# IN RE JA'LA L. ET AL*
## (AC 44072)

Prescott, Elgo and Pavia, Js.

*Syllabus*

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children, who had previously been adjudicated uncared for. The respondent claimed that there was insufficient evidence to establish, by clear and convincing evidence, that termination of her parental rights was in the children's best interest and that, in light of her continuing efforts to rehabilitate and the relationship she has with them, she would be capable of rehabilitating and resuming a responsible position in her children's lives as required by the applicable statute (§ 17a-112) if given additional time and appropriate services. *Held* that there was sufficient evidence to support the trial court's conclusion that it was in the best interests of the children to terminate the respondent's parental rights; the respondent did not challenge as clearly erroneous any of the subordinate facts on which the court relied for its conclusion, the respondent's argument that she should have been permitted more time to rehabilitate was unavailing, as it was inconsistent with the repeated recognition by our Supreme Court of the importance of permanency in children's lives, and the respondent's claim ignored the particular needs of the children, who had experienced confusion and anxiety due to the respondent's sporadic visits and their uncertainty about future placements and who would benefit from the ability to build relationships and connect with permanent homes.

Argued October 13—officially released December 1, 2020**

*Procedural History*

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Conway*, *J.*; judgments terminating the respondents' parental rights,

* 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.

** December 1, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

from which the respondent mother filed an appeal to this court. *Affirmed.*

*David Rozwaski*, assigned counsel, for the appellant (respondent mother).

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

*Opinion*

PRESCOTT, J. The respondent, Shanea L., appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her daughters, Ja'La L. and Ja'Myiaha L., on the ground that the respondent has failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[1] On appeal, the respondent concedes that the evidence was sufficient to prove an adjudicatory ground, but claims that the court improperly concluded that termination was in the best interests of the children. We affirm the judgments of the trial court.

The record reveals the following relevant facts and procedural history, as set forth by the trial court in its memorandum of decision or as otherwise undisputed in the record. The respondent is the mother of four children, only two of whom are the subject of this proceeding, namely, Ja'La and Ja'Myiaha. The respondent has a history with the Department of Children and Families

[1] The court also terminated the parental rights of Ja'La's father, Raymond B., and Ja'Myiaha's putative fathers, Kenneth V. and John Doe, in the same proceeding on the ground of abandonment. None of these individuals appealed from the judgments, and, therefore, we refer to Shanea L. as the respondent in this opinion.

(department) that dates back to 2010.[2] Only the respondent's youngest child, Jordyn L., remained in her care at the time of these proceedings.[3]

In January, 2015, the Probate Court vested guardianship of Ja'La and Ja'Myiaha with their maternal great grandmother, due to the respondent's homelessness, substance abuse, and mental health issues. In April, 2017, the girls' great grandmother became unable to care for them because of her own medical conditions. On May 2, 2017, the petitioner obtained an order of temporary custody of Ja'La and Ja'Myiaha. Two days later, the petitioner filed neglect petitions, and, on June 8, 2017, the children were adjudicated uncared for[4] and committed to the care and custody of the petitioner.

Shortly thereafter, Ja'La and Ja'Myiaha were placed with Ja'La's paternal aunt. In October, 2017, while in her aunt's care, Ja'La was severely burned by hot water. She spent two months in a hospital receiving treatment for second and third degree burns, during which time the department offered to transport and supervise weekly hospital visits between the respondent and Ja'La. The respondent visited Ja'La at the hospital only once. Ja'Myiaha was removed from the aunt's care and placed in her present nonrelative foster home, and Ja'La joined her sister on her discharge from the hospital. Ja'La has

[2] In 2010, the respondent was arrested after hitting her oldest child, Jaden L., in the head and causing him to fall down the stairs. The allegations of abuse were substantiated and guardianship was later transferred to Jaden's maternal uncle and his girlfriend.

[3] The department has expressed concern with the respondent's ability to parent Jordyn. According to the respondent, Jordyn was briefly removed from her care. Subsequently, Jordyn was adjudicated neglected and remained in the respondent's care under a court-ordered period of protective supervision.

[4] We note, as did the trial court in its memorandum of decision, that although many of the exhibits from the trial on the termination of the respondent's parental rights reflect that the girls were adjudicated neglected, the original allegation of neglect was amended to allege that the girls were uncared for.

since been removed from that foster home because she threatened to kill Ja'Myiaha and attempted to physically assault her on a number of occasions.[5]

On March 8, 2018, a permanency plan of reunification was approved by the court, and the respondent was issued court-ordered specific steps. Specifically, the respondent was ordered, inter alia, to stop using illegal drugs, seek recommended substance abuse treatment, take part in individual therapy, and visit with her children as often as the department permits. With regard to visitation, the respondent was inconsistent in her efforts to see her children. She became more consistent beginning in August, 2018, when she had two hour supervised visits every other week with both girls. In April, 2019, however, the respondent ceased attending visits entirely. Approximately six months passed before the respondent saw Ja'La and Ja'Myiaha again in connection with a court-ordered psychological evaluation.[6] During those intervening six months, the respondent also did not phone her children despite being permitted to do so.

As to the respondent's substance abuse and recommended treatment, in April, 2018, the department referred her to Family Based Recovery, but she denied drug usage and chose not to submit to urine/hair testing. In December, 2018, the respondent completed a substance abuse evaluation at Midwestern Connecticut Council of Alcoholism (MCCA), at which time she acknowledged smoking marijuana two times a day, and her urine screen tested positive for marijuana. Consequently, the respondent was recommended to attend the MCCA Intensive Outpatient Program. She claimed, however, that she

[5] On December 10, 2019, Ja'La was removed and placed in a new foster home, in which she is the only child.

[6] As part of the evaluation, Ines Schroeder, a psychologist, supervised an interaction between the respondent, Ja'La, Ja'Myiaha, and the respondent's youngest child, Jordyn, on November 7, 2019. A written report regarding the evaluation is dated December 7, 2019.

could not attend the program due to child care issues. The respondent was then referred to Multicultural Ambulatory Addict Services (MAAS), which is a drug treatment program with a child care component. She started the MAAS program in January, 2019, but stopped attending after a March, 2019 incident in which Jordyn assaulted another child and was banned from the program's daycare.

With regard to individual therapy, the department referred the respondent to an in-home program called K-Assist in June, 2017. She worked with K-Assist for about one year, did not attend the psychiatric evaluation that her clinician recommended, and ultimately chose not to participate in the program. For a period of time, the respondent was not willing to engage in any other services offered by the department. In February, 2019, the respondent attended an intake appointment at Integrated Wellness, but her participation in the program was short lived.

On March 8, 2019, the petitioner filed termination of parental rights petitions with respect to the two children on the ground that the court had found them uncared for in a prior proceeding and the respondent has failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and the needs of the children, she could assume a responsible position in the lives of the children. See General Statutes § 17a-112 (j) (3) (B) (i).

The trial on the termination of parental rights petitions took place on December 16, 2019.[7] The petitioner

[7] On March 5, 2019, the respondent filed a motion to revoke commitment of Ja'La and Ja'Mayiaha, pursuant to Practice Book § 35a-14a, alleging that the reason for commitment no longer exists and it is in the children's best interests to return to her care. A hearing on that motion was consolidated with the termination of parental rights trial. Ultimately, the court denied the respondent's motion to revoke commitment, finding that she failed to sustain her burden of proof because grounds for commitment continued to exist.

presented one witness, social worker Elizabeth Reynoso. Reynoso testified, inter alia, that (1) the respondent did not successfully utilize the department's services to address her own needs, (2) Ja'La and Ja'Myiaha have specialized needs that the respondent is not capable of meeting, (3) in a conversation the week prior to trial, the respondent acknowledged that she was not currently able to meet the needs of her children and that she had not done what she needed to do to comply with specific steps,[8] and (4) the department has concerns about the respondent's ability to manage three children at once, particularly because she already was experiencing challenges with the only child currently in her care. The respondent testified on her own behalf, stating, inter alia, that she had started seeing a therapist whom she likes three weeks prior to trial.

On December 20, 2019, the court issued a memorandum of decision granting the petitions to terminate the parental rights of the respondent.[9] Specifically, the court noted that the respondent "suffers from major depressive disorder, post-traumatic stress disorder [(PTSD)] and a personality disorder. At times her anxiety precludes her from leaving her home and she habitually consumes marijuana [despite not having a medical prescription]. [The department] has made reasonable efforts to address [the respondent's] debilitating mental health issues and to foster [the respondent's] relationship and interaction with the girls. The [department's] efforts have had little to no positive impact because [the respondent] has been noncompliant and/or unengaged in referrals and services, the most glaring being her failure to engage

[8] The respondent agreed that this conversation took place and confirmed that she told Reynoso that (1) she has not done what was asked of her, and (2) she was tired of fighting for the children and hoped that they would get the help that they needed.

[9] Both the attorney for the minor children and their guardian ad litem supported the termination of the respondent's parental rights. Additionally, on appeal, the guardian ad litem for the minor children adopted the petitioner's brief and supports the affirmance of the trial court's decision.

in mental health and substance use treatment and her April, 2019 cessation of contact with Ja'La and Ja'Myiaha. Similarly, the testimony and exhibits reveal the respondent . . . is unable or unwilling to benefit from reunification efforts." (Footnote omitted.)

The court also quoted portions of Ines Schroeder's December, 2019 psychological evaluation of the respondent.[10] Specifically, Schroeder indicated in her evaluation that "[the respondent] strives to meet her own needs first with little consideration for the effect on others. This was noted when she voiced that she stopped visits [in April, 2019] because she . . . struggled . . . greatly in having them because they left her too emotional and upset. While it is important that she took care of herself, her choice left her daughters feeling abandoned by [the respondent]. She did not share with them what she was doing, why she was doing it, or work with a therapist to help her process and manage these emotions so she can be available to her daughters. Her choices left her daughters to suffer emotionally. . . .

"While she feels more competent now than in the past, she recognizes her limits and admitted her need to stay away from visits because she is too emotionally overwrought by them. She is pessimistic about achieving her goals. She desires to be present for her children but feels emotionally unprepared. She recognizes her inability to care for the girls now but fears what her decision will mean regarding her future relationship with her children. She wishes to have more time to prepare and be available to the girls."

Schroeder concluded that "[i]t is highly recommended that visits with [the respondent] stop unless it is determined that they are going to [be reunified] in the near future and the visits can be consistent and nurturing for them. Random inconsistent visits are very

[10] Court-ordered psychological evaluations of the respondent, Ja'La, and Ja'Myiaha were conducted by Schroeder in July, 2018 and December, 2019.

confusing to the girls and the discussion of potentially returning to her care without a clear understanding of when that might happen are emotionally damaging. When they witness their younger sister [Jordyn] engaging with [the respondent] and remaining in her care when they cannot can also be emotionally damaging. For them, it can affirm a belief that they are not wanted or valued as their sister is."

With regard to the individual needs of the children, the court found that Ja'La has "profound emotional and behavioral issues," including PTSD and disruptive mood dysregulation. She was hospitalized multiple times in 2018, and again in December, 2019, due to her unsafe and out of control behaviors. Ja'Myiaha is diagnosed with PTSD, attention deficit hyperactivity disorder, and enuresis, and her treatment goals in 2018 through 2019 included "gaining control over her fits of anger, physical and verbal aggression towards animals and people, refusing to listen to adults, nightmares, lying, screaming and difficulty expressing herself." (Internal quotation marks omitted.) The court further stated that "Ja'Myiaha has made considerable progress over the past year or so but she continues to need a level of care that is far beyond [the respondent's] capabilities. Any contact between [the respondent] and the girls is detrimental to the girls' well-being . . . ."

Accordingly, the court found that the ground for termination asserted in the petitions, namely a failure to rehabilitate, had been proven. The court next considered the appropriate disposition of the children and made detailed written findings regarding their best interests pursuant to the criteria set forth in § 17a-112 (k).[11] On the basis of these findings, the court determined by clear and convincing evidence that termination of the respondent's rights was in the best interests of the children. Accordingly, the court terminated her parental

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

rights and appointed the petitioner as the children's statutory parent.

On appeal, the respondent concedes that there were sufficient grounds for the termination of her parental rights. She contends, however, that the trial court improperly determined that it was in the best interests of the children to terminate her parental rights. Specifically, the respondent argues that, in light of her continuing efforts to rehabilitate and the relationship she has with her daughters, the court should have concluded that she is capable of rehabilitating and becoming a responsible parent if given additional time and appropriate services.

We begin with general principles of law and our applicable standard of review. "Proceedings to terminate

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

parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence." (Internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 526, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018). "If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 487–88, 940 A.2d 733 (2008).

At oral argument before this court, counsel for the respondent acknowledged that the respondent's claim on appeal is, in essence, that there was insufficient evidence to establish, by clear and convincing evidence, that termination was in the best interests of the children. The petitioner also invites us to employ the evidentiary sufficiency standard of review in this case. Accordingly, we will apply that standard.[12] When "the appropriate

[12] We leave open the question as to whether this is the appropriate standard of review that must be applied when reviewing a court's determination that termination is in the best interest of a child. See *In re Avia M.*, 188 Conn. App. 736, 739, 205 A.3d 764 (2019) ("the standard of review for the court's determination of the best interest of the child is clearly erroneous"). Additionally, we note that we have previously declined to extend the evidentiary sufficiency standard of review to the court's consideration of the best interest of a child where the evidence supported our decision under either standard. See *In re Jacob W.*, 178 Conn. App. 195, 205 n.10, 172 A.3d 1274 (2017) (citing *In re Elijah G.-R.*, 167 Conn. App. 1, 29–30 n.11, 142 A.3d 482 (2016)), aff'd, 330 Conn. 744, 200 A.3d 1091 (2019); *In re Nioshka A.N.*, 161 Conn. App. 627, 637 n.9, 128 A.3d 619, cert. denied, 320 Conn. 912, 128 A.3d 955

standard of review is one of evidentiary sufficiency . . . [the question is] whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . [W]e review the trial court's subordinate factual findings for clear error, but we review the court's ultimate conclusion . . . on the basis of whether the cumulative effect of the evidence was sufficient to justify the ultimate conclusion." (Citation omitted; internal quotation marks omitted.) *In re James O.*, 160 Conn. App. 506, 522, 127 A.3d 375 (2015), aff'd, 322 Conn. 636, 142 A.3d 1147 (2016).

Here, there is abundant evidence in the record to support the court's conclusion that it was in the best interests of the children to terminate the respondent's parental rights. The respondent does not challenge as clearly erroneous any of the subordinate facts on which the court relied in concluding that termination was in the best interests of the children. Moreover, the respondent's argument that she should have been permitted more time to rehabilitate before her parental rights were terminated is inconsistent with our Supreme Court's repeated recognition of "the importance of permanency in children's lives." *In re Davonta V.*, supra, 285 Conn. 494–95 ("Virtually all experts, from many different professional disciplines, agree that children need and benefit from continuous stable home environments. . . . [S]table and continuous care givers are important to normal child development. Children need secure and uninterrupted emotional relationships with the adults who are responsible for their care." (Citation omitted; internal quotation marks omitted.)).

(2015). This case constitutes another instance in which the evidence supports our decision under either standard.

Likewise, the respondent's claim ignores the particular needs of Ja'La and Ja'Myiaha as expressed in Schroeder's recommendation following the December, 2019 psychological evaluation. Specifically, Schroeder stated that "[i]t is recommended that no further time be afforded to [the respondent] to reunify with Ja'La and Ja'Myiaha as the girls would benefit from some stability about their future and permanency. . . . [The visits the children have had with the respondent] are sporadic and also become a source of unrest and unease. . . . They are confused about their permanent placement because of these random visits. . . . The children continue to wonder whether they are going back with [the respondent] or not. This is a source of unrest and anxiety for them. . . . Discussions in the visits about the future and returning to [the respondent's] care leave them feeling confused and stressed. This disrupts their ability to connect and bond with the people who are caring for them full time. It can also disturb their sense of loyalty and worry their biological mother may be upset they are making these bonds. The severance of the relationship [with the respondent] will permit them to process the loss but build the relationships that will be connected to their permanent homes." Because there was sufficient evidence in the record to support the court's conclusion that it was in the best interests of the children to terminate the respondent's parental rights, the respondent's claim fails.

The judgments are affirmed.

In this opinion the other judges concurred.

# IN RE MIRACLE C.*
## (AC 44006)

Alvord, Cradle and Sullivan, Js.

*Syllabus*

The respondent mother appealed from the judgment of the trial court terminating her parental rights with respect to her minor child. She claimed that the court erroneously concluded that the Department of Children and Families had made reasonable efforts at reunification pursuant to statute (§ 17a-112 (j) (1)) because, although the department's plan was to engage her in dialectical behavioral therapy, it failed to inform her that she should have engaged in that therapy. The court also found, pursuant to § 17a-112 (j) (1), that the mother was unable or unwilling to benefit from reunification efforts. *Held* that because the respondent mother, who did not challenge on appeal the trial court's finding that she was unable or unwilling to benefit from reunification efforts, challenged only one of the two separate and independent bases for upholding the court's determination that the requirements of § 17a-112 (j) (1) had been satisfied, there existed a separate and independent basis for upholding the court's determination, and, therefore, there was no practical relief that could be afforded to her; accordingly, the appeal was dismissed as moot.

Argued October 6—officially released December 1, 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, where the matter was tried to the court, *Marcus, J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Appeal dismissed.*

* 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.

** December 1, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*David J. Reich*, for the appellant (respondent mother).

*Renée Bevacqua Bollier*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, *Stephen G. Vitelli*, and *Evan O'Roark*, assistant attorneys general.

*Opinion*

PER CURIAM. The respondent mother, Priscilla W., appeals from the judgment of the trial court terminating her parental rights with respect to her minor child, M.[1] On appeal, she claims that the court erroneously concluded that the Department of Children and Families (department) had made reasonable efforts at reunification, pursuant to General Statutes § 17a-112 (j) (1). The respondent does not claim that the court erred in its additional conclusion that she was unable or unwilling to benefit from reunification efforts. Because the respondent challenges only one of the two bases for the court's determination that § 17a-112 (j) (1) had been satisfied, we conclude that the respondent's appeal is moot.[2]

The following facts, which were found by the trial court, and procedural history are relevant to this appeal. The child was born at Yale New Haven Hospital (hospital) in 2018. Shortly after the child was born, the hospital made a referral to the department. The referral was made on the basis of, inter alia, the respondent's significant mental health history, including past diagnoses of adjustment disorder with disturbance of conduct, bipolardisorder, depression, oppositional defiance disorder, post-traumatic stress disorder, and anxiety. At the time of the child's birth, the respondent had not been engaged in any mental health treatment since 2013.

[1] The child's father, Nigel C., consented to the termination of his parental rights and has not appealed from that judgment. We refer in this opinion to the respondent mother as the respondent.

[2] The attorney for the child has adopted the brief of the petitioner, the Commissioner of Children and Families.

The respondent also was involved in two domestic violence incidents with the child's father. See footnote 1 of this opinion. The first occurred in April, 2017, and the second occurred on January 4, 2018, while the respondent was pregnant with the child. Despite protective orders protecting the respondent from the child's father, the respondent planned, upon her discharge from the hospital following the birth of the child, to resume living with the child's father.

On February 5, 2018, the petitioner, the Commissioner of Children and Families (commissioner), pursuant to General Statutes § 17a-101g, placed a ninety-six hour hold on the child. On February 9, 2018, the commissioner filed a motion for an order of temporary custody, which was granted ex parte that same day. Also on February 9, 2018, the commissioner filed a neglect petition. The order of temporary custody was consolidated with the neglect petition. After a hearing on February 23, 2018, the court sustained the order of temporary custody and adjudicated the child neglected. On April 19, 2018, the court committed the child to the custody of the commissioner. The commissioner filed a petition for the termination of the parental rights of the respondent on May 7, 2019.

Beginning on October 28, 2019, the court, *Marcus*, *J.*, held a trial on the petition for termination of parental rights. The court rendered judgment terminating the respondent's parental rights on January 6, 2020.[3] The court found in relevant part that (1) the department had made reasonable efforts at reunification and (2) the respondent was unable or unwilling to benefit from those efforts at reunification.

The court set forth detailed findings regarding the services offered to the respondent and her level of engagement with and failure to benefit from such services. Specifically, the court found that despite attending weekly,

[3] The court also denied the respondent's motion to transfer guardianship.

trauma focused therapy through Integrated Wellness with Rachel Forbes, a therapist, from April, 2018 to March, 2019, the respondent made "little to no progress." The respondent also refused to increase her therapy sessions to twice weekly, as recommended by a psychological evaluation in November, 2018.[4]

The court further found that the respondent exhibited "extremely dysregulated behavior," including during one incident on July 2, 2018. That day, the department's social worker had transported the respondent and the child to a doctor's appointment for the child. After the appointment, the respondent and the social worker disagreed about the order of drop-offs. The respondent wanted to be dropped off first, began screaming that she wanted to go home, removed the social worker's keys from the car's ignition, and exited the car with the child. The social worker called the police, while the respondent engaged in a tantrum on the side of the road before eventually handing the child to the social worker. In another incident in March, 2019, the respondent expressed threats during a therapy session with Forbes and was admitted to the inpatient psychiatric unit at Middlesex Hospital. She was discharged with a recommendation for intensive outpatient treatment and prescribed Seroquel for her diagnosis of bipolar disorder.

From March through June, 2019, the court found that the respondent refused to attend either of two different trauma based therapy programs, Yale Intensive Outpatient Treatment Program (Yale program) and State Street Counseling, offered by the department. Although the respondent did complete the Yale program in July, 2019, employees of the Yale program reported to the department that the respondent had failed to accept responsibility for her actions and had no understanding

[4] The respondent also refused to be assessed for medication as recommended by a psychological evaluation performed in May, 2018.

why the child remained in the care of the department. Employees of the Yale program prescribed medication to the respondent, but she did not refill the prescription. The department also referred the respondent to a dialectical behavioral therapist recommended by the Yale program in September, 2019. Although the mother attended an intake session and her first appointment, she failed to attend her second appointment and told the department that she was not interested in dialectical behavioral therapy. The department also referred the respondent for medication assessment and management to the Cornell Scott Hill Health Center, but she failed to attend the intake appointment on August 19, 2019.

The court found that the respondent and the child's father "had an extensive history of domestic violence leading to the issuance of multiple protective orders with the [respondent] listed as the protected person." In light of that history, the department referred the respondent to Family Centered Services for domestic violence services. The social worker from Family Centered Services reported that the respondent had participated in four sessions of a domestic violence program, but she was "not . . . able to report what was discussed or what she had learned" and was "inconsistent in her focus during sessions, as she was often on the telephone." The court found that three additional domestic violence incidents with the child's father occurred in February, 2019.

The department also referred the respondent for supervised visits and parenting classes. The respondent completed the Therapeutic Family Time program with R Kids in July or August, 2018. The clinician from R Kids noted that the respondent did well with the child in visits but that she needed further mental health treatment. The clinician reported that the respondent was unable to appreciate what she did wrong in the July,

2018 roadside tantrum incident with the department's social worker. In October, 2018, Jewish Family Services performed a reunification assessment, which included supervised visits, conferences with the respondent's other providers, and a recommendation regarding reunification. Although the supervised visits ordinarily would include parent coaching, the respondent refused to engage in parent coaching, stating that she did not need any parenting advice or support. The clinician did not recommend reunification. The clinician reported, inter alia, that the respondent "did not understand why domestic violence was an issue nor did she understand safety concerns for [the child] as a result of the significant continuing domestic violence . . . ." The respondent's treatment and service providers, including Forbes and clinicians from Family Centered Services and R Kids, "expressed hesitation regarding reunification because of the [respondent's] emotional volatility, which had not been addressed in therapy or by medication."[5]

The court concluded: "Based [on] the foregoing, this court finds that [the department] has made reasonable efforts to reunite the [respondent] with [the child]. In addition, the court finds that the [respondent] is unable or unwilling to benefit from those efforts. . . . [The department] provided the [respondent] with timely, necessary, and appropriate referrals and services. The

[5] The court also found that the department offered the respondent substance abuse treatment and housing assistance. Specifically, the court found that the respondent had tested positive for marijuana both when she was admitted to Middlesex Hospital in March, 2019, and throughout her engagement with the Yale program. The respondent refused the department's request that she attend substance abuse treatment and stated that she planned to obtain a medical marijuana card, but she never obtained it.

The court also found that the department had provided financial assistance to the respondent to help pay her rent on two occasions. The respondent, however, owed $2100 in back rent and, following her noncompliance with a court-ordered repayment plan, was evicted. In February, 2019, the department made a referral to supportive housing, but she was found ineligible on the basis of the pending eviction, noncompliance with mental health treatment, and continued incidences of domestic violence.

[respondent] either did not engage in the services that were offered to her or when she did engage in treatment she did not benefit from those services as set forth in detail [herein]."

The respondent appeals from the judgment terminating her parental rights on the sole ground that the court erred in finding that the department had made reasonable efforts at reunification. Specifically, she argues that, although "[t]he department's plan was to engage [her] in [dialectical behavioral] therapy in order for [her] to heal from the trauma she experienced as a child and the trauma of the domestic violence she endured from [the child's] father," the department "failed to inform her that she should have been engaged in [dialectical behavioral] therapy." She maintains that "[i]t is an injustice for the department to fail to inform [her] that she should have engaged in [dialectical behavioral therapy] and then prevail on [its] termination of parental rights case."

The commissioner argues that the respondent's appeal should be dismissed as moot because she failed to challenge the court's finding that she was unable or unwilling to benefit from the department's reunification efforts. Thus, the commissioner maintains that there is no relief this court can afford the respondent. We agree with the commissioner that the respondent's appeal is moot because there is no practical relief this court can afford to her on appeal.

"Mootness raises the issue of a court's subject matter jurisdiction and is therefore appropriately considered even when not raised by one of the parties. . . . Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . We begin with the four part test for justiciability . . . . Because courts are established to resolve actual controversies,

before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . [I]t 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. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555–56, 979 A.2d 469 (2009).

"Section 17a-112 (j) (1) requires a trial court to find by clear and convincing evidence that the department made reasonable efforts to reunify a parent and child *unless it finds instead* that the parent is unable or unwilling to benefit from such efforts. In other words, either finding, standing alone, provides an independent basis for satisfying § 17a-112 (j) (1)." (Emphasis in original; internal quotation marks omitted.) *In re Natalia M.*, 190 Conn. App. 583, 588, 210 A.3d 682, cert. denied, 332 Conn. 912, 211 A.3d 71 (2019); see also *In re Jorden R.*, supra, 293 Conn. 556.

In the present case, the court found that the department had made reasonable efforts to reunify the respondent with the child *and* that the respondent was unable or unwilling to benefit from reunification efforts. In other words, it found that both alternatives set forth in § 17a-112 (j) (1) had been satisfied. Because the respondent challenges on appeal only one of the two separate and independent bases for the court's determination that the requirements of § 17a-112 (j) (1) had been satisfied, this court can afford the respondent no relief. See

*In re Natalia M.*, supra, 190 Conn. App. 588 (appeal dismissed as moot where trial court found both alternatives set forth in § 17a-112 (j) (1) had been satisfied and respondent challenged on appeal only one of two bases).

The appeal is dismissed.

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# ENRICO VACCARO, ADMINISTRATOR (ESTATE OF MARIE J. VACCARO), ET AL. *v.* CHRISTOPHER P. LOSCALZO ET AL.

(AC 42951)

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

*Syllabus*

The plaintiffs, V and E, sought to recover damages for, inter alia, the allegedly wrongful death of the decedent, M, as a result of the defendants' negligence. The plaintiffs commenced the action in May, 2016. Despite various pleadings and motions filed by the defendants, the plaintiffs did not serve any discovery, take any depositions, close the pleadings, disclose any experts, or respond to outstanding discovery requests. Additionally, E died in May, 2016, and his estate was never substituted as the proper party in the case. Eventually, in February, 2018, the plaintiffs' counsel relayed to the trial court personal reasons why deadlines and discovery compliance were not met and represented that he needed to withdraw. Following more continuances, V was not able to obtain new counsel, and objected to the plaintiffs' counsel withdrawing from the case. In March, 2019, the court denied the motion to withdraw filed by the plaintiffs' counsel and, in April, 2019, granted the defendants' motion to dismiss for failure to prosecute with due diligence. On appeal to this court, the plaintiffs claimed that the court abused its discretion in rendering a judgment of dismissal. *Held* that the trial court did not abuse its discretion in dismissing the plaintiffs' complaint for failure to prosecute with due diligence; under the factors articulated in *Ridgaway* v. *Mount Vernon Fire Ins. Co.* (328 Conn. 60), the court's sanction of dismissal was proportional to the plaintiffs' misconduct in that the court carefully set forth a pattern of misconduct by the plaintiffs over the course of three years, the plaintiffs were clearly on notice of the possibility of a sanction as the defendants began requesting a judgment of dismissal as a sanction in November, 2017, and the court repeatedly notified the plaintiffs that a dismissal would be forthcoming if they continued their pattern of delays, the court demonstrated the use of

alternatives to dismissal by issuing new orders and warnings of dismissal but these alternatives failed and further alternatives were not required, and, although the court squarely put the blame for the repeated violations of its orders on the plaintiffs' counsel, the record demonstrated that the plaintiffs were aware of the misconduct.

Argued September 16—officially released December 8, 2020

*Procedural History*

Action to recover damages for, inter alia, the allegedly wrongful death of the named plaintiff's decedent as a result of the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson, J.*, granted the defendants' motion to dismiss and rendered a judgment of dismissal, from which the plaintiffs appealed to this court. *Affirmed.*

*Paul T. Edwards*, with whom was *Bruce Jacobs*, for the appellants (plaintiffs).

*Patrick M. Noonan*, with whom, on the brief, was *Kristianna L. Sciarra*, for the appellees (defendants).

*Opinion*

BRIGHT, C. J. The plaintiffs, Enrico Vaccaro (Attorney Vaccaro), acting as the administrator of the estate of Marie J. Vaccaro (decedent), and Enrico F. Vaccaro, the now deceased husband of Marie J. Vaccaro,[1] appeal from the judgment of the trial court dismissing for failure to prosecute with due diligence[2] their substitute complaint against the defendants, Christopher P. Loscalzo,

[1] Apparently, the plaintiff Enrico F. Vaccaro died in May, 2016, but his estate has never been substituted as the proper party in this case. Appellate counsel for the plaintiffs has listed Enrico F. Vaccaro as a party to this appeal. Because the propriety of this failure to substitute is not relevant to the issues on appeal, we consider the appeal as filed.

[2] Practice Book § 14-3 (a) provides: "If a party shall fail to prosecute an action with reasonable diligence, the judicial authority may, after hearing, on motion by any party to the action pursuant to Section 11-1, or on its own motion, render a judgment dismissing the action with costs. At least two weeks' notice shall be required except in cases appearing on an assignment list for final adjudication. Judgment files shall not be drawn except where an appeal is taken or where any party so requests."

Cardiology Associates of New Haven, P.C., Yale Medical Group, Yale University School of Medicine, and Yale New Haven Hospital, Inc. The plaintiffs claim that the court abused its discretion in dismissing the substitute complaint. We affirm the judgment of the trial court.

The trial court, in a very thorough memorandum of decision, set forth the following procedural history of this case. "On May 26, 2016, the plaintiff[s] . . . commenced this wrongful death [and loss of consortium] action by service of writ, summons and complaint against the defendants . . . . The return date is June 21, 2016, and the original complaint was returned to court on June 3, 2016. The original complaint contains six counts . . . .

"The plaintiffs divide the six count complaint into two parallel sets of postmortem and antemortem claims. Counts one through three of the plaintiffs' complaint assert claims for wrongful death, loss of consortium, and a claim for reimbursement for any liability incurred per [General Statutes] § 46b-37 for antemortem or postmortem expenses, relating to the decedent's treatment, stroke, and death. Counts four through six of the plaintiffs' complaint assert antemortem claims for medical malpractice, loss of consortium, and a claim for reimbursement for any liability incurred per § 46b-37 for antemortem expenses, relating to the decedent's treatment and stroke. . . .

"On January 17, 2017, counsel filed a joint scheduling order [that] was approved by the court on January 19, 2017. The scheduling order included the following filing deadlines:

"File certificate of closed pleadings: March 1, 2017

"Exchange written discovery requests: April 1, 2017

"Exchange discovery responses: June 1, 2017

"Complete fact witness depositions: August 1, 2017

"Disclose the plaintiff[s'] experts: October 15, 2017

"Depose the plaintiff[s'] experts: December 15, 2017

"Disclose defense experts: March 2, 2018

"Depose defense experts: May 1, 2018

"Trial management conference: May 21, 2018

"Trial: June 5, 2018.

"Despite these clear deadlines, the plaintiff[s] did not serve any discovery, take any depositions, close the pleadings, disclose any experts, or respond to outstanding discovery requests. [The defendants'] counsel attempted to work with the plaintiff[s'] counsel since the beginning of the case. According to [the defendants'] counsel, the parties discussed certain revisions to the complaint, and after said discussions, [the defendants'] counsel was under the impression that an amended complaint would be forthcoming. However, after waiting several months for an amended complaint, [the defendants'] counsel was forced to file a partial motion to strike.

"On February 17, 2017, the defendants filed a motion to strike counts three through six of the plaintiffs' complaint on the ground that they fail to state claims upon which relief can be granted. The defendants concurrently filed a memorandum of law in support of their motion to strike. The plaintiffs [did not file] an objection. . . .

"On August 24, 2017, the court granted the motion to strike counts three, four, five, and six of the plaintiff[s'] complaint. On October 6, 2017, the defendants answered the remaining counts of the complaint. On November 29, 2017, the defendants filed a motion to dismiss . . . for the plaintiff[s'] failure to diligently prosecute the case. This motion appeared on the court's January 16, 2018 arguable short calendar. Attorney Joseph Gasser appeared for the defendants, however the plaintiff[s']

counsel, [Paul T. Edwards], failed to appear. At oral argument, the court stated that it would give the plaintiff[s'] counsel until February 5, 2018, to respond to the motion to dismiss and would reschedule the matter for argument. . . . As of January 16, 2019, the date of oral argument on the motion, [the plaintiffs] still [have] not complied with the scheduling order or the defendants' request for discovery.

"[O]n February 7, 2018, the court denied the defendant[s'] motion to dismiss and issued the following order: [February 28, 2018 10 a.m.] This case is scheduled for a status conference with the Honorable Robin L. Wilson on the date and time shown above. All counsel of record must attend. The court further gives notice that it will hear argument on the record regarding the defendant[s'] pending motion to dismiss. Counsel for the plaintiff[s] must appear at the scheduled status conference and hearing and show cause why this action should not be dismissed and costs awarded for failure to diligently prosecute. Failure to appear may result in entry of dismissal or default. Please report to Judge Wilson's courtroom at 4C (New Haven Superior Court, 235 Church St., New Haven). . . .

"On November 29, 2017, the same date the defendants filed their motion to dismiss, they filed a motion for order of compliance. In that motion, the defendants move[d] for an order requiring [the plaintiffs] to comply with the defendants' interrogatories and requests for production dated July 21, 2017, or, in the alternative, for an order of nonsuit. Responses were due by September 21, 2017; [the plaintiffs] [have] neither responded nor sought an extension of time to respond. Counsel for the defendants attempted to resolve [the plaintiffs'] noncompliance without consuming judicial resources. . . . Having received no response from [the plaintiffs'] counsel, the defendants respectfully request[ed] that this court either order [the plaintiffs] to respond or enter

an order of nonsuit against [the plaintiffs] for failure to comply with [their] discovery obligations. . . . On February 7, 2018, the court ordered the plaintiff[s] to comply with discovery by March 2, 2018.

"In accordance with the court's order issued on February 7, 2018, a status conference was held on February 28, 2018. At the status conference, [the plaintiffs'] counsel acknowledged that compliance with the deadlines set forth in the scheduling order had not been met, nor had discovery been produced in response to the defendants' discovery requests which were due on September 21, 2017. [The plaintiffs'] counsel relayed to the court and to [the defendants'] counsel personal reasons why deadlines were not met and discovery compliance had not been met. After discussions with both counsel, the court issued the following order in accordance with the discussions at the status conference: Pursuant to a status conference held on February 28, 2018, the parties have agreed to file a joint modified scheduling order on or before March 14, 2018. Failure to comply with the court's order by filing said modified scheduling order on the date herein ordered could result in the entry of a dismissal or default against the noncomplying party. . . . On March 16, 2018, [the plaintiffs'] counsel filed a modified scheduling order signed by both counsel, and the court approved same on March 20, 2018. The modified scheduling order . . . included the following deadline dates:

"File certificate of closed pleadings: March 31, 2018

"Exchange written discovery requests by: June 1, 2018

"Exchange responses to discovery requests by: September 1, 2018

"Any dispositive motions to be filed by: October 15, 2018

"Responses to dispositive motions [to be filed] by: November 15, 2018

"Dispositive motions shall be marked ready no later than: December 3, 2018

"Disclose [the plaintiffs'] experts by: August 15, 2018

"Disclose the defendants' experts by: January 15, 2019

"Complete depositions:

"[The plaintiffs'] fact witnesses by: April 30, 2018

"[The defendants'] fact witnesses by: June 30, 2018

"[The plaintiffs'] experts by: November 1, 2018

"[The defendants'] experts by: April 1, 2019.

"Counsel further agreed that the plaintiff[s] would respond to the defendants' outstanding written discovery on/or before March 28, 2018. Based upon the filing of the modified scheduling order by the parties, and the court's approval of same, a trial date was continued to March 19, 2019, from its original date of June 5, 2018, and a trial management date was set for March 5, 2019.

"On March 15, 2018, seven months after the court's August 24, 2017 ruling on the defendants' motion to strike, the plaintiff[s] filed a substituted complaint. The . . . substituted complaint, which was filed a year ago, still contains a noncognizable statutory claim under . . . § 46b-37, which was stricken by this court. In addition, the plaintiff Enrico F. Vaccaro died in May, 2016, nearly three years ago and his estate has not been substituted as the proper party in this case.

"Due to the plaintiff[s'] counsel's continued failure to prosecute this case, by failing to comply with scheduling orders, and by failing to respond to the defendants' request for discovery, the defendants, again, on October

15, 2018, moved to dismiss the case for lack of diligence. The defendant[s] also filed a motion for summary judgment on grounds that the plaintiff[s] failed to disclose an expert in support of [their] medical negligence claim and derivative loss of consortium claim and therefore could not meet [their] burden of proof, thus, entitling the defendants to judgment as a matter of law. Both motions were scheduled for oral argument on December 10, 2018. During oral argument on the motions, counsel for the plaintiff[s] represented that he needed to get out of the case due to health issues and personal issues and requested thirty days to allow the plaintiff[s] to obtain new counsel. Counsel for the plaintiff[s] acknowledged on the record that the case had not moved forward, and that the lack of prosecution of the case was no fault of the plaintiff[s'] but rather [was] counsel's fault. Counsel further stated that if the court was going to issue a sanction for failure to prosecute with diligence, it should sanction counsel. Attorney Edwards asked the court for thirty days so that he could assist the plaintiff in obtaining new counsel. The court granted [Attorney Edwards'] request and gave him until January 9, 2019, to file a withdrawal of appearance in accordance with [Practice Book] § 3-10. The court further ordered that an appearance by new counsel be filed by no later than January 9, 2019. The court rescheduled oral argument on the motion to dismiss . . . and the motion for summary judgment . . . for January 14, 2019. The court heard oral argument on January 14, 2019. The [plaintiffs'] counsel failed to comply with the court's order of January 9, 2019. At oral argument on January 14, 2019, [Attorney Edwards] stated that the reason he did not file the withdrawal was because he was not comfortable filing the motion to withdraw and leav[ing] [Attorney Vaccaro] hanging. Counsel stated that he had been making attempts to assist [A]ttorney Vaccaro in obtain-

ing new counsel, and that he did not want to abandon him without assisting him in obtaining new counsel. . . .

"On January 14, 2019, after the court heard argument, it issued the following order: Based upon argument before the court on January 14, 2019, the court hereby issues the following order. By no later than February 13, 2019, counsel for the plaintiff[s] shall file a withdrawal of appearance in accordance with Practice Book § 3-10. It is further ordered that by no later than February 13, 2019, the plaintiff[s] shall file appearance[s] as self-represented [parties][3] or new counsel shall file an appearance by said date. All expert disclosures shall be filed by no later than February 13, 2019. Oral argument on the motion to dismiss . . . and motion for summary judgment . . . is rescheduled for Monday, February 18, 2019, at 9:30 a.m. . . . Any supporting or opposing memoranda must be on file no later than the previous Thursday. . . . [A]ttorney Vaccaro is hereby ordered to appear at oral argument. No continuances will be granted absent compelling reasons and for good cause shown. In light of the court's ruling above, jury selection in this case is continued to July 12, 2019. A [trial management conference] is scheduled for June 28, 2019, at [11 a.m.] The clerk is directed to schedule oral argument and the new trial and [trial management conference] dates in accordance with the court's order. . . . At the request of the plaintiff[s'] counsel, and with the consent of the defendant[s'] counsel, oral argument was continued from February 18, 2019, to March 11, 2019.

"On March 11, 2019, the plaintiff[s'] counsel and the defendants' counsel appeared. Although the court ordered

[3] We note that the court misstated that Attorney Vaccaro could file an appearance as a "self-represented party." Rather, he could have filed an appearance as the attorney acting on behalf of himself *as the administrator of the estate.*

the plaintiff [A]ttorney Vaccaro to appear, due to a medical condition, the court allowed him to appear by phone. As of March 11, 2019, the plaintiff[s'] counsel failed to comply with the court's January 14, 2019 order. A new appearance of counsel was not filed on or before February 13, 2019, and had not been filed as of the date of oral argument. Expert disclosures were filed the day after the court-ordered deadline without any explanation from counsel of any compelling reason or good cause for missing the court-ordered deadline.

"Again, after the court having given the plaintiff[s'] counsel ample opportunity to get this case on track and obtain new counsel . . . he failed to do so. Moreover, [A]ttorney Vaccaro vehemently objected to counsel's motion to withdraw appearance and disputed the representations made to the court by the plaintiff[s'] counsel regarding counsel's assistance in obtaining new counsel . . . . [Attorney] Vaccaro further represented that he looked at the Judicial Branch website and noticed that not much was going on with the case. He contacted Attorney Edwards, [who] represented to him, at that time, that he was going to get the case on track. [Attorney] Vaccaro represented that he hired Attorney Edwards in 2016, and that he just learned, in February, 2019, of [A]ttorney Edwards' need to withdraw from the case, and the basis of [A]ttorney Edwards' motion to withdraw. [Attorney] Vaccaro further represented that to allow [A]ttorney Edwards to withdraw under the circumstances would significantly prejudice his interests. He further argued that [A]ttorney Edwards had not established good cause, under rule 1.16 of the [R]ules of [Professional] [C]onduct to withdraw from the case. After hearing argument of all counsel, the court ruled from the bench on [Attorney Edwards'] motion to withdraw and denied the motion. The court advised the parties that it would take the motion to dismiss under consideration and issue a written decision on the motion."

(Citations omitted; footnote added; internal quotation marks omitted.)

On April 8, 2019, the court, pursuant to Practice Book § 14-3 (a), granted the defendants' motion to dismiss for failure to prosecute with due diligence. In its decision, the court reasoned as follows: "The plaintiff[s] commenced the present action in May, 2016, nearly three years ago. In the nearly three years since the commencement of this case, the case has barely been advanced. . . . [I]n January, 2017, the parties jointly submitted a scheduling order, which the court approved. Pursuant to this scheduling order, trial was scheduled for June 5, 2018. Despite the clear deadlines set forth in the scheduling order, the plaintiff[s] failed to serve any discovery, take any depositions, close the pleadings, timely disclose any experts, or respond to outstanding discovery requests.

"In addition, [the] defendants filed a motion to strike, to which the plaintiff[s] failed to object, or, appear at oral argument. The court granted the motion to strike, and, although the plaintiff[s] filed a substituted complaint, the complaint still contains a noncognizable statutory claim under . . . § 46b-37, which was stricken by the court on August 24, 2017. In addition, the plaintiff Enrico F. Vaccaro, who has a loss of consortium claim, died in May, 2016, nearly three years ago, and his estate has not been substituted as the proper party.

"Due to the plaintiff[s'] inaction on this case, the defendants filed a motion to dismiss on November 29, 2017. This court denied the motion on February 7, 2018, and scheduled the matter for a status conference on February 28, 2018. The parties appeared for the status conference at which time [the] plaintiff[s'] counsel requested additional time to comply with discovery, and represented to the court that he would get the case back on track. Based upon counsel's representations at the status conference, the court ordered counsel to

jointly file a modified scheduling order by no later than March 14, 2018. [The] [plaintiffs'] counsel filed the modified scheduling order on March 16, 2018, and the court approved same on March 20, 2018. Pursuant to the modified scheduling order, the trial in this case was continued from its original date of June 5, 2018, to March 19, 2019.

"Between March, 2018 and October, 2018, counsel for the plaintiff[s] did absolutely nothing on the case, despite his representations to the court at the status conference held in February, 2018, and despite the clear deadlines set forth in the modified scheduling order. On October 15, 2018, the defendants again filed a motion to dismiss for lack of diligence. The court scheduled a show cause [hearing] . . . for Monday, December 10, 2018, at 9:30 a.m. . . . [ordering] [t]he plaintiff[s] . . . to produce the requested discovery by said date or appear and show cause why a dismissal should not be entered for failing to prosecute this case. . . . Counsel appeared on December 10, 2018. At the hearing, [the] plaintiff[s'] counsel represented to the court that he was having personal issues and that he needed to get out of the case and that he wanted thirty days to file a motion to withdraw and to assist [the plaintiff] [A]ttorney Vaccaro in getting new counsel. Attorney Edwards acknowledged that the case had not been prosecuted diligently and that the status of the case was no fault of counsel's client but [was] due to his own actions. Pursuant to this hearing, the court issued an order directing Attorney Edwards to file a motion to withdraw by January 9, 2019, and that new counsel file an appearance by January 9, 2019. The court rescheduled argument on the motion to dismiss and motion for summary judgment for January 14, 2019. [Attorney Edwards] appeared on January 14, 2019, and once again . . . failed to comply with the court's order. Pursuant to the January 14, 2019 hearing, the court ordered counsel for the plaintiff[s] to file a motion to withdraw by no later

than February 13, 2019. The court further ordered [the plaintiff] [Attorney Vaccaro] to file an appearance as a self-represented party or [to have] new counsel file an appearance by no later than February 13, 2019. [See footnote 3 of this opinion.] The court rescheduled oral argument on the motions to dismiss and for summary judgment for February 18, 2019. In light of the court's January 14, 2019 order, the court continued the trial in this matter to July 12, 2019. The court further ordered [the plaintiff] [A]ttorney Vaccaro to appear at the February 18, 2019 hearing. . . . [A]t the request of [Attorney Edwards], and with the consent of [the] defendants' counsel, the February 18, 2019 hearing was continued to March 11, 2019. . . . As of the date of the March 11, 2019 hearing, there had been zero discovery. The plaintiff[s] had not responded to basic discovery requests, which were served back in July, 2017. This court had twice ordered the plaintiff[s] to respond to discovery without avail. No depositions have occurred despite the defendant[s'] multiple notices for [the] plaintiff[s'] depositions. The pleadings have not been closed.

"[The] [p]laintiff[s'] [counsel] has failed to correct defects in his complaint in accordance with the court's ruling on the defendant[s'] motion to strike, and an estate has not been substituted as the proper party for the plaintiff decedent Enrico F. Vaccaro, who died in May, 2016. This court on numerous occasions has provided the plaintiff[s'] counsel with every opportunity to get this case on track, whether it be by way of the granting of a continuance so that counsel could conduct discovery and disclose experts, or whether it was for the purpose of withdrawing from the case and assisting [A]ttorney Vaccaro in obtaining new counsel. Counsel simply failed to comply with the court's orders. . . .

"Accordingly, for the foregoing reasons, the court concludes that the plaintiff[s] [have] failed to prosecute this case with diligence, and the defendants have been severely prejudiced as a result of same. The defendants' motion to dismiss is therefore granted."

After the court rendered its judgment, the plaintiffs' filed a motion for reargument, which the court denied on April 30, 2019. On May 17, 2019, the plaintiffs filed the present appeal. The plaintiffs also filed a motion to open with the trial court, which the court denied on June 10, 2019. The plaintiffs did not amend their appeal to include the court's denial of its motion to open.[4]

On appeal, the plaintiffs claim that the court abused its discretion in dismissing the substitute complaint for failure to prosecute with due diligence under Practice Book § 14-3. See footnote 2 of this opinion. They argue that the sanction of dismissal was disproportionate "under the totality of the circumstances, particularly where lesser sanctions were available and appropriate, and the plaintiffs, themselves, were not, in any way, responsible for the status of the case and the failure to comply with discovery." In response, the defendants argue that "[t]he record reveals a flagrant and persistent pattern of violating not one, but half a dozen, court orders over the course of one year. . . . In three years, no discovery had been completed . . . . The trial court was patient and clear with each order, granting many extensions and continually warning that the case was subject to dismissal if [the] plaintiffs did not comply.

[4] We note that "[d]isciplinary dismissals pursuant to Practice Book § 14-3 . . . may be set aside and the action reinstated to the docket upon the granting of a motion to open filed in accordance with Practice Book § 17-43 and [General Statutes] § 52-212. *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 429, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018); cf. *Pump Services Corp.* v. *Roberts*, 19 Conn. App. 213, 216, 561 A.2d 464 (1989) (concluding that proper way to open judgment of dismissal rendered pursuant to predecessor to Practice Book § 14-3 is to file motion to open pursuant to predecessor to Practice Book § 17-4, which parallels General Statutes § 52-212a)." (Internal quotation marks omitted.) *Harris* v. *Neale*, 197 Conn. App. 147, 156, 231 A.3d 357 (2020). In *Harris*, we recognized that "there is a conflict in our case law as to whether a motion to open a judgment of dismissal rendered pursuant to Practice Book § 14-3 is governed by § 52-212 and Practice Book § 17-43 or § 52-212a and Practice Book § 17-4." Id., 156 n.9. Because this conflict does not affect the outcome of this appeal, we need not address it at this time.

. . . This persistent pattern of complete neglect was more than a sufficient basis for the trial court to exercise its discretion and dismiss this case for failure to prosecute with reasonable diligence." (Citation omitted; internal quotation marks omitted.) We agree with the defendants.

"Practice Book § 14-3 (a) permits a trial court to dismiss an action with costs if a party fails to prosecute the action with reasonable diligence. The ultimate determination regarding a motion to dismiss for lack of diligence is within the sound discretion of the court. . . . Under [§ 14-3], the trial court is confronted with endless gradations of diligence, and in its sound discretion, the court must determine whether the party's diligence falls within the reasonable section of the diligence spectrum . . . .

"We review the trial court's decision for abuse of discretion. . . . In determining whether a trial court abused its discretion, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . .

"A trial court properly exercises its discretion to dismiss for failure to prosecute [with reasonable diligence] if the case has been on the docket for an unduly protracted period or the court is satisfied from the record or otherwise that there is no real intent to prosecute . . . ." (Footnote omitted; internal quotation marks omitted.) *Fleischer* v. *Fleischer*, 192 Conn. App. 540, 546, 217 A.3d 1028 (2019).

"The court's discretion, however, is not unfettered; it is a legal discretion subject to review. . . . [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised

in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Harris* v. *Neale*, 197 Conn. App. 147, 157, 231 A.3d 357 (2020). "[E]ven though a trial court has wide discretion in determining whether to dismiss an action for failure to prosecute it with due diligence, there are limits to this discretion. Importantly, sanctions imposed by the court must be *proportional* to the violation or misconduct. . . .

"Our Supreme Court has identified the following factors as relevant to determining the proportionality of a sanction: the nature and frequency of the misconduct, notice of the possibility of a sanction, the availability of lesser sanctions, and the client's participation in or knowledge of the misconduct. . . . Our Supreme Court also noted that these principles reflect that, in assessing proportionality, a trial court must consider the totality of the circumstances, including, most importantly, the nature of the conduct itself. . . . [Although] . . . the[se] . . . factors were established [by our Supreme Court in *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 776 A.2d 1115 (2001)] in the context of noncompliance with discovery orders, [they apply to all sanction orders, including] . . . a failure to prosecute with due diligence pursuant to Practice Book § 14-3." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 548–49, citing *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 71–73, 176 A.3d 1167 (2018) (holding that proportionality test set forth in *Millbrook Owners Assn., Inc.*, applies to all sanctions of nonsuit). We examine the *Ridgaway* factors in relation to the present case.

"With respect to the first factor, the nature and frequency of the misconduct, it is logical that particularly egregious or frequent misconduct, such as repeated refusals to comply with a court order, warrants more severe sanctions." *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 549. In the present case, the court carefully set forth in its memorandum of decision a pattern of misconduct by the plaintiffs over the course of three years, which included the repeated failure to comply with discovery requests, the repeated failure to comply with court-ordered deadlines, the failure to replead properly after the defendants' motion to strike had been granted in 2017, and the failure to substitute a proper party for a deceased party.

"With respect to the next factor—notice of the possibility of a sanction—our Supreme Court noted [in *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 74] that in instances in which our appellate courts have upheld the sanction of a nonsuit, a significant factor has been that the trial court *put the plaintiff on notice* that noncompliance would result in a nonsuit." (Emphasis in original.) *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 550. In the present case, the defendants, in November, 2017, began requesting a judgment of dismissal as a sanction for the plaintiffs' failure to prosecute this case with due diligence. The court repeatedly notified the plaintiffs that a dismissal would be forthcoming if they continued their pattern of delays. Clearly, they were on notice.

"Next, in evaluating the third factor, i.e., the availability of lesser sanctions, [our Supreme Court has] noted that [it] has refused to uphold a sanction of nonsuit when there were available alternatives to dismissal that would have allowed a case to be heard on the merits while ensuring future compliance with court orders." (Internal quotation marks omitted.) Id., 550–51; see id., 551 (noting that trial court in that case had not stated

on record that it had considered lesser sanction before rendering judgment of dismissal). In the present case, the court repeatedly issued new orders with which, the plaintiffs, again and again, failed to comply. The case had been stalled on the court's docket for approximately three years, and the plaintiffs had failed to comply with several of the court's orders, including discovery orders. The court made a gallant effort to move things along, but the plaintiffs appeared unwilling to do so. Although the court did not state on the record that alternatives to dismissal had been considered, the court repeatedly employed alternatives by issuing new orders and warnings of dismissal to the plaintiffs. We conclude, therefore, that the court demonstrated the use of alternatives to dismissal, but that these alternatives failed. Further alternatives were not required.

Moreover, the only alternative suggested by the plaintiffs, sanctioning counsel, would not have served the interest of the court or mitigated the impact on the defendants from the plaintiffs' failure to prosecute the case with due diligence. The trial court has an interest in ensuring that its orders are respected and followed. The court also has an interest in the timely resolution of the cases on its docket. Similarly, the defendants had an interest in the prompt resolution of the plaintiffs' allegations that the defendants had engaged in medical malpractice. Sanctioning counsel for his failure to follow court orders and advance the case would not have brought the case any closer to resolution. In fact, it is undisputed that, at the time the court rendered its judgment of dismissal, the case, due to the plaintiffs' inaction, in no way was close to being ready for trial, and sanctioning counsel would not have made it so. In this regard, the present case is markedly different than *Fleischer*, on which the plaintiffs principally rely. In *Fleischer*, we concluded that the trial court abused its discretion in ordering a disciplinary dismissal, in part because the

parties were prepared to proceed with a hearing on the merits on the very day that the court dismissed the case due to counsel's prior delay in prosecuting the matter. *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 550. As we noted: "There was nothing further the defendant needed to do to comply with [Practice Book] § 14-3, as he was already willing and able to prosecute the motions that day." Id.[5] That certainly was not the circumstance facing the trial court in the present case when it rendered its judgment of dismissal.

"As to the last factor, i.e., the client's participation in or knowledge of the misconduct, [our Supreme Court has] stated that [w]hether the misconduct was solely attributable to counsel and not to the party also has been a factor in assessing whether a less severe sanction than a nonsuit or dismissal should have been ordered." (Internal quotation marks omitted.) Id., 551. In the present case, on December 10, 2018, the court heard argument on the defendants' motions to dismiss and for summary judgment. During argument, Attorney Edwards told the court that the defendants had been "exceedingly gracious throughout this matter" and that he, regretfully, needed to withdraw from the case due to health and personal issues. He requested thirty days to allow the plaintiffs to obtain new counsel. Attorney Edwards acknowledged on the record that the failure to prosecute the case was his fault and not the fault of the plaintiffs. He also stated that he needed thirty days to assist the plaintiffs in obtaining new counsel. The court admonished Attorney Edwards because there had been no movement in this case. The court, however, gave

[5] We further noted in *Fleischer* that, unlike in the present case, the court provided little or no prior notice of the possibility that it would render a disciplinary dismissal. *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 550. Furthermore, unlike in the present case, the trial court in *Fleischer* had alternatives to dismissal available to it that would have addressed the prejudice claimed by the plaintiff. See id., 552–53.

Attorney Edwards until January 9, 2019, and it rescheduled oral argument on the plaintiffs' motions to January 14, 2019.

At the January 14, 2019 hearing, Attorney Edwards stated that he had been making attempts to assist Attorney Vaccaro in obtaining new counsel. He stated that he had spoken to two different attorneys. The court, again, admonished Attorney Edwards for failing to follow the court's orders. It then issued an order requiring Attorney Edwards to file a motion to withdraw his appearance on or before February 13, 2019. It further ordered Attorney Vaccaro to file an appearance by that date or to have new counsel do so. The court again rescheduled the hearing on the defendants' motions to dismiss and for summary judgment for February 18, 2019. The court also ordered Attorney Vaccaro to appear for that hearing. That hearing, however, at the plaintiffs' request, again was rescheduled, this time to March 11, 2019.

At the March 11, 2019 hearing, Attorney Edwards informed the court that Attorney Vaccaro was unable to appear at the courthouse, and he suggested that the court call him by telephone. The court, obviously, was troubled by another direct violation of its orders, but it did allow Attorney Edwards to contact Attorney Vaccaro via his cell phone. As of the date of the hearing, March 11, 2019, Attorney Vaccaro had neither hired new counsel nor filed an appearance, despite having been ordered by the court to do so on or before February 13, 2019. No apparent effort had been made by the plaintiffs to comply with the court's January 14, 2019 order. During the hearing, Attorney Vaccaro objected to Attorney Edwards' withdrawal. Although he admitted knowing that Attorney Edwards needed to withdraw from the case for "about a month or so," he contended that he had been unable to find replacement counsel. Although Attorney Vaccaro stated that, in 2018, he was unaware of the delays in this case, he admitted that he

"found out about [it] this year . . . ." He also told the court that he had checked the Judicial Branch website and that anyone "who looks at the judicial website sees that little or nothing has been done in this case." That online judicial docket contains all of the orders of the court, as well as its repeated warnings that the case would be dismissed if the plaintiffs' failed to comply with the court's orders. Although the court in this case squarely put the blame for the repeated violations of its orders on Attorney Edwards, we conclude that the record demonstrates that the plaintiffs were aware of the misconduct.

Our Supreme Court has observed that "[i]n the disciplinary dismissal context . . . [a] trial court, for example, might find an attorney's misconduct to be egregious if the attorney represented that his nonappearance was caused by difficulties with his car without disclosing that he had ready access to alternative transportation. A trial court might make a similar finding if, in one case, the attorney repeatedly, and without credible excuse, delayed scheduled court proceedings. Nonappearances that interfere with proper judicial management of cases, and cause serious inconvenience to the court and to opposing parties, are categorically different from a mere failure to respond to a notice of dormancy pursuant to Practice Book § 251 [now § 14-3]; see *Lacasse* v. *Burns*, [214 Conn. 464, 474, 572 A.2d 357 (1990)]; or a single failure to appear, in a timely fashion, after a luncheon recess. See *Gionfrido* v. *Wharf Realty, Inc.*, [193 Conn. 28, 34 n.6, 474 A.2d 787 (1984)]. *Ruddock* v. *Burrowes*, [243 Conn. 569, 576 n.12, 706 A.2d 967 (1998)]." (Internal quotation marks omitted.) *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 50–51 n.17, 12 A.3d 885 (2011). In light of the record in this case, including the court's repeated efforts to accommodate the plaintiffs, and, on the basis of the foregoing analysis of the *Ridgaway* factors, we conclude that the

court's sanction of dismissal was proportional to the plaintiffs' misconduct. Accordingly, the court did not abuse its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

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## CHRYSOSTOME KONDJOUA *v.* COMMISSIONER OF CORRECTION
## (AC 43322)

Moll, Alexander and DiPentima, Js.

*Syllabus*

The petitioner, who had previously been convicted, on a guilty plea, of the crime of sexual assault in the third degree, sought a second writ of habeas corpus, claiming that his guilty plea was not made knowingly, intelligently and voluntarily because, at the time of his plea, he was under the influence of medication, he did not receive the benefit of an interpreter and his trial counsel had coerced him. The habeas court sua sponte dismissed the petition pursuant to the applicable rule of practice (§ 23-29 (3)) as an improper successive petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his claim involved an issue that was debatable among jurists of reason, that a court could resolve the issue in a different manner, or that the question raised was adequate to deserve encouragement to proceed further.
2. The petitioner could not prevail on his claim that the habeas court improperly dismissed his second habeas petition as an improper successive petition, as the second petition presented the same legal ground and sought the same relief as the first petition, and the petitioner failed to state new facts not reasonably available at the time of the first petition.

Argued October 7—officially released December 8, 2020

*Procedural History*

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

*Peter G. Billings*, for the appellant (petitioner).

*Jennifer F. Miller*, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley* and *Matthew C. Gedansky*, state's attorneys, and *Angela Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

DiPENTIMA, J. The petitioner, Chrysostome Kondjoua, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as an improper successive petition pursuant to Practice Book § 23-29 (3). On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly dismissed his habeas petition as successive. We dismiss the appeal.

In the petitioner's appeal from the denial of his first habeas petition, we set forth the following facts and procedural history. "The petitioner is a Cameroonian citizen who has resided in the United States since 2010 as a long-term, permanent resident with a green card. He was arrested on November 29, 2013, and charged with the sexual assault in the first degree of an eighty-three year old woman, for whom he had been working. The petitioner entered a plea of not guilty and elected a jury trial.

"On December 16, 2014, after the jury had been picked and evidence was set to begin, the petitioner accepted a plea agreement to the reduced charge of sexual assault in the third degree. Before accepting the petitioner's guilty plea, the trial court canvassed him. The trial court found that the plea was made knowingly, intelligently, and voluntarily, and ordered a presentence investigation. On March 4, 2015, the court sentenced

the petitioner to the agreed disposition of five years of imprisonment, execution suspended after twenty months, with ten years of probation. The petitioner also was required to register as a sex offender for ten years. The petitioner did not file a direct appeal.

"While the petitioner was serving his sentence, the United States Department of Homeland Security (department) initiated deportation proceedings against him. The department cited the petitioner's March, 2015 conviction for sexual assault in the third degree as the ground for removal and stated that the petitioner was subject to removal because he had been convicted of an aggravated felony and a crime of moral turpitude, in violation of § 237 (a) (2) (A) (iii) and § 237 (a) (2) (A) (i) of the Immigration and Nationality Act, respectively. A warrant for the petitioner's arrest was served on July 14, 2015, and the petitioner was taken into the department's custody.

"On June 19, 2015, the petitioner, then self-represented, filed a petition for a writ of habeas corpus. Appointed counsel thereafter filed an amended petition. On October 17, 2017, counsel filed a second amended petition . . . . It alleged two claims: Ineffective assistance of trial counsel for the improper advice concerning the immigration consequences of a guilty plea and a due process challenge to his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made. On December 19, 2017, the respondent, the Commissioner of Correction, filed a return alleging that the petitioner's due process claim was in procedural default. The petitioner filed a reply denying the allegations in the respondent's return on December 28, 2017.

"On May 16, 2018, the habeas court issued a memorandum of decision in which it denied the petition. The habeas court found that the petitioner failed to establish that trial counsel had rendered ineffective assistance. . . . Regarding the petitioner's second claim,

the court found that the petitioner had not established cause and prejudice sufficient to overcome the procedural default." (Footnotes omitted.) *Kondjoua* v. *Commissioner of Correction*, 194 Conn. App. 793, 795–99, 222 A.3d 974 (2019), cert. denied, 334 Conn. 915, 221 A.3d 809 (2020). On appeal, this court rejected the petitioner's claims that the first habeas court erred in rejecting his ineffective assistance of counsel claim and in concluding that his second claim, that his plea was not made knowingly, intelligently, and voluntarily, was procedurally defaulted. Id., 799–807.

The self-represented petitioner filed a second habeas action on August 17, 2018. The petitioner alleged that his plea was not made knowingly, intelligently, and voluntarily because he had been under the influence of medication that caused him to become passive and to accept a guilty plea "unconsciously," he did not receive the benefit of an interpreter, and his counsel coerced him to plead guilty.[1] On July 11, 2019, the court, without holding a hearing on the petition, dismissed the petition sua sponte and found the following: "Upon review of the complaint in the above titled matter, the court hereby gives notice pursuant to Practice Book § 23-29 that the matter has been dismissed for the following reasons: (1) The petition is successive, in that it presents the same grounds as the prior petition . . . previously denied . . . and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition. More specifically, the prior petition made claims of ineffective assistance of counsel and a claim that the petitioner's guilty plea was not knowingly, voluntarily, and intelligently made, and a fair reading of the present complaint presents the same legal grounds, but without any new facts or evidence not

[1] The petitioner also alleged that his trial counsel had rendered ineffective assistance. On appeal, the petitioner does not challenge the court's dismissal of his ineffective assistance claim as successive.

known at the time of the prior petition, and seeks the same relief." The habeas court denied the petition for certification to appeal from the dismissal of the second habeas action. This appeal followed.

I

The petitioner claims that the court erred in denying his petition for certification to appeal from the court's dismissal of his second petition for being successive.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 448, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

On the basis of our review of the petitioner's substantive claim, we conclude that he has not shown that the

court abused its discretion in denying his petition for certification to appeal.

II

The petitioner claims that the court improperly dismissed his second habeas petition as successive. Specifically, he argues that he raised new factual allegations and a new legal ground in his second petition. He contends that his first habeas petition centered on ineffective assistance rendered by trial counsel in failing to advise him of the immigration consequences of his guilty plea and that his second petition focused on the involuntariness of his plea as a result of the psychological effect of his medication, the lack of an interpreter, and the coercive conduct by trial counsel. We are not persuaded.

Our standard of review is well established. "The conclusions reached by the [habeas] court in its decision to dismiss the habeas petition are matters of law, subject to plenary review. . . . Thus, [w]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts in the record." (Internal quotation marks omitted.) *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 276, 35 A.3d 337, cert. granted, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013).

Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ." See *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 64–65, 6 A.3d 213 (2010) (Practice Book § 23-29 (3) memorialized ability to dismiss petition that presents same ground as previously denied petition and that fails to state new facts

or to proffer new evidence not reasonably available at time of prior petition), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

"In *Negron* v. *Warden*, [180 Conn. 153, 158, 429 A.2d 841 (1980)], [our Supreme Court] observed that pursuant to Practice Book § 531 [now § 23-29], [i]f a previous application brought on the same grounds was denied, the pending application may be dismissed without [a] hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing. [The court] emphasized the narrowness of [its] construction of Practice Book [§ 23-29] by holding that dismissal of a second habeas petition without an evidentiary hearing is improper if the petitioner either raises new claims or offers new facts or evidence. . . . *Negron* therefore strengthens the presumption that, absent an explicit exception, an evidentiary hearing is always required before a habeas petition may be dismissed."[2] (Emphasis omitted; internal quotation marks omitted.) *Mejia* v. *Commissioner of Correction*, 98 Conn. App. 180, 188–89, 192, 908 A.2d 581 (2006).

Pursuant to Practice Book § 23-29 (3), the habeas court sua sponte dismissed the second habeas petition as successive. In his first habeas petition, the petitioner claimed that his trial counsel had provided ineffective assistance by failing to advise him properly of the immigration consequences of pleading guilty and made a due process challenge to his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made. See *Kondjoua* v. *Commissioner of Correction*, supra, 194 Conn. App. 798–99. Specifically, with respect to the second claim, the petitioner had alleged that his guilty plea was not made knowingly, intelligently, and voluntarily due to the failure of trial counsel to advise him adequately of the immigration consequences of his guilty plea. See id., 805.

[2] The petitioner does not raise as a ground for reversal the lack of an evidentiary hearing.

In his second habeas petition, the petitioner again claimed that his guilty plea was not made knowingly, intelligently, and voluntarily. Instead of claiming, as he had in his first petition, that the involuntary nature of his guilty plea was due to inadequate advice by trial counsel, the petitioner alleged in his second petition that the involuntary nature of the plea was caused by the effects of medication, the lack of an interpreter, and coercion by trial counsel.

The petitioner argues that his second petition is not successive because his first petition alleged ineffective assistance of counsel and the second petition alleges the involuntariness of his guilty plea. We disagree. Both petitions challenge the voluntariness of the guilty plea. Although the factual allegations in the two operative petitions are not the same, it does not necessarily follow that the claims are not identical. "Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . They raise, however, the same generic legal basis for the same relief. Put differently, two grounds are not identical if they seek different relief." (Internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 393, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

The legal ground and the relief sought by the petitioner here is the same in both the first and second petitions. Moreover, the petitioner cannot prevail on his argument that the second petition alleges new facts not reasonably available at the time of the first petition. See, e.g., *McClendon* v. *Commissioner of Correction*, 93 Conn. App. 228, 231, 888 A.2d 183 (successive petition premised on same legal grounds and seeking same relief will not survive dismissal unless petition is supported by allegations not reasonably available to petitioner at time of original petition), cert. denied, 277 Conn. 917, 895 A.2d 789 (2006); see also Practice Book § 23-29

(3). In the first habeas action, the petitioner's original nonoperative petition "alleged a due process violation claiming that his guilty plea was not made knowingly, intelligently, or voluntarily because he was under the influence of medication, trial counsel pressured him to plead guilty, and he had trouble understanding and communicating with trial counsel because English is not his first language and he did not always have the benefit of an interpreter during their conversations." *Kondjoua* v. *Commissioner of Correction*, supra, 194 Conn. App. 798 n.3. Although that petition was later amended to eliminate these precise grounds; see id., 798–99; the petitioner clearly knew of their existence at the time of the first petition, defeating any argument now made on appeal that these grounds were not reasonably available at the time of the first petition.

The habeas court was not required to determine the merits of the second habeas petition because, pursuant to Practice Book § 23-29 (3), the second petition presented the same ground as the first petition and the petitioner failed to state new facts not reasonably available at the time of the prior petition. See *McClendon* v. *Commissioner of Correction*, supra, 93 Conn. App. 231; see also Practice Book § 23-29 (3). The petitioner, therefore, has not shown that the resolution of this claim involves an issue that is debatable among jurists of reason, that a court could resolve the issue in a different manner, or that the question is adequate to deserve encouragement to proceed further. Accordingly, we conclude that the habeas court did not abuse its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.