ALISON BARR *v.* DEAN BARR
(AC 42333)

Keller, Bright and Sheldon, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's postjudgment motion for contempt. The plaintiff had filed five postjudgment motions for contempt alleging the defendant's noncompliance with various dissolution orders. The court granted three of the motions and issued orders thereon, after which the plaintiff filed a sixth postjudgment motion for contempt, seeking an order holding the defendant in contempt for failing to comply with the court's orders. By the time the plaintiff filed this motion, the defendant had moved his residence to Georgia. The plaintiff's counsel certified the motion to an address in Georgia on file for the defendant and to his e-mail address on file, but the defendant was not served personally. *Held* that the trial court improperly granted the motion for contempt because the plaintiff did not properly serve the defendant with process: the defendant's claim was reviewable because it challenged the court's personal jurisdiction, and that issue was not waived because there had been no service of process or attempt of service; moreover, a postjudgment motion for contempt filed for the purpose of enforcing an antecedent judicial order requires proper service of process and the plaintiff made no attempt to serve the defendant with process, rather, the plaintiff's counsel certified that a copy of the motion was mailed to the defendant's address in Georgia and e-mailed to the defendant's e-mail address on file, and whether the plaintiff's attempts to provide the defendant with mail or e-mail actually occurred, or whether they provided the defendant with actual notice of the motion, was immaterial because knowledge of the motion, without proper service, was insufficient to confer personal jurisdiction.

Argued November 13, 2019—officially released January 28, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *S. Richards*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Heller*, *J.*, granted three motions for contempt filed by the plaintiff and entered orders thereon; subsequently, the court, *Heller*, *J.*, granted the plaintiff's motion for

contempt, and the defendant appealed to this court. *Reversed; judgment directed.*

Joseph M. Pastore III, for the appellant (defendant).

Opinion

KELLER, J. The defendant, Dean Barr, appeals from the trial court's judgment granting the postjudgment motion for contempt brought by the plaintiff, Alison Barr.[1] The defendant claims that, with respect to the motion, the plaintiff did not properly serve the defendant with process.[2] We agree with the defendant and, accordingly, reverse the judgment of the court and remand the case with direction to dismiss the motion for contempt.

The record reveals the following procedural history. The court, *S. Richards*, *J.*, rendered judgment dissolving the parties' marriage on December 31, 2015. On October 7, 2016, the plaintiff filed five postjudgment motions for contempt, citing the defendant's noncompliance with various dissolution orders. On March 21, 2017, the court, *Heller*, *J.*, issued a memorandum of decision, in which it granted three[3] of the plaintiff's

[1] The plaintiff did not file a brief and we have ordered that this appeal be considered on the basis of the defendant's brief and the record alone.

[2] The defendant asserts two claims: "(1) [The] [d]efendant was not properly served with process of [the] plaintiff's motion for contempt, postjudgment, dated June 21, 2018.

"(2) The trial court erred in holding that [the] defendant was properly served with the motion for contempt, postjudgment, dated June 21, 2018."

Because we deem these claims to raise the same issue we have combined these claims into one.

[3] The court granted the plaintiff's motions for contempt related to the following matters: (1) the defendant's failure to pay the balance of alimony and child support arrearage, (2) the defendant's failure to pay a $210,000 loan due to the Bank of America, and (3) the defendant's failure to pay pendente lite attorney's fees.

Further, on March 13, 2017, the court granted the plaintiff's motion for reimbursement of the sums paid by the plaintiff to reinstate medical insurance coverage for the parties' minor children and to maintain the defendant's then existing life insurance coverage.

motions for contempt and denied two[4] of the plaintiff's motions for contempt. On June 21, 2018, the plaintiff filed a motion for contempt seeking an additional order holding the defendant in contempt for failing to comply with the orders set forth in the March 21, 2017 memorandum of decision. The plaintiff's counsel certified the June 21, 2018 motion to an address for the defendant in Suwanee, Georgia. On July 16, 2018, the court held a hearing on the plaintiff's motion. The defendant did not file an appearance and was not present at the hearing, but the court found that the defendant had notice of the hearing and of the June 21, 2018 motion for contempt. The court did not make any finding with respect to whether the out-of-state defendant was served with process in accordance with the applicable long arm statutes. On November 9, 2018, the court issued a memorandum of decision, in which it granted the plaintiff's motion for contempt. The defendant filed the present appeal on November 29, 2018.[5]

[4] The court denied the plaintiff's motions for contempt related to the following matters: (1) the defendant's failure to make a payment due to the plaintiff from proceeds received from certain prior litigation, and (2) the defendant's failure to obtain life insurance.

[5] In its November 9, 2018 memorandum of decision, the court also awarded the plaintiff attorney's fees as a sanction for the defendant's conduct. At the time this appeal was filed, it does not appear that the court had made a finding regarding the amount of the attorney's fees to be awarded as a sanction. Even though the issue of sanctions had not been resolved fully at the time this appeal was filed, the court's judgment finding the defendant in contempt constitutes an appealable final judgment. See *Khan* v. *Hillyer*, 306 Conn. 205, 217, 49 A.3d 996 (2012) ("a civil contempt order requiring the contemnor to incur a cost or take specific action . . . satisfies the second prong of [*State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)] and, therefore, constitutes an appealable final judgment"); *Bryant* v. *Bryant*, 228 Conn. 630, 636, 637 A.2d 1111 (1994) (civil contempt finding based upon determination of arrearage under marital dissolution decree an appealable final order even though issue of sanctions unresolved).

In *State* v. *Curcio*, supra, 191 Conn. 31, our Supreme Court set forth the test for determining when an otherwise interlocutory order or ruling of the Superior Court constitutes an appealable final judgment. "An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id.

On appeal, the defendant asserts that the plaintiff's counsel had claimed that a copy of the June 21, 2018 postjudgment motion for contempt was mailed to a Georgia address on file for the defendant and was e-mailed to the defendant's e-mail address on file. The defendant claims that the plaintiff, therefore, did not properly serve the defendant with process. We agree.

Preliminarily, we address the reviewability of the defendant's claim because he raises the issue of personal jurisdiction for the first time on appeal. "Under our well established jurisprudence, [a] challenge to a court's personal jurisdiction . . . is waived if not raised by a motion to dismiss within thirty days [after the filing of an appearance]. . . . The general waiver rule, however, is inapplicable in situations in which there has been no service of process or attempt of service." (Citations omitted; internal quotation marks omitted.) *Bowen* v. *Seery*, 99 Conn. App. 635, 638, 915 A.2d 335, cert. denied, 282 Conn. 906, 920 A.2d 308 (2007). In *Bowen*, this court held that a party did not waive its challenge to personal jurisdiction by not filing a motion to dismiss within the time constraints of Practice Book § 10-30 because the party was not served with process and did not appear in the action. Id., 640 n.5.

Further, our Supreme Court has held that "[i]t is axiomatic that a court cannot render a judgment without first obtaining personal jurisdiction over the parties. No principle is more universal than that the judgment of a court without jurisdiction is a nullity. . . . Such a judgment, whenever and wherever declared upon as a source of a right, may always be challenged." (Internal quotation marks omitted.) *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 576, 953 A.2d 868 (2008). "As a matter of law, in the absence of jurisdiction over the parties, a judgment is void ab initio and is subject to both direct and collateral attack." (Internal quotation marks omitted.) *Wilkinson* v. *Boats Unlimited, Inc.*, 236 Conn. 78, 84, 670 A.2d 1296 (1996). The Restatement

(Second) of Judgments categorizes relief by way of an appeal from a judgment as a direct attack. 2 Restatement (Second), Judgments, c.5, introductory note, pp. 140–41 (1982).[6]

Having determined that this court can review the defendant's claim, we now turn to the applicable standard of review.[7] "[A] challenge to the jurisdiction of the court presents a question of law over which our review

[6] The defendant potentially could have moved to open the court's judgment. Raising the claim before the trial court, by means of an appropriate postjudgment motion, would have afforded the trial court an opportunity to correct any potential error with respect to this issue; see, e.g., *Alexandre* v. *Commissioner of Revenue Services*, 300 Conn. 566, 584–85, 22 A.3d 518 (2011); and, perhaps, would have provided the defendant with a more efficient means of obtaining relief. Nonetheless, we conclude that the defendant did not waive his right to challenge the court's lack of personal jurisdiction, and, in the present appeal, he may raise such issue in the form of a direct attack on the judgment rendered against him.

[7] Even if we were to conclude that, in the absence of recourse to an extraordinary level of review, the defendant could not properly raise a claim related to lack of personal jurisdiction for the first time on appeal, we nonetheless would conclude that the claim is amenable to review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

"[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) Id.; see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding* by eliminating word "clearly" before words "exists" and "deprived" [internal quotation marks omitted]).

In the present case, the record is adequate to review the alleged claim of error and the defendant's claim is of constitutional magnitude because, as he asserts in his brief, it implicates the right to due process. Additionally, as explained later in this opinion, the constitutional violation exists. The defendant's claim is not subject to a harmless error analysis.

The defendant did not affirmatively request review pursuant to *Golding*; this fact, however, does not preclude this court from such review. See *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014) ("to obtain review of an unpreserved claim pursuant to [*Golding*], a defendant need only raise that claim in his main brief, wherein he must present a record that is [adequate] for review and affirmatively [demonstrate] that his claim is indeed a violation of a fundamental constitutional right" [internal quotation marks omitted]).

is plenary." *Ryan* v. *Cerullo*, 282 Conn. 109, 118, 918 A.2d 867 (2007). "[T]he Superior Court . . . may exercise jurisdiction over a person *only if that person has been properly served with process*, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction." (Emphasis added; internal quotation marks omitted.) *Kim* v. *Magnotta*, 249 Conn. 94, 101–102, 733 A.2d 809 (1999).

"Proper service of process is not some mere technicality . . . but is designed to provide notice of judicial proceedings that may implicate a party's rights. It is beyond question that due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. . . .

"Adjudication of a motion for civil contempt implicates these constitutional safeguards. . . . [W]here the alleged contempt does not occur in the presence of the court . . . process is required to bring the party into court, and the acts or omissions constituting the offense are to be proved as in ordinary cases." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Alldred* v. *Alldred*, 132 Conn. App. 430, 434–35, 31 A.3d 1185 (2011), appeal dismissed, 303 Conn. 926, 35 A.3d 1075 (2012). This court, in *Alldred*, addressed an issue nearly identical to that in the present case: "[W]hether a postjudgment motion for contempt that is filed for the purpose of enforcing an antecedent judicial order requires proper service of process." Id., 435. Although the procedural posture of *Alldred* differed from that of the present case, because in *Alldred*, this court reviewed the trial court's judgment granting the plaintiff's motion to dismiss the defendant's contempt actions and, here, we are reviewing the trial court's

judgment granting the plaintiff's motion for contempt, the service of process requirement delineated in *Alldred* remains equally applicable to the present case. Id., 433.

In *Alldred*, this court distinguished between the service requirements for pendente lite and postjudgment motions in holding that "proper service of process in postjudgment contempt proceedings requires the movant to cause the contempt complaint and summons to be served upon the alleged contemnor." (Emphasis omitted.) Id., 436. Further, this court relied on the family law volume of the Connecticut Practice Series to support this service of process requirement: "Where a final judgment has entered and no other matters in connection with the case are currently pending before the court . . . the contempt proceeding must be initiated by way of an Application for Order to Show Cause and for Contempt Citation. . . . [T]he application is forwarded first to the clerk of the court who assigns a specific date and time for hearing on the contempt matter. The papers are then served on the respondent in the same manner employed for the service of civil process." A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice with Forms (2010) § 34:5, pp. 110–11. Further, in a postjudgment contempt proceeding, "mere knowledge of the proceedings is insufficient to confer personal jurisdiction over a party who has not been properly served." *Alldred* v. *Alldred*, supra, 132 Conn. App. 437. On the basis of the foregoing, in *Alldred* this court held that the defendant's "attempt to serve the plaintiff by mailing copies of the postjudgment contempt motions to the plaintiff's counsel did not confer personal jurisdiction over the plaintiff on the court." Id., 438. Our Supreme Court has also held that, "[w]hen a particular method of serving process is set forth by statute, that method must be followed. . . . Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction." (Internal quotation marks omitted.) *Argent Mortgage Co., LLC* v. *Huertas*, supra, 288 Conn. 576.

Here, with regard to the June 21, 2018 postjudgment motion for contempt, the plaintiff did not provide the defendant with proper service of process. Pursuant to *Alldred*, the plaintiff must have provided the defendant with service of process in the manner required for the service of civil process. The record indicates that the plaintiff made no attempt to serve the defendant under any applicable long arm statute. Rather, the record reflects that the plaintiff's counsel certified that he mailed a copy of the motion to an address on file for the defendant in Suwanee, Georgia, and e-mailed a copy to the defendant's e-mail address on file. Whether the plaintiff's attempts to provide the defendant with mail or e-mail actually occurred, or whether they provided the defendant with actual notice of the motion, is immaterial because knowledge of the motion, without proper service, is insufficient to confer personal jurisdiction over that party. *Alldred* v. *Alldred*, supra, 132 Conn. App. 438.

The judgment is reversed and the case is remanded with direction to dismiss the June 21, 2018 motion for contempt.

In this opinion the other judges concurred.

ANDREW J. PICCOLO, JR. *v.* AMERICAN AUTO SALES, LLC, ET AL.
(AC 41988)

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

Syllabus

The plaintiff sought to recover damages arising out of a dispute over his purchase of a motor vehicle from the defendant A Co. The plaintiff's revised complaint alleged fraud, negligent misrepresentation, breach of contract, and unjust enrichment, and claimed that the vehicle was not in good condition when he purchased it and that the defendants had failed to make certain promised repairs. The defendants filed a motion to strike several counts of the complaint, including counts four and eight, which alleged unjust enrichment. The defendants claimed that because paragraph 5 of count one, which sounded in fraud, alleged that

the plaintiff had relied on the defendants' representations, both oral and written, that the motor vehicle was in sound condition, and because paragraph 5 was incorporated by reference into counts four and eight, the plaintiff had alleged that there was an oral and written contract that was breached and, therefore, could not properly allege unjust enrichment. The trial court granted the motion to strike as to counts four and eight, and the remaining counts were tried to the jury, which found in favor of the defendants. From the judgment rendered thereon, the plaintiff appealed to this court. *Held* that the trial court improperly granted the defendants' motion to strike the unjust enrichment counts of the revised complaint, as the court mistakenly concluded that the plaintiff had incorporated allegations of breach of an express contract in the unjust enrichment counts: parties routinely plead alternative counts alleging breach of contract and unjust enrichment, although in doing so, they are entitled only to a single measure of damages arising out of those alternative claims, given that reliance is an essential element of a claim of fraud and that false representations can be oral and written, this court did not construe paragraph 5 of count one as alleging an express contract or agreement between the parties, and given that count four sounded in unjust enrichment and incorporated the first nine paragraphs of count one, which established the relationship between the parties and did not allege a breach of contract, the plaintiff did not allege an express contract in the unjust enrichment counts, nor did he incorporate the breach of contract allegations in the unjust enrichment counts but, rather, separately alleged breach of contract in counts three and seven and unjust enrichment in counts four and eight; accordingly, the trial court should not have granted the motion to strike counts four and eight of the revised complaint.

Argued October 24, 2019—officially released January 28, 2020

Procedural History

Action, by way of a revised complaint, to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted in part the defendants' motion to strike; thereafter, the court granted the defendants' motion for judgment as to certain counts of the complaint and rendered judgment thereon; subsequently, the remaining counts were tried to the jury before *Brazzel-Massaro*, *J.*; verdict and judgment for the defendants, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Andrew J. Piccolo, Jr., self-represented, the appellant (plaintiff).

Michael A. Fasano, Jr., with whom were *Julie R. Fasano* and, on the brief, *Michael A. Fasano, Sr.*, for the appellee (defendant).

Opinion

LAVINE, J. The self-represented plaintiff, Andrew J. Piccolo, Jr., appeals from the judgment of the trial court, rendered after a trial to a jury, in favor of the defendants, American Auto Sales, LLC (business), and Robert J. Vitale, Sr. (Vitale). On appeal, the plaintiff claims that the court erred as a matter of law by striking counts four and eight of his revised complaint, which sounded in unjust enrichment, because it mistakenly concluded that the plaintiff had incorporated the allegations of the existence and breach of an express contract and unjust enrichment in those counts. We agree with the plaintiff and, therefore, reverse the judgment of the trial court.

The record discloses the following facts. On July 26, 2010, the plaintiff purchased a used 1997 Chevy Lumina motor vehicle (auto) from the business for $2398. At that time, Vitale held a managerial position with and had an ownership interest in the business. On July 30, 2013, the plaintiff commenced a civil action against the defendants. Pursuant to an order of the court, the plaintiff filed a revised eight count complaint on February 3, 2017. The counts sounded in fraud, negligent misrepresentation, breach of contract, and unjust enrichment against each of the defendants. The first four counts were alleged against the business, and the second four counts were alleged against Vitale. The plaintiff alleged that Vitale had made certain representations concerning the soundness of the auto, which the plaintiff relied on when he bought it. He also alleged that Vitale had agreed to repair the auto at no cost, if necessary. The plaintiff further alleged that the auto

was not in good condition and that the defendants failed to make the repairs as promised.

In reply, the defendants filed a motion to strike counts four through eight of the revised complaint.[1] The court granted the motion to strike counts four and eight, the unjust enrichment counts. In doing so, the court cited *Burke* v. *Boatworks, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-04-4001838-S(July 26, 2005) ("allegations of express contract between the parties incorporated into a count stating a claim for unjust enrichment cause a violation of the rule that those alternative causes of action must be pleaded in separate counts"); and Superior Court cases cited therein. Thereafter, the court granted the defendants' motion for judgment on those counts. The remaining counts were tried to a jury in July, 2018. The jury found in favor of the defendants, and the court rendered judgment accordingly. The plaintiff appealed, claiming that the court erred in striking counts four and eight of his revised complaint because (1) the defendants had failed to present a valid reason to strike the unjust enrichment counts and (2) the court erred in its reading of the revised complaint or misapplied the law.

We begin by setting forth the standard of review with respect to a motion to strike. "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 on the [defendants' motion] 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. . . . Thus,

[1] The defendants moved to strike counts five through seven of the revised complaint on the ground that a member of a limited liability corporation cannot be held liable for the acts of the corporation. The court denied the motion to strike counts five through seven. The propriety of that decision is not at issue on appeal.

[i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a [defendants'] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Emphasis omitted; internal quotation marks omitted.) *Kumah* v. *Brown*, 127 Conn. App. 254, 259, 14 A.3d 1012 (2011), aff'd, 307 Conn. 620, 58 A.3d 247 (2013).

"Pleadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them." (Internal quotation marks omitted.) *Criscuolo* v. *Mauro Motors, Inc.*, 58 Conn. App. 537, 544, 754 A.2d 810 (2000). "The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations in his complaint. . . . A plaintiff may not allege one cause of action and recover on another." (Internal quotation marks omitted.) Id., 544–45.

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . Furthermore, [t]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *McCann Real Equities Series XXII, LLC* v. *David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 491, 890

A.2d 140, cert. denied, 277 Conn. 928, 895 A.2d 798 (2006).

The defendants' motion to strike does not set forth the basis of the motion; see Practice Book § 10-39 (b) (requiring specification of reason for claimed legal insufficiency); but in their memorandum in support of the motion to strike the defendants argued that "[u]njust enrichment is a form of the equitable remedy of restitution by which a [p]laintiff may recover the benefit conferred on a [d]efendant in situations where no express contract has been entered into by the parties. Unjust enrichment is not based on an express contract. Instead, litigants normally resort to the remedy of unjust enrichment when they have no written or verbal contract to support their claim for relief." The defendants pointed out that paragraph 5 of count one of the revised complaint alleged that "[t]he plaintiff did rely on the representations, both oral and written, that said [auto] was in good condition and that all mechanical and other deficiencies would be repaired at no cost." The defendants also noted that paragraph 5 was incorporated by reference in each of the succeeding counts of the revised complaint, including counts four and eight alleging unjust enrichment. The defendants argued that because the plaintiff had alleged that there was an oral and written contract that had been breached, the plaintiff properly could not allege unjust enrichment.

The plaintiff opposed the motion to strike, arguing that Connecticut requires fact-based pleadings, which permit separate legal theories to be alleged in separate counts. He contended that he pleaded different legal theories in different counts and in the alternative, acknowledging that a plaintiff may recover under only one theory, not both. "Generally, if two theories are alleged in the same pleading, it is for the trier of fact to determine whether the plaintiff has proved both, neither, or but one of them." *Burns* v. *Koellmer*, 11 Conn. App. 375, 386, 527 A.2d 1210 (1987). In addition,

the plaintiff set forth the principles underlying unjust enrichment.

In ruling on the defendants' motion to strike, the court stated in relevant part: "Unjust enrichment applies wherever justice requires compensation to be given for property or services rendered under a contract and no remedy is available by an action on the contract. Unjust enrichment is consistent with the principles of equity, a broad and flexible remedy. . . . The plaintiff seeking recovery for unjust enrichment must prove (1) that the defendants were benefitted, (2) that the defendants unjustly did not pay the plaintiff for the benefits, and (3) that the failure of payment was to the plaintiff's detriment. . . . Indeed a lack of a remedy under the contract is a precondition for recovery based on unjust enrichment. . . . Despite these limiting principles, [p]arties routinely plead alternative counts alleging breach of contract and unjust enrichment, although in doing so, they are entitled only to a single measure of damages arising out of these alternative claims. . . . Under this typical belt and suspenders approach, the equitable claim is brought in an alternative count to ensure that the plaintiff receives some recovery in the event that the contract claim fails." (Citations omitted; internal quotation marks omitted.)

The court continued, stating that although the appellate courts of this state "have [not yet decided] whether it is sufficient to merely incorporate allegations of an express contract into a claim for unjust enrichment, several judges of the Superior Court have addressed [the] matter." The court cited several Superior Court cases. See *William Raveis Real Estate* v. *Cendant Mobility Corp.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-05-4002709-S (December 5, 2007) (plaintiff may plead unjust enrichment in alternative but this is not accomplished by incorporating into that count allegations of express contract; such complaint does not involve alternative pleading but inconsistent pleading); *Burke* v. *Boatworks, Inc.*, supra,

Superior Court, Docket No. CV-04-4001838-S (allegations of express contract between parties incorporated into count stating claim for unjust enrichment violate rule that alternative causes of action be pleaded in separate counts).

The court in the present case found that the plaintiff alleged a cause of action for unjust enrichment as to the business in count four and as to Vitale in count eight. The court noted that the counts were identical, incorporating paragraphs 1 through 9 of count one and then alleging that the respective "defendant was unjustly enriched in that it received compensation for the [auto] in excess of the product delivered." The plaintiff also alleged that the defendants' acts resulted in unjust enrichment that caused him harm.[2] The court questioned whether the "cause of action as [pleaded]

[2] Counts four and eight each alleged as to the business and Vitale respectively:

"1. At all times mentioned herein the plaintiff . . . has been a resident of Waterbury . . . .

"2. At all times mentioned herein the defendant, American Auto Sales, LLC . . . has been a business duly licensed in Connecticut . . . .

"3. At all times the defendant represented itself as a licensed dealer of used automobiles.

"4. On July 26, 2010, the defendant did sell to the plaintiff an automobile . . . specifically, a 1997 Chevy Lumina . . . and a warrantee for a price of $2398 . . . . The defendant then later demanded additional monies.

"5. The plaintiff did rely on the representation, both oral and written, that said [auto] was in sound condition and that all mechanical and other deficiencies would be repaired at no cost.

"6. The defendant did make additional positive representations as to the soundness of the [auto].

"7. The defendant did make authoritative representation to the plaintiff of the laws and requirements of . . . Connecticut covering vehicles over ten years old which it knew or should have known to be false.

"8. The plaintiff relied upon the representations of the defendant.

"9. The [auto] was and remains unrepaired and unsound.

"10. The defendant was unjustly enriched in that it received compensation far in excess of the product it delivered.

"11. That such constitutes unjust enrichment causing the plaintiff great harm."

Paragraphs 1 through 9 are common to each of the eight counts in the revised complaint. Paragraphs 10 and 11 are not included in counts other than four and eight.

in and of itself satisfies the elements of a claim of unjust enrichment but based on the many decisions as to the failure to provide more than an incorporation of the contract count . . . the plaintiff has not sufficiently [pleaded] a cause of action for unjust enrichment.'' The court, therefore, granted the motion to strike counts four and eight of the plaintiff's revised complaint. Following the presentation of evidence on the remaining counts, a jury found in favor of the defendants and the court rendered judgment accordingly. The plaintiff appealed.

On appeal, the plaintiff claims that the court erred in striking counts four and eight by misapplying the law or misreading the revised complaint. The question of law presented is whether the court correctly construed counts four and eight of the revised complaint as incorporating allegations of breach of express contract and unjust enrichment in the *same* count.

Unjust enrichment is a common-law doctrine that provides ''restitution, or the payment of money, when justice so requires.'' *United Coastal Industries, Inc.* v. *Clearheart Construction Co.*, 71 Conn. App. 506, 511–12, 802 A.2d 901 (2002). ''Recovery is proper if the defendant was benefitted, the defendant did not pay for the benefit and the failure of payment operated to the detriment of the plaintiff. . . . In the absence of a benefit to the defendant, there can be no liability in restitution; nor can the measure of liability in restitution exceed the measure of the defendant's enrichment. . . . These requirements for recovery of restitution are purely factual.'' (Citations omitted; internal quotation marks omitted.) Id., 512.

Unjust enrichment is a ''doctrine allowing damages for restitution, that is, the restoration to a party of money, services or goods of which he or she was deprived that benefited another.'' Id.

"The right of recovery for unjust enrichment is equitable, its basis being that in a given situation it is contrary to equity and good conscience for [one] to retain a benefit which has come to him at the expense of [another]. . . . A court may award a plaintiff damages under the doctrine of unjust enrichment if the plaintiff can establish (1) that the [defendant was] benefited, (2) that the [defendant] unjustly did not pay the [plaintiff] for the benefits, and (3) that the failure of payment was to the [plaintiff's] detriment." (Citations omitted; internal quotation marks omitted.) *Andy's Oil Service, Inc.* v. *Hobbs*, 125 Conn. App. 708, 714, 9 A.3d 433 (2010), cert. denied, 300 Conn. 928, 16 A.3d 703 (2011).

The case of *Burns* v. *Koellmer*, supra, 11 Conn. App. 375, is instructive. In *Burns*, the defendant on appeal argued "that the plaintiff pleaded a cause of action in express contract only, thereby prohibiting the jury from finding the defendant liable on theories of quantum meruit, unjust enrichment and implied contract. He thus [raised] the corollary argument that the trial court erred by charging the jury on those theories of recovery." Id., 381. The defendant asserted on appeal that "counts one and two of the complaint [alleged] an express contract and that the plaintiff [was], therefore, precluded from recovery on a restitutionary theory. The pleadings of the plaintiff's complaint must be examined to determine whether she alleged these theories." Id., 381–82.

This court stated that the "allegations of the complaint must be given such reasonable construction as will give effect to [it] in conformity with the general theory which it was intended to follow, and do substantial justice between the parties." (Emphasis omitted; internal quotation marks omitted.) Id., 382. "The burden rests on the plaintiff to allege a recognizable cause of action in her complaint." (Internal quotation marks omitted.) Id.

"The theory of restitution as a basis for recovery encompasses both unjust enrichment and quantum meruit as the terms have been used in Connecticut cases. Broadly speaking, the availability of restitution is dependent upon unjust enrichment, that is, upon a perceived injustice because one party has benefited at the expense of another. In a narrower sense, unjust enrichment has been the form of action commonly pursued in this jurisdiction when the benefit that the enriched party receives is either money or property. . . . This doctrine is based upon the principle that one should not be permitted unjustly to enrich himself at the expense of another but should be required to make restitution of or for property received, retained or appropriated. . . . The question is: Did he, [the party liable] to the detriment of someone else, obtain something of value to which he was not entitled?" (Citations omitted; internal quotation marks omitted.) Id., 384.

"It may once have been true that a plaintiff could not assert two theories of recovery in the same action. Such a situation, however, was due to the distinct common law pleading of debt and assumpsit, out of which the theory of restitution has sprung. . . . The system of pleadings has been abolished in this jurisdiction, which now requires the pleadings of facts. Practice Book § [10-1]. The fact-based pleadings now in use can support in a single action previously incompatible theories, and there is no requirement that the plaintiff plead the legal effect of those facts. Practice Book §§ [10-2, 10-4]. Generally, if two theories are alleged in the same pleading, it is for the trier of fact to determine whether the plaintiff has proved both, neither, or but one of them." (Footnote omitted.) Id., 385–86.

This court concluded in *Burns* that "the factual allegations in the pleading support the plaintiff's recovery

on a restitutionary theory.[3] [Our Supreme Court] has "uniformly approved the use of a single count to set forth the basis of a plaintiff's claims for relief where they grow out of a single occurrence or transaction or closely related occurrences or transactions, and it does not matter that the claims for relief do not have the same legal basis. It is only causes of action, that is, the groups of facts upon which the plaintiff bases his claims for relief, are separate and distinct that separate counts are necessary or indeed ordinarily desirable. *Purdy* v. *Watts*, 91 Conn. 214, 216, 99 A. 496 [1916]. *Veits* v. *Hartford*, 134 Conn. 428, 438–39, 58 A.2d 389 (1948) . . . ." (Footnote added; internal quotation marks omitted.) *Burns* v. *Koellmer*, supra, 11 Conn. App. 387–88.

On appeal in the present case, the plaintiff cites *Schifano* v. *Bank of New York Co.*, Superior Court, judicial district of Danbury, Docket No. CV-12-5009097-S (April 1, 2013), which takes a more liberal interpretation of the law of alternative pleading than the Superior Court cases cited in the trial court's memorandum of decision striking the unjust enrichment counts. *Schifano* relies on this court's decision in *United Coastal Industries, Inc.* v. *Clearheart Construction Co.*, supra, 71 Conn. App. 513, to wit: "Although restitution for unjust enrichment often applies to situations in which there is no written contract, it can also apply to situations in which there is a written contract and the party seeking restitution has—breached the contract." (Internal quotation marks omitted.) *Schifano* v. *Bank of New York Co.*, supra, Superior Court, Docket No. CV-12-5009097-S.

United Coastal Industries, Inc., does not concern a motion to strike or construction of pleadings, but stands

[3] "The defendants knew before and during trial that the court was relying upon the theory of unjust enrichment, and implied contract.

"The defendants did not make any motions to separate the two theories relied upon by the plaintiff's complaint. The language of the complaint included the theory of quantum meruit and implied contract." (Internal quotation marks omitted.) *Burns* v. *Koellmer*, supra, 11 Conn. App. 385 n.7.

for the proposition that a party may recover in unjust enrichment despite an express contract between the parties and a breach of that contract. *United Coastal Industries, Inc.* v. *Clearhart Construction Co.*, supra, 71 Conn. App. 512–13. "[U]njust enrichment relates to a benefit of money or property . . . and applies when no remedy is available based on the contract. . . . The lack of a remedy under a contract is a precondition to recovery based on unjust enrichment . . . . It would be contrary to equity and fairness to allow a defendant to retain a benefit at the expense of the plaintiff. . . .

"Partial performance under a contract is sufficient to trigger, and, in some cases, to allow a claim for restitution by a breaching party, when there has been a nonwillful breach of contract, equal to the benefits conferred on the nonbreaching party." (Citations omitted.) Id.

The trial court in *Schifano* denied the motion to strike the unjust enrichment count for the following reasons: "[T]he plaintiff incorporates his first and second cause of action into his third cause of action for unjust enrichment. The defendant points out, in its motion to strike, that the plaintiff references the mortgage deed and the promissory note in his first cause of action, and acknowledges that it is these contracts that govern his relationship with the defendant. The plaintiff does not specifically plead breach of contract until his sixth cause of action. At no point in his third cause of action or any causes of action prior to that does the plaintiff plead a breach of contract. As the [Appellate] Court has acknowledged, plaintiffs are permitted to plead alternative counts alleging breach of contract and unjust enrichment. [See] *Stein* v. *Horton*, [99 Conn. App. 477, 485, 914 A.2d 606 (2007)]. Based on the split in current case law, the court could find either way on this issue. However, the appellate authority implies that the correct conclusion would be that while the plaintiff

may not be entitled to collect under both of these methods, it would be improper to strike this cause of action at this point based on these grounds." *Schifano* v. *Bank of New York Co.*, supra, Superior Court, Docket No. CV-12-5009097-S.

Although *Schifano* is not binding on this court, its rationale is sound and predicated on appellate case law cited therein. "Parties routinely plead alternative counts alleging breach of contract and unjust enrichment, although in doing so, they are entitled only to a single measure of damages arising out of these alternative claims. . . . Under this typical belt and suspenders approach, the equitable claim is brought in an alternative count to ensure that the plaintiff receives some recovery in the event that the contract claim fails." (Citations omitted.) *Stein* v. *Horton*, supra, 99 Conn. App. 485. Moreover, there is a distinction between alleging the existence of a contract and alleging its breach. "[U]njust enrichment relates to a benefit of money or property . . . and applies when no remedy is available based on the contract. . . . The lack of a remedy under a contract is a precondition to recovery based on unjust enrichment . . . . It would be contrary to equity and fairness to allow a defendant to retain a benefit at the expense of the plaintiff." (Citations omitted.) *United Coastal Industries, Inc.* v. *Clearheart Construction Co.*, supra, 71 Conn. App. 512–13.

We now turn to the allegations of the revised complaint in the present case. "The role of the trial court [is] to examine the [revised complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Heyward* v. *Judicial Dept.*, 178 Conn. App. 757, 762, 176 A.3d 1234 (2017). Some latitude must be afforded to self-represented parties as long as it does not interfere with the rights of other parties. See *Shobeiri* v. *Richards*, 104 Conn. App. 293, 296, 933 A.2d 728 (2007).

"Complaints under the Practice Act [of 1879] are to contain a statement of the facts constituting the cause of action. . . . This is to be a plain and concise statement of the material facts on which the pleader relies. . . . Acts and contracts may be stated according to their legal effect . . . and the plaintiff may claim alternative relief, based upon an alternative construction of his cause of action. . . . Several causes of action may be united in the same complaint, if all are upon claims, whether in contract or tort or both, arising out of the same transaction or transactions connected with the same subject of action; but they must be separately stated . . . ." (Citations omitted; internal quotation marks omitted.) *Craft Refrigerating Machine Co.* v. *Quinnipiac Brewing Co.*, 63 Conn. 551, 559, 29 A. 76 (1893). "Where separate and distinct causes of action (as distinguished from separate and distinct claims for relief, founded on the same cause of action or transaction), are joined, the complaint is to be divided into separate counts." (Internal quotation marks omitted.) Id.

Our Supreme Court's interpretation of the words "causes of action" in the Practice Act of 1879, "carries out one of the purposes which we have said the Practice Act [of 1879] was designed to serve, to enable parties to settle all their controversies in a single action . . . and it also furthers the general policy of our law which favors as far as possible the litigation of related controversies in one action. . . . It is now an established principle in our law of civil procedure that two suits shall not be brought for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination can be had as effectually and properly in one suit." (Citations omitted; internal quotation marks omitted.) *Veits* v. *Hartford*, supra, 134 Conn. 435–36.

In the present case, count one of the revised complaint sounded in fraud and contained eleven paragraphs; paragraph 10 contained subparagraphs alleging the nature of the defendants' fraud. Paragraph 11

alleged that the defendants' actions constituted fraud. Paragraph 5, which is at the heart of the defendants' claim that the plaintiff alleged an express contract, states: "The plaintiff did rely on the representation, both oral and written, that said [auto] was in sound condition and that all mechanical and other deficiencies would be repaired at no cost." Reliance is a necessary element of a claim of fraud. See *Leonard* v. *Commissioner of Revenue Services*, 264 Conn. 286, 296, 823 A.2d 1184 (2003) (elements of fraud include false representation made as statement of fact, statement was untrue and known to be untrue by party making it, made to induce other party to act, other party acted on false representation). Given that paragraph 5 alleged an essential element of a claim of fraud and that false representations can be both oral and written, we are unwilling to construe paragraph 5 as alleging an express contract or agreement between the parties.

In each of the subsequent counts of the revised complaint, the plaintiff realleged paragraphs 1 through 9 of count one, including in count three which sounded in breach of contract. Paragraph 10 of the breach of contract count alleged that the plaintiff relied on the representations and agreements with the defendants. Paragraph 11 alleged that the defendants breached their obligation to the plaintiff. Paragraph 12 alleged that "such constitutes breach of contract causing the plaintiff great harm."

Count four of the revised complaint sounded in unjust enrichment against the business and incorporated the first nine paragraphs of count one, which establish the relationship between the parties. These paragraphs did not allege a breach of contract. Paragraph 10 of counts four and eight alleged that "[t]he defendant was unjustly enriched in that it received compensation far in excess of the product it delivered"; paragraph 11 alleged that "such constitutes unjust enrichment causing the plaintiff great harm." The plaintiff did *not* allege an express

contract in his unjust enrichment counts, nor did he incorporate the breach of contract allegations found in paragraphs 11 and 12 of count three and count seven in the unjust enrichment counts. The plaintiff alleged breach of contract in counts three and seven and alleged separately unjust enrichment in counts four and eight. The trial court, therefore, should not have granted the defendants' motion to strike counts four and eight of the plaintiff's revised complaint.

The judgment is reversed and the case is remanded with direction to deny the defendants' motion to strike counts four and eight of the revised complaint and for further proceedings according to law.

In this opinion the other judges concurred.

ROBERT GOGUEN *v.* COMMISSIONER OF CORRECTION
(AC 41339)

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

Syllabus

The petitioner, who had been convicted on a plea of guilty of the crime of sexual assault in the second degree, sought a writ of habeas corpus, claiming that he did not voluntarily enter his guilty plea and that he received ineffective assistance of counsel in connection with his guilty plea. Pursuant to the applicable rule of practice (§ 23-24 [a]), the habeas court declined to issue the writ because, at the time of filing, the petitioner was not in the custody of the respondent, the Commissioner of Correction. Thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that because the petitioner failed to address the threshold question of whether the habeas court abused its discretion in denying his petition for certification to appeal, he was not entitled to appellate review and this court declined to review his claims on appeal.

Argued December 10, 2019—officially released January 28, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, rendered judgment declining

to issue a writ of habeas corpus; thereafter, the court granted the petitioner's motion for reconsideration but denied the relief requested; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Robert Goguen, self-represented, the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, was *Davis S. Shepak*, state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The self-represented petitioner, Robert Goguen, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court declining to issue a writ of habeas corpus. Although the petitioner raises a variety of substantive claims with respect to his underlying conviction on appeal, he has failed to brief the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal. Accordingly, we dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our conclusion. On September 6, 1996, the petitioner pleaded guilty to one count of sexual assault in the second degree in violation of General Statutes (Rev. to 1995) § 53a-71 (a) (3). In accordance with his guilty plea, the petitioner was sentenced to ten years of incarceration, execution suspended after four years, followed by five years of probation. On April 11, 2017, the self-represented petitioner filed a petition for a writ of habeas corpus wherein he alleged that (1) he did not voluntarily enter his guilty plea, and (2) he received ineffective assistance of counsel in connection with his guilty plea.

On April 18, 2017, pursuant to Practice Book § 23-24 (a) (1),[1] the habeas court declined to issue the writ because "[a]t the time of filing . . . the petitioner was not in the custody of the [Commissioner of Correction]." On December 20, 2017, the petitioner filed a motion for reconsideration. The court subsequently granted his motion and, after reconsideration, followed its original ruling declining to issue the writ. On January 11, 2018, the petitioner filed a petition for certification to appeal. The court denied his petition, and this appeal followed.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . If this burden is not satisfied, then the claim that the judgment of the habeas court should be reversed does not qualify for consideration by this court." (Citation omitted; internal quotation marks omitted.) *Logan* v. *Commissioner*

[1] Practice Book § 23-24 provides in relevant part: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction . . . ."

of Correction, 125 Conn. App. 744, 750–51, 9 A.3d 776 (2010), cert. denied, 300 Conn. 918, 14 A.3d 333 (2011).

Our review of the petitioner's briefing to this court indicates that he has failed to brief the threshold question of whether the habeas court abused its discretion in denying his petition for certification to appeal. Under these circumstances, we have repeatedly determined that a petitioner who has failed to brief this issue is not entitled to appellate review. See, e.g., *Cordero* v. *Commissioner of Correction*, 193 Conn. App. 902, 215 A.3d 1282, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019); *Thorpe* v. *Commissioner of Correction*, 165 Conn. App. 731, 733, 140 A.3d 319, cert. denied, 323 Conn. 903, 150 A.3d 681 (2016); *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 8, 790 A.2d 463, cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002); *Reddick* v. *Commissioner of Correction*, 51 Conn. App. 474, 477, 722 A.2d 286 (1999). Because the petitioner has failed to meet the first prong of *Simms* by demonstrating that the denial of his petition for certification to appeal constituted an abuse of discretion, we decline to review his claims on appeal.

The appeal is dismissed.