced by service of process." (Internal quotation marks omitted.) *Rios* v. *CCMC Corp.*, 106 Conn. App. 810, 820, 943 A.2d 544 (2008). It is undisputed that service of process in the present case occurred on May 5, 2017. The wrongful conduct detailed in the operative complaint allegedly transpired from 1997 to 2013. Because the present action was not commenced until 2017, the tort counts alleged by the plaintiff fall outside the three year statutory period set forth in § 52-577.

Relying on a decision from a century ago, the plaintiff argues that those counts "did not become ripe" until Sylvia's death in 2015. The sole authority cited by the plaintiff for that novel contention is *State ex rel. McClure* v. *Northrop*, 93 Conn. 558, 569, 106 A. 504 (1919). *Northrop* did not involve an action against trustees of a trust but, rather, a claim against sureties of a probate bond. Id., 562. The statute of limitations at issue in that case was *not* § 52-577—it was General Statutes § 6151, which governed actions "brought on contracts under seal . . . ." Id., 563. Moreover, in *Northrop*, the court stated that "[i]t is undoubted that the statute of limitation[s] begins to run as soon as the right of action has accrued. . . . But the right of action will not accrue until there is a person or persons capable of suing and being sued." (Citation omitted.) Id. In the present case,

the plaintiff's causes of action against Sylvia all pertain to her conduct as a trustee. As a result, she was capable of being sued prior to the expiration of the three year limitation period of § 52-577, and the plaintiff has not argued otherwise in this appeal. In addition, we note that the limited discussion of remainder beneficiaries in *Northrop* pertained to whether they were subject to a defense of laches, and not their failure to file a tort claim within the statutory period of repose.[7] *Northrop* is, in a word, inapposite to the present case.

The plaintiff's contention that his causes of action did not become "ripe" until the death of Sylvia also contravenes the well established precedent of this state that § 52-577 operates as a bar to tort claims irrespective of when they accrue. As our Supreme Court has explained, "the history of [the] legislative choice of language [contained in § 52-577] precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred." *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 212, 541 A.2d 472 (1988); see also *Prokolkin* v. *General Motors Corp.*, 170 Conn. 289, 294–95, 365 A.2d 1180 (1976) (noting that legislature, in crafting § 52-577, "distinguished Connecticut's statutes of limitations for torts from those of other jurisdictions, the majority of which begin to run only after the cause of action has accrued" (internal quotation marks omitted)); *Sanborn* v. *Green-*

[7] As the court stated: "No obligation rested upon the [remainder beneficiaries] of this trust fund to protect the sureties on this bond against the act of the principal, prior to the death of the last life tenant . . . on February 26th, 1913. Until then the [remainder beneficiaries] could not be known; and in the absence of fraud on their part prejudicial to the sureties, they cannot be held in any degree responsible for the acts or omissions of this testamentary trustee. . . . Nor can [they] be held responsible for the acts or omissions of the life tenants. [Remainder beneficiaries] and life tenants are not in privity. There is thus no possible basis for a claim of laches on the part of these [remainder beneficiaries] . . . until after the decease of the life tenant, for their right to enforce a final distribution began then. Before that time a charge of laches on their part could not be sustained." (Citation omitted.) *State ex rel. McClure* v. *Northrop*, supra, 93 Conn. 564–65.

wald, 39 Conn. App. 289, 302, 664 A.2d 803 (1995) ("[§] 52-577 is a statute of repose in that it sets a fixed limit after which the tortfeasor will not be held liable and in some cases will serve to bar an action *before* it accrues" (emphasis added; internal quotation marks omitted)), cert. denied, 235 Conn. 925, 666 A.2d 1186 (1995). This court is bound by that precedent.

Our law instructs that "[t]he date of the act or omission complained of" pursuant to § 52-577 is the date when the conduct of the defendant occurs. (Internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 408, 957 A.2d 836 (2008). In his operative complaint, the plaintiff details specific conduct on the part of the defendants, none of which is alleged to have transpired after Sylvia's and Barbara's removal as cotrustees on June 11, 2013.[8] The dates alleged in the complaint are the relevant metric for purposes of applying the limitation period of § 52-577. Because the conduct described therein is beyond that limitation period, the court properly concluded that the defendants satisfied their burden of demonstrating the applicability of § 52-577 to the plaintiff's tort claims.

IV

We next address the question of whether genuine issues of material fact exist as to the plaintiff's tolling

[8] As the court noted in its memorandum of decision, "[t]he plaintiff alleges numerous wrongful actions by the defendants on behalf of the trust but does not specify in every instance when these actions and failures to act occurred." Significantly, the operative complaint lacks any allegations of wrongful conduct on the part of the defendants that transpired after June 11, 2013. For example, in paragraph 15 of the breach of fiduciary count against Sylvia, the plaintiff sets forth a litany of alleged transgressions, for which the plaintiff has alleged either (1) a specific date prior to June 11, 2013, or (2) no date whatsoever. Paragraph 18 of that count then alleges that Sylvia "breached her fiduciary duty . . . by wrongfully causing funds to be spent against the will and intent of the [trust] *from 1997 through 2013, as stated in paragraph 15 above.*" (Emphasis added.) Paragraph 13 of the conversion count against Roberta similarly alleges that, "[a]s a result of [Roberta's] misconduct from 1997 through 2013, the plaintiff has suffered money damages."

claims. The plaintiff submits that § 52-577 was tolled in the present case by (1) the pendency of a final accounting in the Probate Court, (2) the continuing course of conduct doctrine, and (3) fraudulent concealment. We address each in turn.

We begin by noting the well established standard that governs our review of the trial court's decision to grant a motion for summary judgment. "The facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 164, 204 A.3d 717 (2019). "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

As our Supreme Court has explained, "[i]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that

the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the [limitation] period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . . The statutes of limitations applicable in the present case are occurrence statutes. . . . With such statutes, the [limitation] period typically begins to run as of the date the complained of conduct occurs, and not the date when the plaintiff first discovers his injury. . . . In certain circumstances, however, we have recognized the applicability of the continuing course of conduct doctrine to toll a statute of limitations. Tolling does not enlarge the period in which to sue that is imposed by a statute of limitations, but it operates to suspend or interrupt its running while certain activity takes place." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Financial Co., LLC*, 312 Conn. 286, 310–11, 94 A.3d 553 (2014). With those principles in mind, we turn to the plaintiff's claims.

A

Pending Accounting in Probate Court

The plaintiff claims that the court "made a legal error" in concluding that the limitation period of § 52-577 commenced in 2013, because the Probate Court "has not yet approved [the] accountings" submitted by Sylvia and Barbara. We disagree.

In his principal appellate brief, the plaintiff relies on *State ex rel. McClure* v. *Northrop*, supra, 93 Conn. 558,[9]

[9] In *Northrop*, our Supreme Court held that "the statute of limitation[s] cannot run against [the trust beneficiaries] . . . until his trusteeship is terminated . . . ." *State ex rel. McClure* v. *Northrop*, supra, 93 Conn. 563. It is undisputed that Sylvia's trusteeship was terminated on June 11, 2013, more than three years prior to the commencement of this action.

and a 1996 Superior Court decision to support his contention that the limitation period of § 52-577 does not begin to run until a final accounting has been approved in the Probate Court. His reliance is misplaced, as neither case involved the statute of limitations for tort claims. Rather, both involved actions against the surety on a probate bond, which are governed by General Statutes § 52-579.[10] Unlike § 52-577, application of the limitation period contained in § 52-579 expressly is conditioned on the approval of a final accounting by the Probate Court.[11]

In this case, there is no allegation or evidence of the existence of a probate bond. The operative complaint contains no claim against the surety of a probate bond. Section 52-579 and its requirements thus have no bearing on the present case.

Although the plaintiff concedes that he "is not suing on a surety bond," he nonetheless argues that the analysis under §§ 52-577 and 52-579 "is the same." We do not agree. As we observed in part III of this opinion, "[w]hen conducting an analysis under § 52-577, *the only*

[10] In *Northrop*, the plaintiff commenced an action "to hold the principal and [the] surety . . . upon a probate bond . . . ." *State ex rel. McClure* v. *Northrop*, supra, 93 Conn. 562. As the Supreme Court noted in its decision, "[t]he sureties [abandoned] the claim that this action is barred by the statute limiting actions against sureties on probate bonds to those brought within six years from the final settlement and acceptance of the account of the principal. General [Statutes (1918 Rev.) § 6156] [the statutory precursor to § 52-579]." *State ex rel. McClure* v. *Northrop*, supra, 564.

In *Lindberg* v. *Godbout*, Superior Court, judicial district of New Britain, Docket No. CV-95-0466626-S (May 14, 1996) (17 Conn. L. Rptr. 123, 124), the plaintiff sought recovery on a probate bond "from the former [estate] administrator and the bondholder." Because "no final accounting [had] been approved," the court concluded that "the plaintiff's cause of action is timely" under § 52-579.

[11] General Statutes § 52-579 provides: "No action shall be maintained against the surety on any probate bond unless brought within six years from the final settlement of account of the principal in such bond and the acceptance of such account by the Court of Probate; but this provision shall not apply to minors who are parties in interest."

facts material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed." (Emphasis added; internal quotation marks omitted.) *Pagan* v. *Gonzalez*, supra, 113 Conn. App. 139. Moreover, the plaintiff has provided this court with no authority, nor are we aware of any, in which a court has held that the limitation period of § 52-577 automatically is tolled for any and all tort claims against a trustee due to the pendency of a final accounting in the Probate Court, and we are not inclined to articulate such a per se rule here.[12] Rather, we believe that the accounting issue raised by the plaintiff in this appeal, which implicates the fiduciary duty of a removed trustee, properly falls within the purview of the continuous course of conduct doctrine.

B

Continuing Course of Conduct

The continuing course of conduct doctrine operates to delay the commencement of the running of an otherwise applicable statute of limitations. See, e.g., *Handler* v. *Remington Arms Co.*, 144 Conn. 316, 321, 130 A.2d 793 (1957) ("[w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed"). "When presented with a motion for summary judgment under the continuous course of conduct doctrine, [the court] must determine whether there is a genuine issue

[12] Whether to amend § 52-577 with respect to accountings pending before the Probate Court remains the exclusive prerogative of the legislature. See, e.g., *Genesky* v. *East Lyme*, 275 Conn. 246, 268, 881 A.2d 114 (2005) (Connecticut courts cannot read into legislation provisions that clearly are not contained therein); *Glastonbury Co.* v. *Gillies*, 209 Conn. 175, 181, 550 A.2d 8 (1988) ("[I]t is not the province of a court to supply what the legislature chose to omit. The legislature is supreme in the area of legislation, and courts must apply statutory enactments according to their plain terms." (Internal quotation marks omitted.)).

of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) *Martinelli* v. *Fusi*, supra, 290 Conn. 357; see also *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 45, 148 A.3d 1123 (2016) ("[i]f there is no genuine issue of material fact with respect to any one of the three prongs [of the continuous course of conduct test] summary judgment is appropriate" (internal quotation marks omitted)), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017). "Although the question of whether a party's claim is barred by the statute of limitations is a question of law, the issue of whether a party engaged in a continuing course of conduct that tolled the running of the statute of limitations is a mixed question of law and fact." (Internal quotation marks omitted.) *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 715, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

1

Roberta

We begin with the plaintiff's counts against Roberta, which sound in conversion, civil theft, and fraudulent misrepresentation. Nowhere in the operative complaint or his reply to the statute of limitations special defense does the plaintiff allege that Roberta owed a legal duty to him. Unlike Sylvia and Barbara, Roberta never was a trustee and did not stand in a fiduciary relation to him. The plaintiff's claims pertain to her activities as a bookkeeper who allegedly provided assistance to Sylvia and Barbara during their tenure as trustees.[13] Moreover,

[13] In her March 16, 2015 deposition testimony, portions of which the plaintiff submitted as an exhibit in his opposition to the motions for summary judgment, Barbara stated that "[m]y sister [Roberta] did the bookkeeping" for the trust. Roberta similarly testified at her February 27, 2015 deposition, which also was submitted as an exhibit, that she provided assistance to Sylvia by writing checks on behalf of the trust from 2005 until June 1, 2013.

the plaintiff has not offered affidavits or other proof indicating that Roberta engaged in any activity with respect to the trust after June 11, 2013. Indeed, the plaintiff alleges in count three of his operative complaint, which sets forth a conversion claim against Roberta, that, "[a]s a result of [Roberta's] misconduct from 1997 through 2013, the plaintiff has suffered money damages." For that reason, the court properly concluded that the continuing course of conduct doctrine did not apply to the plaintiff's claims against Roberta.

2

Sylvia

a

The continuing course of conduct doctrine often is implicated when a fiduciary relationship exists between the parties. See, e.g., *Essex Ins. Co.* v. *William Kramer & Associates, LLC*, 331 Conn. 493, 506–507, 205 A.3d 534 (2019) (continuing course of conduct doctrine implicated by fiduciary relationship); *Flannery* v. *Singer Asset Financial Co., LLC*, supra, 312 Conn. 304–305 (concluding that Appellate Court improperly declined to reach merits of plaintiff's "continuing course of conduct claims in avoidance of the defendant's statute of limitations defenses" because plaintiff had alleged breach of fiduciary duty); *Carson* v. *Allianz Life Ins. Co. of North America*, 184 Conn. App. 318, 332, 194 A.3d 1214 (2018) (concluding that continuing course of conduct doctrine did not apply to toll § 52-577 because no genuine issue of material fact existed "as to whether the defendant had a fiduciary duty to the plaintiff"), cert. denied, 331 Conn. 924, 207 A.3d 27 (2019). Unlike Roberta, Sylvia served as a trustee from 1993 to June 11, 2013. She thus owed a fiduciary duty to the plaintiff as a remainder beneficiary of the trust. See *Ramondetta* v. *Amenta*, 97 Conn. App. 151, 157 n.4, 903 A.2d 232 (2006) (trustee accountable to beneficiary for breach of fiduciary duties); 3 Restatement (Third), Trusts § 70, p. 6 (2007)

(trustee owes fiduciary duty to beneficiary). That fiduciary duty includes the duty to provide an accounting to trust beneficiaries.[14] See *Phillips* v. *Moeller*, 148 Conn. 361, 371, 170 A.2d 897 (1961) (trustee has duty "to keep clear and accurate accounts, and in his reports he should . . . keep beneficiaries informed concerning the management of the trust"); *Dettenborn* v. *Hartford-National Bank & Trust Co.*, 121 Conn. 388, 391, 185 A. 82 (1936) (requirement that trustee file final accounting "is implicit in the statutory provisions governing the matter"); 3 A. Scott et al., supra, § 17.5, pp. 1196–97 ("The trustee is under a duty to give the beneficiaries . . . complete and accurate information as to the administration of the trust . . . . The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it.").

More complicated is the question of precisely when Sylvia's fiduciary duty to the plaintiff expired. Though numerous are the decisions involving the duty of a trustee upon termination of a trust, there is scant authority regarding the duty of a trustee who has been removed.[15]

[14] Apart from the duty to account for the assets of the trust, the plaintiff has not identified any legal duty that allegedly continued following Sylvia's removal as a trustee in 2013. We therefore confine our analysis to the allegations in the operative complaint concerning Sylvia's fiduciary duty to account for trust assets. See footnote 17 of this opinion.

[15] We recognize that, in 2019, the General Assembly enacted the Connecticut Uniform Trust Code; General Statutes (Supp. 2020) § 45a-499aa et seq.; which expressly recognizes a continuing duty on the part of a removed trustee. For example, General Statutes (Supp. 2020) § 45a-499xx provides in relevant part: "(a) . . . [U]ntil the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property. (b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee or other person entitled to it. . . ." Furthermore, pursuant to General Statutes (Supp. 2020) § 45a-499hhh (a), a trustee is obligated to "keep adequate records of the administration of the trust," and pursuant to General Statutes (Supp. 2020) § 45a-499kkk (c) is required to "send a report to the current beneficiaries . . . at least annually and at the termination of the trust." Because the effective date of those enactments is January 1, 2020, they are inapplicable to our review.

A brief review of the trustee's duty upon termination of a trust, therefore, is warranted.

When a trust is terminated, a trustee is obligated under Connecticut law to render a final accounting. See General Statutes § 45a-175 (a) (vesting Probate Court with "jurisdiction of the . . . final accounts" of trustees); General Statutes § 45a-177 (a) (requiring trustees to file "periodic accounts of their trusts" as well as "a final account"); cf. *Dettenborn* v. *Hartford-National Bank & Trust Co.*, supra, 121 Conn. 391 (requirement that trustee file final accounting "is implicit in the statutory provisions governing the matter"). That precept is well recognized throughout the United States. See, e.g., *Brine* v. *Paine, Webber, Jackson & Curtis, Inc.*, 745 F.2d 100, 104 (1st Cir. 1984) ("[o]nce a trust is terminated, the trustee has the continuing power and obligation only to preserve the trust property while winding up the trust and to deliver any remaining trust property to the beneficiary"); *In re Estate of Moring* v. *Colorado Dept. of Health Care Policy & Financing*, 24 P.3d 642, 647 (Colo. App. 2001) ("it is the duty of the trustee to make a final accounting"); *Duncan* v. *Dow*, 95 N.H. 5, 10, 57 A.2d 417 (1948) ("[f]inal accounts should . . . be filed at the expiration of a trust and whenever a trustee severs his connection by reason of resignation, removal or otherwise"); *In re Cary's Estate*, 81 Vt. 112, 120, 69 A. 736 (1908) (at expiration of trust "it was then the duty of the trustee . . . to render a full and final account of his trust to the probate court, and on settlement thereof to turn over the trust fund to the remaindermen"); *Klein* v. *Estate of Klein*, Docket No. 54192-7-I, 2005 WL 3105580, *5 (Wn. App. November 21, 2005) ("testamentary trusts do not terminate until a final accounting by the trustee and the end of the trust, and a trustee is not discharged from his duties until all of the property in the trust is accounted for and distributed") (decision without published opinion, 130 Wn. App. 1029 (2005)); *Matter of Sensenbrenner*, 76 Wis. 2d 625, 634,

252 N.W.2d 47 (1977) ("[T]he law is clear that upon the event terminating a trust, the trustees must use due care and diligence to distribute the trust assets. The distribution must be accomplished as soon as it is reasonably possible to do so."); accord 2 Restatement (Second), supra, § 345, p. 193 ("[u]pon the termination of the trust it is the duty of the trustee to the person beneficially entitled to the trust property to transfer the property to him"); id., comment (e), p. 195 ("[i]t is the duty of the trustee . . . to make his final accounting with reasonable promptness"); 5 A. Scott et al., supra, § 36.1, pp. 2321–23 (trustee's duties continue until final accounting rendered and trust assets distributed).

Significantly, a trustee's fiduciary duty does not immediately end upon termination of a trust. As this court explained in *Ramondetta* v. *Amenta*, supra, 97 Conn. App. 157–58, "the fiduciary duty of a trustee does not immediately terminate when the trust property ceases to exist. Rather, the trustee's fiduciary duty survives even the termination of the trust." (Footnote omitted.) Accord 1A A. Scott & W. Fratcher, Scott on Trusts (4th Ed. 1987) § 74.2, p. 435 (trustee still under duty to account to beneficiary and still owes fiduciary duties as "fiduciary relation continues, although it ceases to be a relation with respect to any specific property"); 2 Restatement (Second), supra, § 344, p. 190 ("[w]hen the time for the termination of the trust has arrived, the trustee has such powers and duties as are appropriate for the winding up of the trust").

That maxim applies with equal force to trustees who resign their position. As the Restatement (Third) of Trusts notes, "[r]esignation does not relieve the trustee from liability for breaches of trust committed prior to the time the resignation becomes effective. Normally the trustee has a duty to account to the beneficiaries, and this accounting may have the effect of determining any liability of the resigning trustee and of relieving the

trustee of other liability. . . . The trustee also has a duty to administer and preserve the trust property until a successor is properly appointed and assumes the duties of the trusteeship." (Citations omitted.) 2 Restatement (Third), Trusts, § 36, comment (d), p. 130 (2003); see also 2 A. Scott et al., supra, § 11.9.3, p. 653 ("[g]enerally, the court does not permit a trustee to resign until a successor has been appointed, title to the trust property has been transferred to the successor trustee, and the trustee has accounted"). Connecticut law likewise provides that "resignation shall not relieve [a] fiduciary from the obligation to fully and finally account to the court for the administration of such fiduciary's trust." General Statutes § 45a-242 (b).

We see no good reason why the principles that govern the duties of a trustee upon either resignation or the termination of the trust should not also apply to a trustee that is removed by order of the Probate Court. In each instance, the trustee's tenure has come to a close; in each, the trustee is in a paramount position to survey the assets of the estate and report thereon. The need for a proper accounting arguably is at its zenith when a trustee is removed, as removal is an extraordinary measure. See, e.g., *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 458, 844 A.2d 836 (2003) ("The power of removal of trustees . . . ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save the trust property." (Internal quotation marks omitted.)); *Phillips* v. *Moeller*, supra, 148 Conn. 369 ("[i]n no case ought the trustee to be removed where there is no danger of a breach of trust" (internal quotation marks omitted)); *Matter of Joan Moran Trust*, 166 App. Div. 3d 1176, 1179, 88 N.Y.S.3d 590 (2018) ("[r]emoval of a trustee . . . is a drastic action, and courts are generally hesitant to exercise the power to remove a fiduciary absent a clear necessity"). Logic dictates that the fiduciary duty of an outgoing trustee to account for trust assets and to surrender those assets

to the successor trustee continues for some period of time beyond the date of removal.

In light of the foregoing, we disagree with DiPreta's contention that Sylvia's fiduciary duty to the plaintiff immediately ceased upon her removal as a trustee on June 11, 2013. We also note that, when it removed Sylvia as a trustee on June 11, 2013, the Probate Court ordered her "to file an account for the period from January 1, 2010, to the present."[16] We therefore conclude that the plaintiff has met his burden of establishing the second prong of the continuing course of conduct test. On the record before us, we conclude that Sylvia owed a continuing fiduciary duty to account for trust assets following her removal as a trustee on June 11, 2013.

b

We therefore turn our attention to the third prong of the continuous course of conduct test, which requires "evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto." (Internal quotation marks omitted.) *Watts* v. *Chittenden*, 301 Conn. 575, 585, 22 A.3d 1214 (2011). With respect to "what constitutes a continuing violation of a breach" under that third prong; *Saint Bernard School of Montville, Inc.* v. *Bank of America*, 312 Conn. 811, 838, 95 A.3d 1063 (2014); our Supreme Court has stated: "[T]he continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied. . . . In between the case in which a single event gives rise to continuing injuries and the case in which a continuous series of events gives rise to a cumulative injury is the case in which repeated events give rise to discrete injuries . . . . [In such a case] the

[16] At oral argument before this court, counsel for DiPreta conceded that Sylvia had a legal duty to file an accounting subsequent to her June 11, 2013 removal as a cotrustee.

damages from each discrete act . . . would be readily calculable without waiting for the entire series of acts to end. There would be no excuse for the delay. And so the violation would not be deemed continuing." (Citation omitted; internal quotation marks omitted.) Id., 837–38. As applied to the present case, the question is whether the plaintiff has presented an evidentiary basis to establish a genuine issue of material fact as to whether Sylvia and the estate continually breached the fiduciary duty to account for trust assets following her removal as a trustee in 2013.

The following facts are relevant to our analysis. In his operative complaint, the plaintiff alleged that Sylvia breached her fiduciary duty by failing to properly account for certain expenditures and transactions involving trust assets during her tenure as a trustee.[17] DiPreta filed an answer on March 16, 2018, in which he

[17] In paragraph 15 of the breach of fiduciary duty count of his operative complaint, the plaintiff alleged that Sylvia, "by her continuing course of conduct intentionally and/or carelessly and negligently [handled] the [t]rust assets in the following particular ways . . .

"(c) By failing to safeguard and provide an accounting of [t]rust cars, 1928 Model A Roadster and 1948 MG-TC . . . .

"(f) By selling [t]rust antique car parts and memorabilia without disclosing such sales, or accounting for the proceeds from such sales . . . .

"(g) By failing to properly account for, and continually [distribute], [t]rust cash to Victor Rakoczy for landscaping work performed on [nontrust] assets in a continuing course of action from 2004 to 2013. . . .

"(h) By failing to properly account for and continually distributing [t]rust cash as a continuing course of conduct to Cesar Tupac for nontrust related services from 2004 to 2013. . . .

"(i) By failing to properly account for, and continually distributing, trust cash as a continuing course of conduct to Temple Shalom for a nontrust related expenditure. Such payments total $1000 in 2013. . . .

"(j) By failing to properly account for cash distributions of principal and income as a continuing course of conduct in the amount of $428,405.53, resulting in the loss of a valuable trust asset from 2004 to 2009. . . .

"(s) By failing to keep accurate books and records pertaining to the [t]rust expenditures and distributions from 1997 through 2013. . . .

"(v) By failing to properly account for the distribution of the 1959 Mercedes Benz Roadster. . . ."

For purposes of our continuing course of conduct analysis, those allegations constitute the initial wrongs allegedly committed upon the plaintiff. See *Flannery* v. *Singer Asset Financial Co., LLC*, supra, 312 Conn. 312.

denied the substance of those allegations. In that pleading, DiPreta also raised a statute of limitations special defense pursuant to § 52-577, alleging in relevant part that Sylvia "no longer had access to or control of the [t]rust after June 11, 2013," and that her "purported continuous conduct, which is expressly denied, ended on June 11, 2013," when she was removed as a trustee.

On June 25, 2018, the plaintiff filed a reply to that special defense. With respect to the continuing course of conduct, the plaintiff alleged that Sylvia continued to breach her fiduciary duty as follows: "[Sylvia has failed] to turn over two automobiles and automotive parts to the [successor trustee]. [Sylvia has] also failed to return admittedly inappropriately taken funds from the [t]rust. In addition, [Sylvia has] failed and/or refused to turn over documents and records required to be kept under Probate Court Rule 36.13."

In that reply, the plaintiff also acknowledged that DiPreta had, in fact, filed an accounting with the Probate Court subsequent to Sylvia's removal as a trustee.[18] The Probate Court thereafter ordered, with the consent of "all interested parties," that "a forensic accountant be retained to conduct an accounting of all trust finances from the period of 1997 to September 11, 2013." At no time has the plaintiff alleged a failure on the part of Sylvia or DiPreta to comply with that forensic accounting.

Although the plaintiff commenced this action after DiPreta filed that accounting, the plaintiff's pleadings

[18] Although the plaintiff states in his appellate reply brief that DiPreta "still [has] not complied with" the Probate Court's order to provide an accounting with the Probate Court, no such allegation is contained in his operative complaint. Moreover, in both his reply to the statute of limitations special defense raised by DiPreta and his principal appellate brief to this court, the plaintiff conceded that DiPreta had "filed their accountings" with the Probate Court, albeit in an allegedly belated manner. At oral argument before this court, the plaintiff likewise acknowledged that DiPreta had filed an accounting with the Probate Court in 2015.

contain no specific allegations of a continuing breach of a fiduciary duty subsequent to Sylvia's removal as a trustee, save for the issue of antique automobiles and parts. The plaintiff has not identified, never mind offered proof of, the "admittedly inappropriately taken funds" or the "documents and records" referenced in his reply. The record before us contains no admission by Sylvia or DiPreta that any trust funds were inappropriately taken by Sylvia. Moreover, the plaintiff offered no further explication of those generalized accusations in his memorandum of law in opposition to the motions for summary judgment.

In that memorandum of law, the plaintiff confuses the relevant time period for purposes of the continuing course of conduct analysis, arguing that "[a]ll of the alleged misdeeds, breaches, and all illegal actions occurred after" the Probate Court entered an order in 2004, in which the court (1) removed the plaintiff as a cotrustee and (2) indicated that Sylvia and Barbara would be removed as trustees following the sale of the antique automobiles. It nonetheless remains that the Probate Court did *not* remove Sylvia and Barbara as trustees until nine years later in 2013. In applying the third prong of the continuing course of conduct doctrine to the present case, the relevant inquiry is not whether Sylvia breached her fiduciary duty to the plaintiff prior to her removal as a trustee, as those initial breaches occurred beyond the time limitation of § 52-577. Rather, the critical inquiry under the third prong asks whether Sylvia committed a subsequent breach of a continuing fiduciary duty following her removal as a trustee that would operate to toll that statute of repose.

"The facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 164; see also *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 745, 196 A.3d 328 (2018) ("The purpose

of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . [T]he applicable rule regarding the material facts to be considered on a motion for summary judgment is that the facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.)). The only factual allegations in the plaintiff's pleadings of a continuing breach of the fiduciary duty owed to remainder beneficiaries that occurred subsequent to Sylvia's removal as a trustee concern the failure to account for certain automobiles and parts. As a result, any other infirmities in the accounting provided by DiPreta are immaterial to the present dispute.[19] See *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 14 n.4, 151 A.3d 358 (2016) ("[f]acts . . . not averred [in the plaintiff's pleadings] cannot be made the basis for a recovery" (internal quotation marks omitted)); *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014) ("The principle that a plaintiff may rely only [on] what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations [in the pleadings]." (Internal quotation marks omitted.)); *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, supra, 167 Conn. App. 728 ("[a] genuine issue of material fact must be one which the party opposing the motion is entitled

[19] We note that the proceedings before the Probate Court remained ongoing at the time that both the present action and the motions for summary judgment were filed. In that ancillary proceeding, the Probate Court is empowered to "enforce the delivery to the successor fiduciary of any estate held by the former fiduciary . . . ." General Statutes § 45a-244. General Statutes § 45a-175 (h) confers jurisdiction upon the Probate Court over the accountings of fiduciaries and provides in relevant part that "[i]n any action under this section, the Probate Court shall have . . . all the powers available to a judge of the Superior Court at law and in equity pertaining to matters under this section." Furthermore, parties to proceedings before the Probate Court, such as the plaintiff, retain the right to appeal from any "order, denial or decree of a Probate Court" pursuant to General Statutes § 45a-186.

to litigate under his pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment'' (emphasis omitted; internal quotation marks omitted)).

Accordingly, we turn our attention to the plaintiff's claim that Sylvia and DiPreta continued to breach the fiduciary duty owed to remainder beneficiaries by failing to account for two antique automobiles and automobile parts that were assets of the trust.[20] In opposing DiPreta's motion for summary judgment, the plaintiff submitted a copy of an accounting inventory of the trust dated July 11, 2002, at which time the plaintiff, Sylvia, and Barbara served as cotrustees. In a section captioned ''Miscellaneous Assets,'' that inventory listed various automobiles, including a 1928 Model A and a 1948 MG-TC.[21] The cover sheet to that 2002 inventory contains a prefatory note, which states: ''This account has been prepared on behalf of two of the trustees,

[20] The record before us indicates that, at all relevant times, the antique automobiles and parts in question remained unaccounted for. In opposing the motions for summary judgment, the plaintiff furnished an affidavit from Margenot, in which he stated: ''Part of my duties as the successor trustee is to take control of the trust assets. I was ordered by the Probate Court . . . to do an inspection of the 'Tunick Property' to look for two cars and/or parts. I was unsuccessful in finding the two cars at issue, and only found some nominal discarded car parts.'' The plaintiff also submitted the September 21, 2016 affidavit of Emanuel Dragone, owner of Dragone Classic Motorcars, in which Dragone averred that, in 1985, he assisted the settlor in moving truckloads of automobile parts worth more than $500,000 to be stored at the Tunick family home in Greenwich.

DiPreta has offered no affidavit regarding the automobiles or parts in question, which may be attributable to the fact that Sylvia died more than two years prior to the commencement of this action. Moreover, the materials in the record before us indicate that the plaintiff was very involved in the settlor's antique automobile business and, as the plaintiff stated in his memorandum of law in opposition to summary judgment, he was ''very familiar . . . and extremely knowledgeable about the automobile collection and auto parts.'' The plaintiff nonetheless has not submitted a sworn affidavit on his own behalf.

[21] The 2002 inventory specifies a fair market value of $11,500 for the 1928 Model A and $14,000 for the 1948 MG-TC.

[Sylvia] and [Barbara]. The remaining trustee, [the plaintiff], prepared the inventory of the automobiles contained in the account. [Sylvia] and [Barbara] have reason to believe that at least one of the automobiles belonging to the trust has been omitted from that inventory. Furthermore, certain of the automobiles have been in the sole possession and control of [the plaintiff] during the period of the accounting, and [Sylvia] and [Barbara] have been denied access to these vehicles. Accordingly, [Sylvia] and [Barbara] make no representations concerning these vehicles and disclaim any responsibility for the accuracy of the information contained herein relating to automobiles." Although the 2002 inventory includes various items described as "Miscellaneous Assets," it contains no reference to automobile parts.

When the plaintiff was removed as a trustee in 2004, the Probate Court ordered the cotrustees, including Sylvia, to arrange for the sale of the antique automobiles that belonged to the trust.[22] In count two of the operative complaint, the plaintiff alleged in relevant part that Sylvia breached her fiduciary duty by failing to "safeguard and provide an accounting of [t]rust cars, 1928 Model A Roadster and 1948 MG-TC, resulting in the loss of . . . valuable [t]rust assets . . . ." The plaintiff also alleged that Sylvia breached her fiduciary duty "[b]y selling [t]rust antique car parts and memorabilia without . . . accounting for the proceeds from such sales . . . ."

[22] In its July 7, 2004 decree, the Probate Court stated in relevant part: "[I]n regard to certain trust assets, specifically the antique [automobiles], they are to be sold, and that any [automobiles] that are kept by the beneficiaries or remainder beneficiaries of the trust, the value of the [automobile] shall be taken against the beneficiary's share of the trust. Once the [automobiles] are sold, a corporate trustee will be appointed and the remaining [t]rustees will resign . . . ." The 2002 inventory of trust assets, which the plaintiff submitted in opposition to the motions for summary judgment, listed twenty-one antique automobiles with a combined fair market value of $795,450.

In response to the statute of limitations special defense raised by the defendants, the plaintiff alleged that Sylvia engaged in a continuous course of conduct by failing to account for the automobiles and parts in question. The court rejected that claim and concluded that the continuing course of conduct doctrine did not apply. We agree with that determination.

Contrary to the plaintiff's contention, the failure to account for the two antique automobiles and unspecified automobile parts does not constitute a continuous series of events that give rise to a cumulative injury. See *Watts* v. *Chittenden*, supra, 301 Conn. 592. The subsequent injury allegedly sustained by the plaintiff following Sylvia's removal as trustee is the very same injury that the plaintiff incurred prior to her removal—the failure to obtain an accounting of the automobile assets in question. As our Supreme Court has explained, when the continuous course of conduct doctrine is implicated, "each incident *increases* the plaintiff's injury . . . ." (Emphasis added; internal quotation marks omitted.) Id., 588. This court likewise has observed that, in cases in which the doctrine applies, the injury to the plaintiff "was perpetuated [and] enhanced" by the subsequent breach of a continuing duty. *Sanborn* v. *Greenwald*, supra, 39 Conn. App. 296. No such increase or enhancement to the plaintiff's injury is present in this case.

This also is not a case in which the "specific tortious acts or omissions" are difficult to identify. (Internal quotation marks omitted.) *Martinelli* v. *Fusi*, supra, 290 Conn. 356. The issue of the antique automobile assets long has been the subject of dispute between the parties, and on which the Probate Court entered a specific order in 2004, almost one decade prior to Sylvia's removal as a trustee. This case also is not one in which "the situation keeps evolving after the act complained of is complete, such as medical malpractice

. . . .”[23] *Sanborn* v. *Greenwald*, supra, 39 Conn. App. 298; see also *Macellaio* v. *Newington Police Dept.*, 145 Conn. App. 426, 436, 75 A.3d 78 (2013) (continuing course of conduct doctrine did not apply when plaintiff failed to establish that “the alleged violation continued to evolve” after initial wrong committed). The initial breach of Sylvia’s fiduciary duty and the subsequent breach of that duty following her removal as trustee are one and the same—the failure to account for two antique automobiles and unspecified automobile parts. To paraphrase this court’s observation in *Vaccaro* v. *Shell Beach Condominium, Inc.*, supra, 169 Conn. App. 55, all of the injuries alleged by the plaintiff arise from Sylvia’s failure to account for those assets at the time that she was removed as a trustee in 2013, and the plaintiff has identified no separate injuries that have arisen as a result of any ongoing failure by Sylvia and DiPreta to account for those assets.

Construing the pleadings and the materials before us in the light most favorable to the nonmoving party; see, e.g., *NetScout Systems, Inc.* v. *Gartner, Inc.*, 334 Conn. 396, 408–409, 223 A.3d 37 (2020); we conclude that the plaintiff has not established the existence of a genuine issue of material fact as to whether Sylvia and DiPreta committed a continuous breach of the fiduciary duty owed to remainder beneficiaries that resulted in an enhanced injury to him. Accordingly, the court properly determined that this case did not warrant application of the continuing course of conduct doctrine.

[23] Although the continuing course of conduct doctrine has been applied in medical malpractice cases; see, e.g., *Witt* v. *St. Vincent’s Medical Center*, 252 Conn. 363, 746 A.2d 753 (2000); we note that such actions are governed by the limitation period contained in General Statutes § 52-584, which “begins to run when the plaintiff discovers some form of actionable harm . . . .” (Internal quotation marks omitted.) *Rosato* v. *Mascardo*, 82 Conn. App. 396, 405, 844 A.2d 893 (2004). For that reason, “the continuing course of conduct doctrine has no application after the plaintiff has discovered the harm” in actions subject to § 52-584. Id. Section 52-577, by contrast, is “solely a repose statute and contains no discovery provision.” Id., 407.

C

Fraudulent Concealment

The plaintiff also claims that a genuine issue of material fact exists as to whether Sylvia, DiPreta, and Roberta fraudulently concealed the plaintiff's causes of action against them, such that the statute of limitations was tolled by the application of General Statutes § 52-595. We disagree.

1

As a preliminary matter, we address a burden-shifting argument raised by the plaintiff with respect to this claim. It is well established that, when a defendant, in moving for summary judgment on the basis of a statute of limitations special defense, demonstrates that the action was commenced outside of the statutory limitation period, "the burden normally shifts to the plaintiff to establish" a disputed issue of material fact on its claim "that the [limitation] period has been tolled by an equitable exception . . . ." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Financial Co., LLC*, supra, 312 Conn. 310; see also *Bound Brook Assn.* v. *Norwalk*, 198 Conn. 660, 665, 504 A.2d 1047 ("[t]o establish that the defendants had fraudulently concealed the existence of their cause of action and so had tolled the statute of limitations, the plaintiffs had the burden" of proof), cert. denied, 479 U.S. 819, 107 S. Ct. 81, 93 L. Ed. 2d 36 (1986). Relying on *Martinelli* v. *Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 421 (2d Cir. 1999),[24] the plaintiff argues that, because the present case involves a fiduciary relationship between the parties, the burden should instead rest with the defen-

[24] In *Martinelli*, the United States Court of Appeals for the Second Circuit held that, in cases involving a fiduciary, the burden shifts to the defendants to disprove that they fraudulently concealed the existence of the plaintiff's cause of action. See *Martinelli* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 196 F.3d 423.

dants to demonstrate that they did not engage in fraudulent concealment.

The plaintiff overlooks the fact that our Supreme Court has not adopted the burden-shifting framework articulated in *Martinelli* in the two decades since it was decided. In *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 912 A.2d 1019 (2007), a fraudulent concealment defense was raised in a case in which a fiduciary relationship between the parties was alleged. Our Supreme Court nonetheless held that the burden of establishing fraudulent concealment belonged to the party seeking to avail itself of that tolling doctrine. Id., 105. This court has adhered to that precedent in the years since, even when a fiduciary relationship is alleged. See, e.g., *Carson* v. *Allianz Life Ins. Co. of North America*, supra, 184 Conn. App. 326–28; cf. *Hodges* v. *Glenholme School*, United States District Court, Docket No. 3:15-cv-1161 (SRU) (D. Conn. September 13, 2016) ("that burden-shifting approach [articulated in *Martinelli*] has not been adopted by Connecticut courts"), aff'd, 713 Fed. Appx. 49 (2d Cir. 2017). Moreover, in *Iacurci* v. *Sax*, 313 Conn. 786, 793 n.9, 99 A.3d 1145 (2014), our Supreme Court declined to address "a potentially shifting burden of proof in [fraudulent concealment] cases" in accordance with *Martinelli*.

As an intermediate appellate tribunal, this court is not at liberty to modify, reconsider, or overrule the precedent of our Supreme Court. See *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 121 Conn. App. 31, 48–49, 994 A.2d 262, cert. denied, 297 Conn. 918, 996 A.2d 277 (2010), and case law cited therein. Whether to alter the applicable legal standard governing fraudulent concealment claims remains the prerogative of this state's highest court. See, e.g., *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 715, 111 A.3d 473 (2015) ("if the well established hardship standard is to be modified, such modification is the prerogative of our Supreme

Court''). We therefore decline the plaintiff's invitation to revisit that legal standard.

2

The plaintiff's tolling defense is predicated on § 52-595, our fraudulent concealment statute.[25] To toll a statute of limitations thereunder, "a plaintiff must present evidence that a defendant: (1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish the [plaintiff's] cause of action; (2) intentionally concealed these facts from the [plaintiff]; and (3) concealed the facts for the purpose of obtaining delay on the [plaintiff's] part in filing a complaint on their cause of action." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, supra, 313 Conn. 799–800. Our Supreme Court further has explained that, "[t]o meet this burden, it [is] not sufficient for the plaintiffs to prove merely that it [is] more likely than not that the defendants had concealed the cause of action. Instead, the plaintiffs [must] prove fraudulent concealment by the more exacting standard of clear, precise, and unequivocal evidence." (Internal quotation marks omitted.) *Bartone* v. *Robert L. Day Co.*, 232 Conn. 527, 533, 656 A.2d 221 (1995).

In rendering summary judgment in favor of Roberta and DiPreta, the court noted that it had ''carefully reviewed all of the correspondence, pleadings, rulings, account statements, affidavits and deposition transcripts submitted by the plaintiff in opposition to the defendants' motions. The motions filed in the Probate Court action (and the defendants' opposition to them) establish that the parties' litigation in the Probate Court has been highly contested. They do not, even when viewed in the light most favorable to the plaintiff, show

[25] General Statutes § 52-595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

any intent on the part of the defendants to conceal facts or support a finding that the defendants' alleged concealment was in any way directed toward delaying commencement of an action against them.'' On our review of the record before us, we concur with that determination. As this court noted in *Macellaio* v. *Newington Police Dept.*, supra, 145 Conn. App. 434, a plaintiff's "bare assertions" do not suffice "to establish [a] factual predicate" for a fraudulent concealment defense; evidence is required. In the present case, the plaintiff has not provided clear and unequivocal evidence that either Sylvia, DiPreta, or Roberta had actual awareness of the facts necessary to establish the plaintiff's causes of action or that they intentionally concealed such facts from him. For that reason, the court properly concluded that no genuine issue of material fact existed with respect to his fraudulent concealment claim.

V

The plaintiff also claims that the court improperly denied his motion to open the judgment. In that motion, the plaintiff claimed that newly discovered evidence warranted the opening of the summary judgment rendered in favor of the defendants. Specifically, he claimed that testimony from DiPreta during a November, 2018 Superior Court proceeding regarding an award of attorney's fees for work performed by DiPreta subsequent to Sylvia's removal as a trustee directly contravened DiPreta's contention that Sylvia had no continuing duty to the remainder beneficiaries following her removal as a trustee on June 11, 2013. According to the plaintiff, the judgment must be opened to permit him to present that evidence in support of his claim that Sylvia possessed a fiduciary duty that continued beyond June 11, 2013.[26]

[26] In response, DiPreta correctly notes that, at the time that Sylvia was removed as a trustee, the Probate Court ordered her to submit a final accounting. DiPreta thus argues that his testimony regarding the services that he rendered on Sylvia's behalf subsequent to her removal as a trustee does not contravene that position.

We conclude that the plaintiff's appeal in this regard is moot. "When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *State* v. *Nalewajk*, 190 Conn. App. 462, 464–65, 211 A.3d 122 (2019). In part IV (B) (2) (a) of this opinion, we determined that Sylvia owed a continuing fiduciary duty to the remainder beneficiaries to account for trust assets following her removal as a trustee on June 11, 2013. Accordingly, no practical relief can be afforded to the plaintiff. Simply put, the relief the plaintiff is requesting is an opportunity to submit further evidence that ostensibly supports a legal conclusion already rendered by this court today. We, therefore, dismiss that portion of the plaintiff's appeal challenging the propriety of the denial of his motion to open the judgment.

The appeal is dismissed only as to the portions challenging the partial summary judgment rendered in favor of Barbara and the denial of the plaintiff's motion to open the judgment; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TERRY FREEMAN (AC 43014)

Bright, C. J., and Cradle and Alexander, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crime of robbery in the first degree, the defendant appealed to this court, claiming that the trial court erred in denying his motion to dismiss because his prosecution was time barred by the applicable five year statute of limitations

(§ 54-193 (b)). The warrant for the defendant's arrest had been obtained by the police two weeks before the expiration of the limitation period, however, it was not executed until seven days after the statute of limitations had expired. *Held* that the trial court properly denied the defendant's motion to dismiss: contrary to the defendant's claim, the trial court applied the correct legal test, as set forth in *State* v. *Swebilius* (325 Conn. 793), in determining whether the statute of limitations had been tolled; moreover, the trial court correctly determined that the state made reasonable efforts to serve the arrest warrant before the statute of limitations had expired and that the delay in the service of the warrant was reasonable, as the stipulated facts showed that, following the defendant's confession to the robbery, the state expeditiously prepared and obtained an arrest warrant and a writ of habeas corpus to transport the defendant, who was incarcerated at the time, to the Superior Court to serve him with the warrant before the expiration of the limitation period, and the fact that the defendant was not transported to the Superior Court and served with the warrant until seven days after the statute of limitations had expired did not undermine the reasonable efforts of the state; furthermore, the court properly based its decision, in part, on the state's assertion that the nine day delay from the signing of the writ of habeas to the transport of the defendant was not unusual given the logistical, practical and safety precautions associated with transporting a person from a correctional facility to a courthouse, as it was within the purview of the court to use its knowledge of the inner workings of the courts and the processes by which incarcerated persons are transported to the court in its determination of the state's efforts.

Argued September 14—officially released December 1, 2020

Procedural History

Information charging the defendant with the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, larceny in the fifth degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Brown*, *J.*, denied the defendant's motion to dismiss; thereafter, the defendant was presented to the court, *Brown*, *J.*, on a conditional plea of nolo contendere to robbery in the first degree; judgment of guilty in accordance with the plea; subsequently, the state entered a nolle prosequi as to the charges of conspiracy to commit robbery in the first degree and criminal possession of a firearm; thereafter, the court dismissed the charge of larceny in the fifth degree, and the defendant appealed to this court. *Affirmed.*

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

Samantha L. Oden, deputy assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Matthew Kalthoff*, assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. The defendant, Terry Freeman, appeals from the judgment of conviction, rendered after his conditional plea of nolo contendere, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (3). On appeal, the defendant claims that the trial court erred in denying his motion to dismiss, arguing that the prosecution was time barred by the five year statute of limitations set forth in General Statutes § 54-193 (b). We are not persuaded and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. On November 5, 2018, Jeffrey Gabianelli, a detective with the West Haven Police Department, received a letter from the defendant containing information about an armed robbery that had occurred at the Wine Press Liquor Store in West Haven on November 29, 2013. The next day, Gabianelli visited the defendant at the Carl Robinson Correctional Institution in Enfield where the defendant was incarcerated on unrelated charges.[1] The defendant confessed to Gabianelli as to his involvement in the November 29, 2013 robbery. On November 9, 2018, Gabianelli prepared an arrest warrant. On November 15, 2018, a Superior Court judge signed the warrant. On November 19, 2018, John Laychak, a West Haven police officer, obtained the signed warrant and submitted a request that the Office of the

[1] The stipulated facts entered into evidence with the trial court indicate that the defendant had been incarcerated in the state of Connecticut since November 27, 2015.

State's Attorney prepare an application for a writ of habeas corpus to transport the defendant to the Superior Court in the judicial district of Ansonia-Milford for service of the arrest warrant. On November 21, 2018, the Office of the State's Attorney prepared the application for a writ of habeas corpus requesting that the defendant be transported to the court on December 6, 2018. On November 27, 2018, a prosecutor and a clerk of the court signed the writ of habeas corpus. On December 6, 2018, the defendant was transported to the Superior Court where he was served with the arrest warrant.

Thereafter, the defendant filed a motion to dismiss, claiming that prosecution was barred due to the lapse of the five year statute of limitations set forth in § 54-193 (b).[2] The defendant argued that the statute of limitations had lapsed on November 29, 2018, five years after the robbery had occurred, and that the state had failed to proffer sufficient evidence to show that the delay in the execution of the arrest warrant until December 6, 2018, was reasonable.

The trial court denied the motion, finding that the state had offered "some evidence explaining why the delay was reasonable" and that the state acted "reasonably and diligently" in its preparation and execution of the warrant. The defendant thereafter entered a conditional plea of nolo contendere to the charge of robbery in the first degree.[3] The court subsequently sentenced

[2] General Statutes § 54-193 (b) provides: "No person may be prosecuted for any offense, other than an offense set forth in subsection (a) of this section, for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed."

[3] The defendant's plea of nolo contendere was entered pursuant to General Statutes § 54-94a, which provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's . . . motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such . . . motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied . . . the

the defendant to a term of one year of imprisonment to be served consecutively to his current sentence.

On appeal, the defendant claims that the court erred in denying his motion to dismiss. He argues that the court misinterpreted and misapplied *State* v. *Crawford*, 202 Conn. 443, 521 A.2d 1034 (1987), and *State* v. *Swebilius*, 325 Conn. 793, 159 A.3d 1099 (2017). He further argues that the state failed to proffer sufficient evidence to demonstrate the reasonableness of the delay in service of the arrest warrant beyond the statute of limitations under these cases. We disagree.

We initially address the standard of review for a trial court's denial of a motion to dismiss. "Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable legal standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations." (Internal quotation marks omitted.) *State* v. *Crosby*, 182 Conn. App. 373, 383, 190 A.3d 1, cert. denied, 330 Conn. 911, 193 A.3d 559 (2018).

In *State* v. *Crawford*, supra, 202 Conn. 444–45, the defendant moved to dismiss the information charging him with two misdemeanor offenses. Although the arrest warrant for the offenses was issued before the expiration of the one year statute of limitations, the warrant was not served on the defendant until more than two

motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

years after the offenses were committed. Id., 445. In affirming the trial court's denial of the defendant's motion to dismiss, our Supreme Court stated: "When an arrest warrant has been issued, and the prosecutorial official has promptly delivered it to a proper officer for service, he has done all he can under our existing law to initiate prosecution and to set in motion the machinery that will provide notice to the accused of the charges against him. When the prosecutorial authority has done everything possible within the period of limitation to evidence and effectuate an intent to prosecute, the statute of limitations is tolled." (Footnote omitted.) Id., 450. Nevertheless, the court held that, "in order to toll the statute of limitations, an arrest warrant, when issued within the time limitations . . . must be executed without unreasonable delay." Id., 450–51. The court declined to adopt a per se approach to determining the reasonableness of the execution of an arrest warrant and explained that what constitutes a "reasonable period of time is a question of fact that will depend on the circumstances of each case." Id., 451. The court stated: "If the facts indicate that an accused consciously eluded the authorities, or for other reasons was difficult to apprehend, these factors will be considered in determining what time is reasonable. If, on the other hand, the accused did not relocate or take evasive action to avoid apprehension, failure to execute an arrest warrant for even a short period of time might be unreasonable and fail to toll the statute of limitations." Id. Because there was an absence of evidence showing an unreasonable delay in service on the defendant, our Supreme Court affirmed the trial court's denial of the defendant's motion to dismiss. Id., 452.

In cases following *Crawford*, this court articulated a burden shifting framework where, "once a defendant puts forth evidence to suggest that [he or] she was not elusive, was available and was readily approachable, the burden shifts to the state to prove that the delay

in executing the warrant was not unreasonable." *State* v. *Soldi*, 92 Conn. App. 849, 857, 887 A.2d 436, cert. denied, 277 Conn. 913, 895 A.2d 792 (2006); see also *State* v. *Woodtke*, 130 Conn. App. 734, 740, 25 A.3d 699 (2011).

In *State* v. *Swebilius*, supra, 325 Conn. 804, our Supreme Court expanded on *Crawford* and affirmed this burden shifting framework. The court concluded that, "if the defendant can demonstrate his availability during the statutory period, the state must make some effort to serve the arrest warrant before the relevant statute of limitations expires, or to offer some evidence explaining why its failure to do so was reasonable under the circumstances." Id., 814. Finding that the trial court had applied the wrong legal standard in concluding that the delay was reasonable based solely on the length of the delay, the court remanded the case for further proceedings for the state to have the opportunity "to demonstrate that it made reasonable efforts to execute the warrant before the expiration of the statute of limitations or to explain why its failure to do so was reasonable under the circumstances." Id., 815.

In the present case, the state conceded that the defendant satisfied his preliminary burden because the defendant was not elusive and was available for arrest throughout the relevant time period. We agree and conclude that the defendant has satisfied his burden. Thus, under *Swebilius*, the state then had the burden to show that, notwithstanding the defendant's availability, any delay in service of the warrant after the expiration of the statute of limitations was reasonable. See id., 807.

The defendant first argues that, as a result of the trial court's misinterpretation and misapplication of *Swebilius*, it erred in finding that the state had satisfied its burden. Specifically, he argues that the trial court implemented the wrong test when it relied on language in *Swebilius* that "the state must make some effort to

serve the arrest warrant before the relevant statute of limitations expires . . . .'' Id., 814. He further argues that the proper test is that ''[t]he state must make reasonable efforts to execute the warrant before the expiration of the statute of limitations or to explain why its failure to do so was reasonable under the circumstance.''(Emphasis omitted; internal quotation marks omitted.) We are not persuaded.

In *Swebilius*, a search warrant was executed in May, 2008, and the police seized ''thirty-four computer related items, which were submitted on the same day to the state forensic laboratory for analysis. The police did not receive the results of the forensic analysis until April 2, 2013, and another month elapsed before they secured a warrant for the defendant's arrest. The arrest warrant was issued on May 9, 2013, nineteen days before the expiration of the five year limitation period of General Statutes (Rev. to 2007) § 54-193 (b). A short time after the limitation period had expired, *the defendant* contacted the state police seeking the return of the property seized from his residence on May 28, 2008. As a result of this inquiry, the defendant learned about the warrant for his arrest, and, on June 10, 2013, he voluntarily surrendered to the state police.'' (Emphasis added; footnote omitted.) *State* v. *Swebilius*, supra, 325 Conn. 797. Therefore, there was a thirty-two day delay in the execution of the warrant. Id., 799 n.4. At the hearing on the defendant's motion to dismiss, the state proffered *no evidence* and instead argued that ''the delay was not unreasonable because of its short duration . . . .'' Id., 798. The trial court agreed. Id., 798–99. Our Supreme Court noted that the trial court had applied an incorrect legal standard by relying solely on the length of the delay in its ruling; id., 799 n.5 (''we do not believe that simply citing a period of time and stating that 'common sense' makes that period of time reasonable can, without more, render the trial court's determination one of

fact"); and ordered that, "on remand, the state must be afforded the opportunity to demonstrate that it made reasonable efforts to execute the warrant before the expiration of the statute of limitations or to explain why its failure to do so was reasonable under the circumstances." Id., 815.

The court explained that the rationale behind its holding was to prevent the tolling of the statute of limitations where no effort is made by the state, stating: "[W]e agree with the drafters of § 1.06 (5) of the Model Penal Code that [i]t is undesirable . . . to toll the statute of limitations in instances [in which] the warrant is issued *but no effort is made to arrest a defendant whose whereabouts are known*." (Emphasis added; footnote omitted; internal quotation marks omitted.) Id., 814. The court, acknowledging the boundaries of its holding, stated: "To be sure, our decision in the present case is not intended to impose an undue burden on the state. We have concluded merely that, if the defendant can demonstrate his availability during the statutory period, the state must make some effort to serve the arrest warrant before the relevant statute of limitations expires, or to offer some evidence explaining why its failure to do so was reasonable under the circumstances." Id. Thus, proof of appropriate efforts by the state may constitute the requisite reasonableness to toll the statute of limitations.

Swebilius, however, does not qualify the efforts the state must show to satisfy its burden nor explain the degree of effort necessary. The court in *Swebilius* stated that, "on remand, the state must be afforded the opportunity to demonstrate that it made *reasonable efforts* to execute the warrant before the expiration of the statute of limitations or to explain why its failure to do so was reasonable under the circumstances." (Emphasis added.) Id., 815. This language is instructive as to what effort the state must demonstrate to satisfy

its burden and is consistent with the dictates of *State* v. *Crawford*, supra, 202 Conn. 450–51 ("in order to toll the statute of limitations, an arrest warrant, when issued within the time limitations . . . must be executed without unreasonable delay"). Thus, the state must prove that any delay in serving the warrant beyond the statute of limitations was reasonable. What efforts the state made to accomplish service and the reasons why service was not accomplished before the statute of limitations expired are necessary parts of the court's reasonableness analysis.

Prior decisions of this court also have utilized a similar reasonableness analysis. In *State* v. *Soldi*, supra, 92 Conn. App. 860, this court reversed the judgment of the trial court denying the defendant's motion to dismiss claiming that the prosecution was time barred because of unreasonable delay or lack of due diligence in executing the arrest warrant. An arrest warrant for a violation of probation had been issued in August, 1997, and was not executed until January 28, 2003, when the defendant appeared in court on unrelated charges. Id., 851. This court determined that the defendant had proffered sufficient evidence establishing that she was available for arrest during the relevant time, and, therefore, the burden shifted to the state to show why the delay in execution of the warrant was reasonable. Id., 860. Because the state "offered no evidence that the five year delay in the execution of the warrant was reasonable," this court concluded that the state had not met its burden and reversed the trial court's judgment denying the defendant's motion to dismiss. Id.

In *State* v. *Woodtke*, supra, 130 Conn. App. 736, the police had not executed an arrest warrant until two years and ten months after the warrant had been issued.[4]

[4] The applicable statute of limitations in that case was one year, pursuant to General Statutes (Rev. to 2005) § 54-193 (b). The arrest warrant in *Woodtke*, like the arrest warrant in the present case, was issued within the statute of limitations. See *State* v. *Woodtke*, supra, 130 Conn. App. 738.

This court, applying *Crawford*, determined that the trial court's reliance on the fact that the New Haven Police Department is "a very busy urban police department is not enough for [the state] to avoid its obligation to serve the warrants in a timely manner." (Internal quotation marks omitted.) Id., 744. This court stated: "Although the police may have faced pressing matters that demanded their immediate attention during the period of delay, this alone will not fulfill the state's burden of showing reasonableness of delay and due diligence. There must be sufficient effort on the part of the police department to ensure that warrants are timely served, even for simple misdemeanors." Id. Because there was no evidence proffered to show the actual efforts made by the police department to execute the warrant, this court determined that the state could not demonstrate that the delay was reasonable and reversed the judgment of the trial court and remanded the case with direction to grant the defendant's motion to dismiss. Id., 745.

In the present case, the defendant argues that the court applied the incorrect legal test because it focused on whether the state made "some effort" to serve the warrant and did not examine whether the state had proved that those efforts were reasonable. We disagree.

In its decision, the trial court began its analysis by stating that the "proper line of inquiry . . . once availability has been established, is whether the state made some effort to serve the warrant or, having failed to do so, whether the state offered some evidence explaining why its failure was reasonable." The court continued by focusing on the reasonableness of the delay in service, stating: "[T]he court is required to interrogate the facts to determine the factual basis for the delay and determine if said delay was reasonable. The defendant argued that the fact he was in custody during the limitation period essentially negates any argument for finding of reasonable delay. The court finds that it is required to

conduct a review of the facts to determine what efforts, if any, [were] made by the state to serve the warrant, or whether there is some evidence explaining why its failure was reasonable." The court then considered whether the state presented evidence that its delay in service was reasonable, considering the facts of the case, and it concluded that the delay in the execution of the warrant was reasonable. Consequently, we conclude that the court applied the correct legal test as set forth by our Supreme Court in *Swebilius* and by this court in *Soldi* and *Woodtke*.

With this standard in mind, we address the defendant's next argument. The defendant argues that the state failed to proffer sufficient evidence to satisfy its burden under *Swebilius*. The state argues that the stipulated facts admitted into evidence show the requisite effort made by the state and the reasonableness in the delay in the execution of the arrest warrant. We agree with the state.

As indicated in the stipulated facts, there was a period of thirty-one days between Gabianelli's receipt of the defendant's letter on November 5, 2018, and the execution of the arrest warrant on December 6, 2018. Following the defendant's confession to Gabianelli, the state made continuous efforts to obtain a warrant and to facilitate the appropriate transportation of the defendant to the Superior Court for the execution of that warrant; efforts that were all made before the statute of limitations expired.[5] The arrest warrant was executed

[5] We further note and take judicial notice of the fact that, during the period between the receipt of the defendant's letter and the expiration of the statute of limitations, there were two state holidays whereby the court and the Office of the State's Attorney were closed. See *Moore* v. *Moore*, 173 Conn. 120, 123 n.1, 376 A.2d 1085 (1977) ("[t]here are two types of facts considered suitable for the taking of judicial notice: those which are common knowledge and those which are capable of accurate and ready demonstration" (internal quotation marks omitted)). Veterans Day was Monday, November 12, 2018, and Thanksgiving Day was Thursday, November 22, 2018. See, e.g., General Statutes § 1-4. Those dates, in conjunction with the

seven days after the statute of limitations expired. The trial court's reliance on these facts in its finding of effort by the state and in determining the reasonableness of the delay was proper.

The defendant directs us to *Swebilius* and *Woodtke* to support his claim that the evidence proffered in this case was insufficient. We are not persuaded and find the facts of those cases to be distinguishable.

In the present case, in contrast to those cases, evidence showing the state's efforts in expeditiously obtaining the arrest warrant and processing the execution of the warrant was before the trial court. Accordingly, the trial court properly could have relied on this evidence in its determination that the delay was reasonable. The stipulated facts show that the state prepared and signed the warrant and prepared a writ of habeas corpus, all before the statute of limitations expired. Specifically, on November 21, 2018, eight days before the statute of limitations was set to expire, the Office of the State's Attorney prepared the application for a writ of habeas corpus, requesting that the defendant be transported to the Superior Court on December 6, 2018, and, on November 27, 2018, a prosecutor and a clerk of the court signed the writ of habeas corpus. The fact that the defendant was not transported to the Superior Court and served with the warrant until after the expiration of the statute of limitations does not undermine the reasonable efforts of the state.

The trial court based its decision, in part, on the argument by the state that the nine day delay from the signing of the habeas writ to the transportation of the defendant was not unusual, as a matter of course, given the logistical, practical and safety precautions that must

six weekend days during this time, effectively gave the state a total of sixteen days to apply for and to execute the arrest warrant before the statute of limitations expired.

be taken whenever an incarcerated individual is transported from a correctional facility to a courthouse. We note that it is within the purview of the trial court to use its knowledge of the inner workings of the courts and the process by which incarcerated persons are transported to a court in its determination of the reasonableness of the state's efforts. See *State* v. *Abushaqra*, 164 Conn. App. 256, 264–65, 137 A.3d 861 (2016) ("[t]he appellate courts of this state consistently have recognized that the trial court has broad inherent authority to manage judicial proceedings in a variety of circumstances"); see also *State* v. *Swebilius*, supra, 325 Conn. 814–15 ("Indeed, in cases involving relatively brief delays, evidence of a legitimate need to prioritize competing public safety responsibilities may well be sufficient to demonstrate compliance with the dictates of *Crawford*. That fact sensitive determination, however, is a matter properly within the reasoned judgment of the fact finder." (Footnote omitted.)).

Here, the trial court properly considered the evidence before it and determined that the state made efforts to serve the arrest warrant before the relevant statute of limitations expired and that the delay in service was reasonable. We conclude that the trial court did not err in its determination.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MINH ANH HAN
(AC 43016)

Bright, C. J., and Alvord and Cradle, Js.

Syllabus

The defendant, who had been charged with the crime of sexual assault in the fourth degree and had been granted permission to participate in the statutory (§ 54-56e) pretrial diversionary program of accelerated rehabilitation, appealed to this court after the trial court terminated the

order of accelerated rehabilitation. At a hearing on additional conditions proposed for the defendant's participation in the accelerated rehabilitation program, the court concluded that the circumstances of the case were too serious based, inter alia, on the defendant's participation in a fraternal organization and, sua sponte, terminated his participation in the accelerated rehabilitation program. *Held*:

1. Contrary to the state's claim, the trial court's ruling terminating the defendant's participation in the accelerated rehabilitation program was a final judgment for the purposes of appeal; consistent with the ordinary meaning of the plain language of the court, this court concluded that the ruling, in which the court stated it was going to terminate the defendant's participation in the accelerated rehabilitation program, constituted a termination of the defendant's participation in the program under § 54-56e and not a reconsideration and denial of the program.
2. The trial court abused its discretion in terminating the defendant's participation in the accelerated rehabilitation program: the defendant was not afforded notice that the court intended to terminate his participation in the program, the court did not allow the defendant to be heard on the issue of termination and the defendant did not have the opportunity to present evidence regarding successful compliance with the program; moreover, the court improperly based its decision to terminate the defendant's participation on extrajudicial information related to a fraternal organization in which the defendant participated, the defendant was not informed of the source of the information or given any opportunity to review or to rebut it, and the mere allegation of concerning activities of the fraternal organization without additional evidence was an insufficient basis to terminate the defendant's participation in the program.

Argued September 15—officially released December 1, 2020

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, where the court, *McNamara*, *J.*, granted the defendant's application for accelerated rehabilitation; thereafter, the court, *McNamara*, *J.*, terminated the order of accelerated rehabilitation, and the defendant appealed to this court. *Reversed; further proceedings.*

Trent A. LaLima, with whom, on the brief, was *Hubert J. Santos*, for the appellant (defendant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Adam Scott*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Minh Anh Han, appeals from the judgment of the trial court terminating[1] his participation in the accelerated rehabilitation program. On appeal, the defendant claims that the trial court abused its discretion by sua sponte terminating his participation in the program.[2] We conclude that the court abused its discretion in terminating the defendant's participation in the accelerated rehabilitation program. Accordingly, we reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On May 12, 2017, the defendant was arrested and charged with three counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (7), and one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (5).[3] On May 15, 2018,

[1] The defendant characterizes the trial court's ruling as a "termination." The state disagrees with the defendant's characterization. For the reasons set forth in part I of this opinion, we agree with the defendant that the trial court's ruling is a termination of his participation in the accelerated rehabilitation program. Accordingly, we refer throughout this opinion to the trial court's ruling as a termination.

[2] The defendant also claims that the trial court lacked statutory authority, under General Statutes § 54-56e, to terminate his participation in the accelerated rehabilitation program without finding that the defendant failed to comply with the imposed conditions of the program. The state contends that the defendant's statutory authority claim is unpreserved and, alternatively, meritless. Because we resolve this appeal on the basis that the court abused its discretion in terminating the defendant's participation in the accelerated rehabilitation program, we need not address the defendant's additional statutory authority claim. See *State* v. *Peeler*, 271 Conn. 338, 412 n.63, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

[3] General Statutes § 53a-71 (a) (7) provides: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . the actor accomplishes the sexual intercourse by means of false representation that the sexual intercourse is for a bona fide medical purpose by a health care professional . . . ." The charges

the state filed a substitute information. The state withdrew the second degree sexual assault charges[4] and charged the defendant only with one count of sexual assault in the fourth degree. On that date, the defendant applied for admission to the accelerated rehabilitation program pursuant to General Statutes § 54-56e.[5]

On June 5, 2018, the trial court, *Oliver*, *J.*, denied the defendant's application for the accelerated rehabilitation program after concluding that the allegations against the defendant were too serious and that it could not

against the defendant of sexual assault in the second degree in violation of § 53a-71 (a) (7) are class C felonies. See General Statutes § 53a-71 (b).

General Statutes § 53a-73a (a) (5) provides: "A person is guilty of sexual assault in the fourth degree when . . . such person subjects another person to sexual contact and accomplishes the sexual contact by means of false representation that the sexual contact is for a bona fide medical purpose by a health care professional . . . ." The charge against the defendant of sexual assault in the fourth degree in violation of § 53a-73a (a) (5) is a class A misdemeanor. See General Statutes § 53a-73a (b).

[4] An individual charged with sexual assault in the second degree in violation of § 53a-71 (a) (7) is ineligible for the pretrial accelerated rehabilitation program unless good cause is shown. See General Statutes § 54-56e (c) (1) (C).

[5] General Statutes § 54-56e provides in relevant part:

"(a) There shall be a pretrial program for accelerated rehabilitation of persons accused of a crime or crimes . . . not of a serious nature. Upon application by any such person for participation in the program, the court shall, but only as to the public, order the court file sealed.

"(b) The court may, in its discretion, invoke such program on motion of the defendant or on motion of a state's attorney or prosecuting attorney with respect to a defendant (1) who, the court believes, will probably not offend in the future, (2) who has no previous record of conviction of a crime or of a violation of section 14-196, subsection (c) of section 14-215, section 14-222a, subsection (a) or subdivision (1) of subsection (b) of section 14-224, section 14-227a or 14-227m or subdivision (1) or (2) of subsection (a) of section 14-227n, and (3) who states under oath, in open court or before any person designated by the clerk and duly authorized to administer oaths, under the penalties of perjury, (A) that the defendant has never had such program invoked on the defendant's behalf or that the defendant was charged with a misdemeanor or a motor vehicle violation for which a term of imprisonment of one year or less may be imposed and ten or more years have passed since the date that any charge or charges for which the program was invoked on the defendant's behalf were dismissed by the court . . . ."

On May 31, 2018, the Court Support Services Division, Office of Adult Probation determined that the defendant was eligible for the accelerated rehabilitation program because he had not used it previously.

find that the defendant would probably not offend again in the future. On November 29, 2018, the trial court, *McNamara*, *J.*, reconsidered the defendant's application for accelerated rehabilitation and granted it. The court imposed the maximum statutory period of supervision, two years, and the following conditions on the defendant: "[1] obey all state and federal laws . . . [2] comply with any other counseling and treatment deemed appropriate by [the Court Support Services Division, Office of Adult Probation (probation)] and continue with treatment . . . [3] have no contact with [the] victim . . . and [4] after a period of [accelerated rehabilitation and with] the approval of [probation] . . . may [travel] overseas for medical work."

By letter dated March 8, 2019, a probation officer, Amy Gile, sent a letter to the court, copying the state's attorney office and defense counsel, in which she asserted the following: Upon the defendant's admission to the program, probation referred the defendant for a sex offender evaluation. On January 28, 2019, he was "deemed appropriate" for sex offender treatment at The Connection, a center for the treatment of problem sexual behavior. The evaluator at The Connection assessed the defendant as a "moderate" risk for reoffending. On February 14, 2019, the defendant signed a treatment agreement with The Connection, which included, inter alia, a condition that he "not [act] in a position of power over others."

Thereafter, the defendant disclosed to probation that he was a participant in the ManKind Project. Probation found that "the Man[K]ind Project is a global network of nonprofit organizations focused on modern male initiation, self-awareness, and personal growth." The defendant was participating in ManKind Project online groups and hosting meetings at his home, and he had submitted an "action plan" to probation requesting that he be allowed to attend out of state retreats with the ManKind Project, including one in New York. Probation

contacted the leader of the New York retreat and learned that the defendant would attend the retreat as a "staff man" and that he potentially would be in a leadership position over other participants.

In her March 8, 2019 letter to the court, Officer Gile articulated a concern that the defendant's "self-disclosed participation in the ManKind Project place[s] him in a power . . . position over vulnerable members." Probation then requested that the court impose sixteen additional conditions as part of the defendant's accelerated rehabilitation program and require him to sign a computer access agreement "in order to effectively supervise the [defendant's] [accelerated rehabilitation] and properly enforce The Connection [t]reatment [a]greement."[6]

[6] Probation requested that the court impose the following additional conditions to the defendant's accelerated rehabilitation program: (1) "You will participate in and complete any sex offender evaluation and recommended treatment as directed by a [p]robation [o]fficer. You may be financially responsible for all or part of the costs of such evaluation and treatment . . . ." (2) "You will participate in polygraph examinations administered by a [Court Support Services Division approved], specially trained polygraph examiner for treatment purposes and level of supervision . . . ." (3) "You will have no contact with victim(s), victim(s) family (including, but not limited to, by means of letter, telephone call, tape, video, [e-mail], text message or third party contact) unless approved by a [p]robation [o]fficer. Contact with the victim(s) or victim(s) family must be reported immediately to a [p]robation [o]fficer . . . ." (4) "You will notify the [p]robation [o]fficer of any new or existing romantic or sexual relationships . . . ." (5) "You will allow the [p]robation [o]fficer entry into your place of residence and notify any occupant of your residence that a [p]robation [o]fficer may enter where you live . . . ." (6) "All employment must be [pre]approved by a [p]robation [o]fficer . . . ." (7) "You will provide financial and telephone records upon a [p]robation [o]fficer's request . . . ." (8) "You will abstain from the use of any alcoholic beverages and/or drugs unless prescribed by a physician [and] you will submit to random drug screens . . . ." (9) "You will not possess or subscribe to . . . any sexually explicit or sexually stimulating material deemed inappropriate by a [p]robation [o]fficer. You will not patronize any adult book store or adult video store, strip club or adult entertainment club or similar establishment . . . ." (10) "[You will] [s]ubmit to [a] search of your person, possession, vehicle or residence when the [p]robation [o]fficer has a reasonable suspicion to do so . . . ." (11) "You will not utilize telephone numbers which provide access to sexually oriented

On March 26, 2019, over the defendant's objection, the court entered a bond condition of no contact with the ManKind Project but did not rule on probation's requested additional accelerated rehabilitation conditions. On May 3, 2019, the defendant filed a written objection to some, but not all, of the additional conditions proposed by probation in the March letter as "unnecessary, unreasonable, overly burdensome, and unrelated to the underlying alleged offense."[7] The defendant stated that he "[did] not object to [probation's] proposed condition requiring preapproval to attend ManKind Project retreats and barring him from attending as a staff member."

On May 15, 2019, defense counsel, a prosecutor, and Officer Gile appeared before the court, *McNamara*, *J.*,

services . . . ." (12) "You will not hitchhike or pick up hitchhikers . . . ." (13) "You are not to associate with other known sex offenders and/or convicted felons except in an approved treatment program or with prior [p]robation [o]fficer approval . . . ." (14) "You are not allowed to leave the [s]tate of Connecticut without an approved [a]ction [p]lan . . . ." (15) "You will not utilize social, media sites, such as Facebook, Snapcha[t], Twitter, Instagram, LinkedIn or any dating websites . . . ." (16) "You will not participate with the ManKind Project in any manner without submitting an [a]ction [p]lan and approval from [probation]. If allowed to attend ManKind retreats, you will attend as a participant and not as a leader or 'staff man'."

In addition, probation requested that the defendant sign the following computer access agreement: (1) "I will not access any site that contains sexually explicit or sexually stimulating material and any other site that my [p]robation [o]fficer has instructed me not to access . . . ." (2) "I agree to have and voluntarily consent to having my computer examined and/or searched at any time, announced or unannounced, by [p]robation or its agent to verify compliance with the special condition of my probation," [and] (3) "[u]se of the internet via a [s]mart [p]hone will be reviewable by [probation] in conjunction with condition[s] [1] and [2] of the [c]omputer [a]ccess [a]greement."

[7] Specifically, the defendant objected to (1) "conditions regarding sex offenses, such as the requirement of sexual offender evaluation and treatment" because he had been undergoing treatment since approximately March, 2018, with William Hobson, a licensed counselor with experience treating sexual offenders, (2) the condition banning use of social media and dating websites, (3) the condition prohibiting alcohol consumption, (4) the condition restricting out of state travel, (5) the condition allowing home visits by probation, and (6) the condition involving polygraph examinations. The defendant also attached to his objection a letter from Hobson in which Hobson opined that other conditions requested by probation likewise were unnecessary.

pursuant to probation's request for the additional conditions. At the hearing, the court stated that it would like to hear from Officer Gile as to why the conditions were necessary. The court asked Officer Gile: "And did you find out anything else about this ManKind Project? It was presented to me that this was a project where people—men would get together and they'd give—be given opportunities for growth, and for leadership, and to set them on the right path. Did you discover that this is, in fact, what it is?" Officer Gile responded: "Well, based on talking to [the leader of the New York ManKind Project retreat], he did say it was individuals that were trying to [achieve] self-growth, change their lives, better themselves."

The state concluded its argument by asking that the court impose the additional conditions requested by probation: "[T]he allegations . . . are serious, but, once again, not so serious that Your Honor couldn't find that [the defendant] shouldn't have a shot at having them dismissed. So . . . I'd ask that Your Honor impose the conditions so we can keep . . . a good eye on the defendant, and make sure he is somebody who will, in fact, have earned his dismissal in the end." Defense counsel rebutted by asking the court "to consider the conditions individually, rather than all of them being granted."

At the conclusion of the hearing, the court ruled as follows: "You know, the more I read about this case and the more I looked into the ManKind Project, I believe I was told certain things—I was led astray as to what the ManKind Project was. I did do research on the ManKind Project. . . . As I view [probation's] requirements, I realize that this [case] is by far too serious for accelerated rehabilitation. As you know the court granted accelerated rehabilitation with my discretion, and now I'm hearing that you don't like the conditions

and you're going to object to certain conditions. Well, I can resolve that pretty easily. And I'm going to do that today. . . . I'm going to terminate his accelerated rehabilitation. [The defendant] does not want to follow the agreements, he does not want to follow the requirements. I feel this is a by far more serious case than I was led to believe. Especially the more I heard about the ManKind Project. . . . [T]he ManKind Project, as far as I know, may be a fraternal organization, but it also has some interesting idiosyncrasies, where parties go and they're subjected to more like a [boot camp like] atmosphere where parties are told not to wear any clothing when they're there. So I am going to terminate the accelerated rehabilitation, I'm going to place this back on [the] pretrial docket. What date would you like to come back and we can discuss this?"

In response to defense counsel's clarification that the defendant was "willing to abide by any condition" that the court may impose, the court stated: "It's too serious. After what I've learned about the ManKind Project and hearing [from probation] and reviewing [probation's] report . . . it's by far too serious for . . . accelerated rehabilitation. I made a mistake. I was led astray by certain facts which has bothered me since this program was granted. I thought it would be all right, but I'm more convinced now that it would not be the right thing to do with this case."[8] Accordingly, the court terminated the defendant's participation in the accelerated rehabili-

[8] Defense counsel twice tried to interject during the court's ruling:

"The Court: Well, I can resolve that pretty easily. And I'm going to do that today.

"[Defense Counsel]: Your Honor—

"The Court: I'm going to terminate his accelerated rehabilitation. . . .

* * *

"The Court: I thought it would be all right, but I'm more convinced now that it would not be the right thing to do with this case.

"[Defense Counsel]: Your Honor—

"The Court: So we're going to place this back on the pretrial docket, tell me when you're available."

tation program and returned the case to the pretrial docket. This appeal followed.[9]

I

At the outset, we address the state's argument that the trial court's ruling is not a final judgment for the purposes of appeal and, thus, this court lacks jurisdiction to consider it. The defendant characterizes the trial court's ruling as a "termination" of his participation in the accelerated rehabilitation program. The state contends that the trial court's ruling is not a termination, but a "reconsideration" of its decision granting the defendant's participation in the accelerated rehabilitation program and a "denial" of the application. As such, the state argues that the trial court's ruling is not a final judgment for the purposes of appeal, and, therefore, this court should dismiss the appeal for lack of jurisdiction. We agree with the defendant that the trial court's ruling constituted a termination of his participation in the accelerated rehabilitation program and, accordingly, that it is a final judgment for the purposes of appeal.

"Unless otherwise provided by law, the jurisdiction of our appellate courts is restricted to appeals from final judgments." *Krausman* v. *Liberty Mutual Ins. Co.*,

[9] Both parties have relied on the court's oral ruling of May 15, 2019. The record does not contain a signed transcript of the court's decision, as is required by Practice Book § 64-1 (a), and the defendant did not file a motion pursuant to § 64-1 (b) providing notice that the court had not filed a signed transcript of its oral decision. Furthermore, the defendant did not take any additional steps to obtain a decision in compliance with § 64-1 (a). As this court previously has stated, however: "In some cases in which the requirements of . . . § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. Despite the absence of a signed transcript of the court's oral decision or a written memorandum of decision, however, our ability to review the claims raised on the present appeal is not hampered because we are able to readily identify a sufficiently detailed and concise statement of the court's findings in the transcript of the proceeding." *State* v. *Esquilin*, 179 Conn. App. 461, 464 n.1, 179 A.3d 238 (2018). Accordingly, we will review the defendant's claim.

195 Conn. App. 682, 687, 227 A.3d 91 (2020); see also General Statutes §§ 51-197a and 52-263; Practice Book § 61-1. "An order of the court . . . terminating the participation of a defendant in [the accelerated rehabilitation] program [is] a final judgment for purposes of appeal." General Statutes § 54-56e (f). Conversely, an order of the court granting or denying a defendant's application for the accelerated rehabilitation program is not a final judgment for purposes of appeal. See *State* v. *Spendolini*, 189 Conn. 92, 96, 454 A.2d 720 (1983); *State* v. *Angelo*, 25 Conn. App. 235, 239, 594 A.2d 24, cert. denied, 220 Conn. 911, 597 A.2d 335 (1991). Therefore, this court must determine whether the trial court's ruling is a termination of the defendant's participation in the accelerated rehabilitation program or a reconsideration and denial of the program.

"It is well established that the construction of a judgment presents a question of law over which we exercise plenary review." *Bauer* v. *Bauer*, 308 Conn. 124, 131, 60 A.3d 950 (2013). "To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Internal quotation marks omitted.) *Pasco Common Condominium Assn., Inc.* v. *Benson*, 192 Conn. App. 479, 516, 218 A.3d 83 (2019). "In construing a trial court's judgment, [t]he determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Bauer* v. *Bauer*, supra, 131.

During the May 15, 2019 hearing, the court clearly expressed its intent when it twice stated that it was "going to terminate" the defendant's participation in the accelerated rehabilitation program. The state maintains that "despite the court's use of the word 'terminate'

when issuing its oral decision . . . [v]iewed in totality, the substance of the court's action . . . was a reconsideration and denial of its initial decision granting the program." The state's argument rests on the court's prefatory statements that it had been "led astray" and "made a mistake" in granting the defendant's application for the program. The state suggests that these statements imply the court's intent to reconsider and deny the defendant's application for the program, notwithstanding the court's express statement that it was going to terminate the defendant's participation in the program. We decline the state's invitation to disregard the plain and unambiguous language of the trial court. See 46 Am. Jur. 2d 474, Judgments § 66 (2017) ("[w]hen the language of the judgment is plain and unambiguous, there is no room for construction or interpretation").

"The language of a judgment must be given its ordinary meaning unless a technical or special meaning is clearly intended." *Brewer* v. *Gutierrez*, 42 Conn. App. 421, 424, 681 A.2d 345 (1996). Consistent with the ordinary meaning of the plain language of the trial court, we conclude that the court's ruling constituted a termination of the defendant's participation in the accelerated rehabilitation program under § 54-56e (f) and, accordingly, it is a final judgment for the purposes of appeal.

II

The defendant claims on appeal that the trial court abused its discretion by terminating, sua sponte, his participation in the accelerated rehabilitation program. Specifically, the defendant argues that the court erred by (1) failing to provide notice that the court was contemplating termination, (2) failing to permit argument on termination, and (3) terminating the program despite the fact that there was an insufficient basis to conclude that the defendant violated the imposed conditions of the program. We agree with the defendant that the court's

termination of the defendant's participation in the accelerated rehabilitation program was an abuse of its discretion.

"We review the court's rulings regarding a defendant's participation in the accelerated rehabilitation program for an abuse of discretion. . . . Our review of the trial court's exercise of its discretion is limited to the questions of whether the court correctly applied the law and whether it could reasonably conclude as it did. . . . It is only where an abuse of discretion is manifest or where an injustice appears to have been done that a reversal will result from the trial court's exercise of discretion. . . . Every reasonable presumption will be given in favor of the trial court's ruling. . . . The trial court's findings of fact [underlying a termination] are entitled to great deference and will be overturned only upon a showing that they were clearly erroneous." (Citation omitted; internal quotation marks omitted.) *State* v. *Jerzy G.*, 183 Conn. App. 757, 763, 193 A.3d 1215, cert. denied, 330 Conn. 932, 194 A.3d 1195 (2018).

"[Section] 54-56e establishes a discretionary pretrial diversionary program in certain criminal cases. It suspends criminal prosecution for a stated period of time subject to such conditions as the court shall order. If the defendant satisfactorily completes the probationary period he may then apply to the court for dismissal of the charges lodged against him. The main thrust of the statute is suspension of prosecution. . . . The only right that the defendant acquires by the granting of a motion for accelerated rehabilitation is the right to a dismissal of the underlying criminal charge if the defendant satisfactorily completes the period of pretrial probation imposed." (Internal quotation marks omitted.) *State* v. *Fanning*, 98 Conn. App. 111, 115, 908 A.2d 573 (2006), cert. denied, 281 Conn. 904, 916 A.2d 46 (2007). "If the defendant refuses to accept, or, having accepted,

violates such conditions [as the court shall order], the defendant's case shall be brought to trial." General Statutes § 54-56e (d); see *State* v. *Trahan*, 45 Conn. App. 722, 732, 697 A.2d 1153 ("[i]f the trial court determines that the defendant did not fulfill the conditions of probation, the charges will not be dismissed and the defendant may be required to go to trial" (internal quotation marks omitted)), cert. denied, 243 Conn. 924, 701 A.2d 660 (1997).

In *State* v. *Jerzy G.*, supra, 183 Conn. App. 770, this court upheld the trial court's termination of a defendant's participation in an accelerated rehabilitation program when the court's decision "was a reasonable application of our law and did not result in injustice to the defendant." In that case, after the trial court granted the defendant's application for the program, United States Immigration and Customs Enforcement deported the defendant to Poland. Id., 761. Upon probation's request, the trial court advanced the date for a determination of whether the defendant had successfully completed the terms of his accelerated rehabilitation. Id. At that hearing, the state sought termination of the program. Id. Following additional hearings, the trial court found that the defendant, having been deported, was unable to comply with the imposed conditions of the program. Id., 769. The trial court indicated, however, that it would consider "tak[ing] remedial action and reinstat[ing] [the accelerated rehabilitation program] if somebody could show that [the defendant] was successful and he's back here and wants to complete the program, but, until that time, it remains terminated." (Internal quotation marks omitted.) Id. In support of this court's conclusion that, given the circumstances, the trial court's decision "was a reasonable application of our law and did not result in injustice to the defendant," we noted that "if the defendant were to return to court, he presumably would have the opportunity to present evidence regarding successful completion." Id., 770 and n.5.

In *State* v. *Fanning*, supra, 98 Conn. App. 117, this court reversed the trial court's termination of a defendant's participation in an accelerated rehabilitation program because the only information provided to the court was that the defendant had been arrested. In that case, the defendant filed a motion to dismiss the charge underlying his admission into the accelerated rehabilitation program. Id., 113. At the hearing on that motion, the state made an oral motion to terminate the defendant's accelerated rehabilitation status, representing to the court that the defendant had been arrested during his participation in the program. Id. The trial court then indicated that it was terminating the defendant's accelerated rehabilitation status. Id., 115. On appeal, this court held that the mere fact of an arrest, without more, was an insufficient basis for the court to termi nate the defendant's participation in the accelerated rehabilitation program. Id., 117; see also *State* v. *Buehler*, 110 Conn. App. 814, 816, 956 A.2d 602 (2008). In support of this court's conclusion that the trial court abused its discretion in terminating the program, we noted that although the defendant did not dispute his arrest, "the state filed no motion to terminate the defendant's accelerated rehabilitation status, but merely orally moved to do so at the hearing on the defendant's motion to dismiss the case. . . . Thus, on the facts in this case, it is not clear that the defendant had any notice that the state intended to oppose his motion to dismiss or would seek to terminate his pretrial probation." *State* v. *Fanning*, supra, 122 n.4.

In the present case, the state sought only to impose additional conditions requested by probation in order to keep "a good eye on the defendant, and make sure he is somebody who will, in fact, have earned his dismissal [of the charge] in the end."[10] At the hearing on

[10] There is nothing in the record suggesting that the defendant was not complying with the conditions of his accelerated rehabilitation that were previously imposed by the court.

the additional conditions, neither the state nor the defendant were aware that the trial court was contemplating termination of the defendant's participation in the program. The defendant was not afforded "notice that the state [or the trial court] intended to . . . terminate" his participation in the program. *State* v. *Fanning*, supra, 98 Conn. App. 122 n.4. When the court's intention became apparent, defense counsel twice attempted to interject his concerns to no avail. See footnote 8 of this opinion. The court did not offer the defendant the opportunity to be heard on the issue of termination, but, instead, repeated its request for counsels' availability to discuss the case once it was back on the pretrial docket for prosecution. Moreover, the defendant did not have an "opportunity to present evidence" regarding successful compliance with the program. *State* v. *Jerzy G.*, supra, 183 Conn. App. 770 n.5.[11]

Furthermore, the trial court expressly based its decision on concerns about the defendant's involvement with the ManKind Project. The only information in the record regarding the ManKind Project was probation's explanation of the goals of the organization, which aligned with how the organization had been presented to the court. When terminating the program, the court stated that "the ManKind Project, as far as I know, may be a

[11] Our appellate courts have not articulated whether due process requires a full evidentiary hearing before terminating a defendant's participation in the accelerated rehabilitation program. This court has noted that "due process does not, in every case require a full evidentiary hearing. What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made. . . . Here, if the defendant's participation in the pretrial accelerated rehabilitation program is terminated, he will be entitled to the full panoply of rights due an accused criminal defendant." (Citation omitted; internal quotation marks omitted.) *State* v. *Fanning*, supra, 98 Conn. App. 122 n.5. On the facts of this case, we hold that, because the trial court failed to afford the defendant (1) notice that the court was contemplating termination, (2) the opportunity to be heard, and (3) the opportunity to present evidence, and the court improperly considered extrajudicial information, the trial court abused its discretion in terminating the defendant's participation in the accelerated rehabilitation program.

fraternal organization, but it also has some interesting idiosyncrasies, where parties go and they're subjected to more like a [boot camp like] atmosphere where parties are told not to wear any clothing when they're there." There is nothing in the record to support this statement, which apparently came from an extrajudicial source.[12] The defendant was not informed of the source of this information or given any opportunity to review or rebut it. Even assuming, arguendo, that such information properly was considered by the court, the mere allegation of concerning associations, without more, is an insufficient basis for the court to terminate the defendant's participation in the accelerated rehabilitation program. See *State* v. *Fanning*, supra, 98 Conn. App. 117; see also *State* v. *Buehler*, supra, 110 Conn. App. 816.[13]

On the basis of the foregoing, we conclude that the trial court's termination of the defendant's participation in the accelerated rehabilitation program was an abuse of its discretion.

On remand, we provide the following guidance to the trial court. During the pendency of this appeal, the trial court's May 15, 2019 judgment terminating the defendant's participation in the accelerated rehabilitation program was stayed pursuant to our rules of practice.

[12] "A judge serving as a fact finder shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed." Code of Judicial Conduct, Rule 2.9 (c). "The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." Code of Judicial Conduct, Rule 2.9, comment (6). This extrajudicial information was, therefore, not properly considered by the court.

[13] The state urges this court to affirm the judgment of the trial court on alternative grounds. The state argues that the information contained in probation's March 8, 2019 letter to the court supports the conclusion that the case is "too serious" for accelerated rehabilitation. This argument runs contrary to the state's representations of the case at the May 15, 2019 hearing: "[T]he allegations . . . are serious, but, once again, not so serious that Your Honor couldn't find that [the defendant] shouldn't have a shot at having them dismissed." Thus, we cannot determine that the court had a sufficient basis to terminate the defendant's participation in the accelerated rehabilitation program.

See Practice Book § 61-13. Consequently, on remand the parties are returned to the status that they assumed prior to the court issuing its judgment.[14] Specifically, under the terms of the defendant's accelerated rehabilitation program, the two year period of accelerated rehabilitation was to expire on November 29, 2020, however, the defendant's two year period of accelerated rehabilitation is considered tolled from the time of the trial court's ruling, May 15, 2019, until ten days following the release of this court's decision.[15] The conditions are those that existed as of the May 15, 2019 hearing. To the extent the state seeks to add conditions to the defendant's participation in the accelerated rehabilitation program and the defendant does not agree to the additional conditions, the parties may seek a further hearing before the court regarding whether additional conditions should be added.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

[14] See, e.g., *State* v. *Brundage*, 148 Conn. App. 550, 558, 87 A.3d 582 (2014) (partially reversing trial court's decision denying motion to dismiss "merely returned the parties to the position that they would have been in had the trial court properly ruled on the defendant's motion to dismiss"), aff'd, 320 Conn. 740, 135 A.3d 697 (2016); see also *State* v. *Buehler*, supra, 110 Conn. App. 815–16 (reversing trial court's termination of defendant's participation in accelerated rehabilitation program and remanding for further proceedings despite two year statutory period of accelerated rehabilitation set forth in § 54-56e (d) having expired).

[15] A reviewing court may order a statutory time period tolled when doing so is necessary to effectuate the purpose of the statute. See *State* v. *Garcia*, 235 Conn. 671, 675, 669 A.2d 573 (1996) (recognizing proposition and ordering time period for restoring competency under § 54-56d tolled during pendency of appeal because "reasonably necessary and appropriate" to facilitate judgment); see also *State* v. *Johnson*, 301 Conn. 630, 648, 26 A.3d 59 (2011) (recognizing that reviewing court has authority to toll statute of limitations during pendency of appeal in order to protect state's right to reinstitute charges). The purpose of the accelerated rehabilitation program is to ensure that the probationer receives a period of "genuine rehabilitation" assisted by the supervision of probation. (Internal quotation marks omitted.) *State* v. *Fanning*, supra, 98 Conn. App. 116; *State* v. *Jerzy G.*, supra, 183 Conn. App. 764.