STATE OF CONNECTICUT *v.* MAXINE THORNE
(AC 43120)

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

Syllabus

Convicted, after a jury trial, of six counts of the crime of wilful failure to pay sales tax, the defendant appealed to this court. *Held*:

1. There was insufficient evidence to support the defendant's conviction of wilful failure to pay sales tax as charged in count four of the operative information, the state having presented no evidence that the defendant failed to pay the sales tax allegedly due on the date specified in that count.
2. There was sufficient evidence to support the defendant's conviction of wilful failure to pay sales tax as charged in the remaining counts of the operative information: the state presented sufficient evidence by which the jury could have found beyond a reasonable doubt that the defendant, as the person responsible to pay sales tax for her husband's sole proprietorship, was a person who was required by law to pay sale taxes and that she wilfully failed to do so; moreover, although the information technically charged that the defendant wilfully failed to pay sales tax as the owner of a different business entity, the name of the business entity was not an essential element of the crime, the evidence proved that the defendant wilfully failed to pay sales tax that was owed for the sole proprietorship, and the defendant made no claim of variance at trial, did not object to the admissibility of the evidence regarding the sole proprietorship on the ground of variance and did not claim that she was prejudiced in her defense and that substantial injustice had been done because of the language in the information.
3. The defendant could not prevail on her unpreserved claim that the trial court misled the jury by giving an improper jury instruction that diluted the state's burden of proof and weakened her presumption of innocence; the defendant conceded that she waived her claim, and, contrary to her contention, her conviction did not warrant reversal under the plain error doctrine, as she failed to carry her burden of demonstrating that the

court's instruction misled the jury and affected the fairness and integrity of and public confidence in the proceeding.

Argued February 8—officially released May 4, 2021

Procedural History

Substitute information charging the defendant with six counts of the crime of wilful failure to pay sales tax, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Baio*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed in part; reversed in part*; *judgment directed*.

Raymond L. Durelli, assigned counsel, for the appellant (defendant).

Linda F. Currie, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, executive assistant state's attorney, and *Mirella Giambalvo*, senior assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. The defendant, Maxine Thorne,[1] appeals from the judgment of conviction, rendered after a jury trial, of six counts of wilful failure to pay sales tax in violation of General Statutes § 12-428 (1). On appeal, the defendant claims that (1) there was insufficient evidence to support her conviction and (2) the trial court's jury instruction substantially misled the jury. We reverse in part and affirm in part the judgment of the trial court.

The jury reasonably could have found the following facts on the basis of the evidence presented at trial. In October, 1999, Robert C. Thorne, the defendant's husband (husband), applied to the Department of Revenue Services (department) for a tax registration number for

[1] The defendant represented herself at trial but was represented by counsel on appeal.

his tree work and landscaping business as a sole proprietorship. Sometime later, the defendant filed an application for the organization of a domestic limited liability company known as Bob Thorne Tree & Landscaping, LLC, with the Secretary of the State and registered the LLC with the department. The defendant, however, did not register the LLC for sales tax remittance as required. The sole proprietorship and the LLC were being operated simultaneously. Andrea Closson, a department tax enforcement special agent, testified, on the basis of her training and experience, that a new registration for sales tax remittance often is not filed to avoid § 12-428 (1) responsibilities[2] and to avoid paying taxes.

In March, 2012, the defendant and her husband opened a business checking account at Wells Fargo Bank, N.A. (Wells Fargo). The couple completed a four page application, stating that the name on the account was "Robert Thorne [doing business as] Bob Thorne Tree & Landscaping," the name of the business was "Bob Thorne Tree & Landscaping," the type of business was "[s]ole [p]roprietor," and the date the business originally was established was May 8, 2008. The defendant and her husband were the authorized signatories on the account, and their signatures appear on the application. The husband was listed as the "[o]wner/[k]ey [i]ndividual." Thereafter, the defendant entered information pertaining to the Wells Fargo account into the department's taxpayer service center account that she had created for the sole proprietorship. The tax payments that were made to the department were drawn on checks from the Wells Fargo account.[3]

[2] General Statutes § 12-428 (1) provides in relevant part: "Any person required under this chapter to pay any tax, or required under this chapter or by regulations thereunder to make a return, keep any record or supply any information, who wilfully fails to pay such tax, make such return, keep such records or supply such information, at the time required by law, shall, in addition to any other penalty provided by law, be fined not more than one thousand dollars or imprisoned not more than one year or both. . . ."

[3] Copies of the Wells Fargo account application and checks and a screen shot of the taxpayer service center account were placed into evidence at trial.

On or about April 16, 2016, the defendant filed five untimely sales and use tax returns with the department, identifying the business entity as "Robert Thorne." She signed the returns as the owner. The documents filed by the defendant identified five periods for which sales tax was owed,[4] but the department never received payment of the taxes.

In January, 2017, Closson was assigned to investigate the sole proprietorship of Robert Thorne. During her investigation, Closson reviewed multiple sales tax returns that the defendant had signed as the owner of the business known as "Robert Thorne." On October 3, 2017, Closson and David Stephens, a department tax enforcement special agent, visited the defendant and her husband at their home. At that time, Closson asked the couple who was responsible for paying taxes on behalf of the business. The defendant's husband pointed to the defendant and stated, "She is." The defendant remained silent but did not deny her husband's representation. The defendant stated to Closson and Stephens that her husband's original business was closed and that she had registered a new business entity called Bob Thorne Tree & Landscaping, LLC, with the department.

On the basis of her subsequent investigation, Closson determined that the original business had never been closed and that the new business called Bob Thorne Tree & Landscaping, LLC, was not registered with the department to pay sales tax. Closson consulted the website for the department taxpayer service center and learned that the defendant was the administrator for the business known as "Robert C. Thorne." The website also

[4] The tax returns at issue documented sales taxes owed for the following periods: (1) April, 2015, $641 due by May 31, 2015; (2) May, 2015, $846 due by June 30, 2015; (3) June, 2015, $256 due by July 31, 2015; (4) September, 2015, $569 due by October 31, 2015; and (5) October, 2015, $733 due by November 30, 2015. Copies of the tax returns were placed into evidence at trial.

contained information regarding the Wells Fargo account. Closson subpoenaed the financial records for the Wells Fargo account. Pursuant to her investigation, Closson concluded that the defendant was the person responsible for paying the sales tax for the business known as Robert C. Thorne.

On or about March 1, 2018, the defendant was arrested pursuant to a warrant. In a six count, amended long form information (information), the state accused the defendant of wilfully having failed to pay state sales tax for six periods in 2015 in violation of § 12-428 (1).[5] The charges against the defendant were tried to a jury in April, 2019. During the trial, Stephens testified that the person responsible for paying state sales tax "is any individual who has a duty and is required by law to file Connecticut tax returns and pay the tax due," somebody who is financially responsible for the business and who acts like a registered owner in the business. Closson testified that she had determined that the defendant was the financially responsible party for the business Bob Thorne

[5] On March 29, 2019, the senior assistant state's attorney accused the defendant in the information as follows:

"Count one . . . wilful failure to pay sales tax in violation of [§] 12-428 (1) . . . [due] on or about May 31, 2015 . . . as required by law as the registered owner of business 'Bob Thorne Tree & Landscaping, LLC' . . . .

"Count two . . . wilful failure to pay sales tax in violation of [§] 12-428 (1) . . . [due] on or about June 30, 2015 . . . as required by law as the registered owner of business 'Bob Thorne Tree & Landscaping, LLC' . . . .

"Count three . . . wilful failure to pay sales tax in violation of [§] 12-428 (1) . . . [due] on or about July 31, 2015 . . . as required by law as the registered owner of business 'Bob Thorne Tree & Landscaping, LLC' . . . .

"Count four . . . wilful failure to pay sales tax in violation of [§] 12-428 (1) . . . [due] on or about August 31, 2015 . . . as required by law as the registered owner of business 'Bob Thorne Tree & Landscaping, LLC' . . . .

"Count five . . . wilful failure to pay sales tax in violation of [§] 12-428 (1) . . . [due] on or about October 31, 2015 . . . as required by law as the registered owner of business 'Bob Thorne Tree & Landscaping, LLC'. . . .

"Count six . . . wilful failure to pay sales tax in violation of [§] 12-428 (1) . . . [due] on or about November 30, 2015 . . . as required by law as the registered owner of business 'Bob Thorne Tree & Landscaping, LLC' . . . . "

Tree & Landscaping, LLC, and for the sole proprietorship of Robert Thorne. She made that determination on the basis of statements made by the defendant's husband and the defendant's having signed the Wells Fargo checks sent to the department. The defendant also had signed the sales tax returns as owner, and she is named the administrator on the taxpayer service center account.

In its closing argument, the state argued that the case was about the defendant's "trying to get out of paying sales taxes for the business Bob Thorne Tree & Landscaping." The state urged the jury to find that the defendant was the person responsible for paying sales tax for her husband's business and that she had failed to do so. In her closing argument, the defendant stated that she was not "responsible for anything" and that "no one was there to verify it was actually even [her] signature." The jury found the defendant guilty of each of the six counts of wilful failure to pay sales tax as charged.

On May 6, 2019, the court sentenced the defendant on each of the six counts to four months of incarceration, execution suspended, and two years of probation. The four month sentences were to be served consecutively for a total effective sentence of two years of incarceration, execution suspended, followed by two years of probation. As a special condition of probation, the court ordered the defendant to make restitution in the amount of $4221 within the first fifteen months of probation. Following sentencing, the defendant appealed.

I

The defendant first claims that the state presented insufficient evidence to support her conviction of wilful failure to pay sales tax in violation of § 12-428 (1) as charged in the information. We disagree that there was insufficient evidence to convict the defendant as charged in counts one, two, three, five, and six of the information. We, however, agree that there was insufficient evidence

to convict the defendant as charged in count four. In count four of the information, the state charged the defendant with failure to pay sales tax due on August 31, 2015. On appeal, the defendant claims that the state presented no evidence that she failed to pay sales tax due on August 31, 2015. Our review of the record supports the defendant's claim, and the state concedes that it failed to present any evidence with respect to count four. We, therefore, reverse the defendant's conviction as to count four and remand the case to the trial court with direction to render a judgment of acquittal as to that count and to resentence the defendant.

In the remaining counts of the information, the state charged that "as required by law as the registered owner of business 'Bob Thorne Tree & Landscaping, LLC' to pay any tax, [the defendant] wilfully failed to pay such tax at the time required by law" in violation of § 12-428 (1). The defendant argues on appeal that the state introduced fourteen documents into evidence, all of which concerned the business known as "Robert Thorne, sole proprietor, or Robert Thorne [doing business as] Bob Thorne Tree & Landscaping,"[6] but that it introduced no evidence with regard to sales tax owed by the business Bob Thorne Tree & Landscaping, LLC. The defendant, therefore, claims that there was insufficient evidence by which the jury reasonably and logically could have found that she wilfully failed to pay sales tax as charged.

In response, the state argues that the defendant had sufficient notice of the crimes against which she had to defend regardless of any variance between the information, i.e., the inclusion of *LLC*, and the evidence adduced at trial that concerned the sole proprietorship as the business entity for which she had a duty to pay sales tax. Significantly, the state notes that the defendant does not claim that the evidence did not establish

[6] The defendant did not object to any of the documents the state placed into evidence at trial.

that she was the person responsible for paying the sales tax due on behalf of the sole proprietorship or "Robert Thorne [doing business as] Bob Thorne Tree & Landscaping." We agree with the state.

It is well known that a defendant "who asserts an insufficiency of the evidence claim bears an arduous burden." (Internal quotation marks omitted.) *State* v. *Leandry*, 161 Conn. App. 379, 383, 127 A.3d 1115, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015). When reviewing a claim of insufficient evidence, an appellate court applies a two part test. See, e.g., *State* v. *Juarez*, 179 Conn. App. 588, 595, 180 A.3d 1015 (2018), cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019). "We first review the evidence presented at trial, construing it in the light most favorable to sustaining the verdict. . . . [Second, we] . . . determine whether the jury could have reasonably concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt. . . . In this process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . The issue is whether the cumulative effect of the evidence was sufficient to justify the verdict of guilty beyond a reasonable doubt." (Internal quotation marks omitted.) Id.

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a

reasonable doubt." (Internal quotation marks omitted.) *State* v. *Daniel B.*, 164 Conn. App. 318, 326, 137 A.3d 837 (2016), aff'd, 331 Conn. 1, 201 A.3d 989 (2019). An appellate court defers to the jury's assessment of the credibility of witnesses on the basis of their firsthand observation of their conduct. *State* v. *Juarez*, supra, 179 Conn. App. 596.

Section 12-428 (1) provides in relevant part: "Any person required under this chapter to pay any tax . . . who wilfully fails to pay such tax . . . at the time required by law, shall, in addition to any other penalty provided by law, be fined not more than one thousand dollars or imprisoned not more than one year or both. . . . As used in this section 'person' includes any officer or employee of a corporation, or a member or employee of a partnership under a duty to pay such tax . . . ."[7] Section 12-428 (1) required the state to prove that the defendant was a person required by law to pay state sales tax and that she wilfully failed to do so. The statute does not require the state to prove the name of the entity owing the sales tax.

There are certain fundamental principles applicable to the statutory construction of tax statutes. "[W]hen the issue is the imposition of a tax, rather than a claimed right to an exemption or a deduction, the governing authorities must be strictly construed against the [C]ommissioner [of Revenue Services] and in favor of the tax payer. . . . [S]tatutes establishing the procedure for the collection of taxes, including statutes enacted to prevent tax frauds, [however] are given a liberal, rather

[7] General Statutes § 12-407 (a) provides in relevant part: "Whenever used in this chapter . . . (2) 'Sale' and 'selling' mean and include . . . (I) The rendering of certain services, as defined in subdivision (37) of this subsection . . . (12) 'Retailer' includes . . . (D) Every seller rendering any service described in subdivision (2) of this subsection . . . [and] (37) 'Services' for purposes of subdivision (2) of this subsection, means . . . (V) Landscaping and horticulture services . . . ."

than strict, construction." (Citations omitted; internal quotation marks omitted.) *Leonard* v. *Commissioner of Revenue Services*, 264 Conn. 286, 295, 823 A.2d 1184 (2003).

In the relevant counts of the information, the state alleged that, on a date certain, the defendant was required by law as the registered owner of "Bob Thorne Tree & Landscaping, LLC," to pay any tax and wilfully failed to do so. (Internal quotation marks omitted.) "[G]enerally speaking, the state is limited to proving that the defendant has committed the offense in substantially the manner described in the information. . . . Despite this general principle, however, both this court and our Supreme Court have made clear that [t]he inclusion in the state's pleading of additional details concerning the offense does not make such allegations essential elements of the crime, upon which the jury must be instructed. . . . Our case law makes clear that the requirement that the state be limited to proving an offense in substantially the manner described in the information is meant to assure that the defendant is provided with sufficient notice of the crimes against which [she] must defend. As long as this notice requirement is satisfied, however, the inclusion of additional details in the charge does not place on the state the obligation to prove more than the essential elements of the crime." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Vere C.*, 152 Conn. App. 486, 527, 98 A.3d 884, cert. denied, 314 Conn. 944, 102 A.3d 116 (2014).

At its core, the defendant's claim is not one of insufficient evidence but, rather, one of variance. See *State* v. *Rafanello*, 151 Conn. 453, 456, 199 A.2d 13 (1964). That is, that, although the information charged that the defendant wilfully failed to pay sales tax as the owner of " 'Bob Thorne Tree & Landscaping, LLC,' " the evidence proved that she wilfully failed to pay sales tax that was owed for the sole proprietorship. The defendant made

no claim of variance at trial, and she did not object to the admissibility of any of the evidence regarding the sole proprietorship on the ground of variance. In the absence of a "showing of substantial injustice," we do not entertain claims not advanced at trial. *State* v. *Rafanello*, supra, 456–57. The proper way for the defendant to have asserted such a claim at trial would have been by a timely objection to the evidence offered. See id., 457. If the defendant had suggested the variance at trial and the trial court found it to exist, it would not have been a ground for acquittal but would have permitted the state to amend the information as needed to make it conform to the evidence.[8] See id.

"When the state's pleadings have informed the defendant of the charge against [her] with sufficient precision to enable [her] to prepare [her] defense and to avoid prejudicial surprise, and were definite enough to enable [her] to plead to [her] acquittal or conviction in bar of any further prosecution for the same offense, they have performed their constitutional duty. . . . The inclusion in the state's pleading of additional details concerning the offense does not make such allegations essential elements of the crime, upon which the jury must be instructed." (Citations omitted; internal quotation marks omitted.) *State* v. *Morrill*, 197 Conn. 507, 551, 498 A.2d 76 (1985); id., 552 (location of murder not essential element of crime); see also *State* v. *Sharpe*, 195 Conn. 651, 667, 491 A.2d 345 (1985) (deadly weapon element did not require court to instruct jury that crime could only be committed with pistol); *State* v. *Sam*, 98 Conn. App. 13, 37–38, 907 A.2d 99 (state need not prove knife was dangerous instrument used to commit crime), cert.

[8] Pursuant to Practice Book § 36-18, "[a]fter commencement of the trial for good cause shown, the judicial authority may permit the prosecuting authority to amend the information at any time before a verdict or finding if no additional or different offense is charged and no substantive rights of the defendant would be prejudiced."

denied, 280 Conn. 944, 912 A.2d 478 (2006). In the present case, the name of the business entity was not an essential element of the crime of wilful failure to pay sales tax pursuant to § 12-428 (1).

Furthermore, the defendant cannot prevail on her claim without demonstrating that she was in fact prejudiced in her defense on the merits and that substantial injustice has been done on the basis of the language in the information. See Practice Book § 36-18; *State* v. *Rafanello*, supra, 151 Conn. 457. The defendant has made no such claim; she knew that she was being prosecuted for failure to pay sales tax for her husband's tree and landscaping business, regardless of its technical name.

On the basis of our review of the record, we conclude that there was sufficient evidence by which the jury could find beyond a reasonable doubt that the defendant, as the person responsible to pay sales tax for the tree service business, was a person who was required by law to pay sales tax and that she wilfully failed to do so. The defendant's claim therefore fails.

II

The defendant also claims that the court misled the jury by giving an improper instruction that diluted the state's burden of proof and weakened the defendant's presumption of innocence. The state contends that the claim is not reviewable because the defendant waived it by failing to submit a written request to charge or to take an exception to the charge given by the court. In her appellate brief, the defendant acknowledges that she did not preserve her claim for appellate review but argues that her claim is reviewable pursuant to the plain error doctrine. We disagree with the defendant.

Practice Book § 42-16 provides in relevant part that "[a]n appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request

to charge or exception has been taken by the party appealing immediately after the charge is delivered . . . .'"

"[W]hen the trial court provides [the parties] with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments . . . regarding changes or modifications and [the defendant] affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011).

The record in the present case discloses that the trial court provided the defendant and the state with a copy of its proposed charge and the next day solicited comments regarding it. The court agreed to make several changes to its charge and provided copies of the revised charge to the defendant and the state. The next day, the court reviewed the revised charge page by page with the defendant and the state. The defendant did not object to the proposed charge. The court further canvassed the defendant as follows:

"The Court: You have no objections to anything that has been included in the charge?

"The Defendant: No.

"The Court: You're not asking that anything be removed from the charge?

"The Defendant: No.

"The Court: Are you asking that anything be added to the charge?

"The Defendant: No.

"The Court: Are you taking any exception to the charge at all?

"The Defendant: No."

On the basis of this record, we conclude that the defendant waived the right to challenge the court's instruction on appeal.[9]

The defendant, however, posits that a *Kitchens* waiver does not foreclose claims of plain error. See *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). Although that is a correct statement of the law, the plain error exception to the *Kitchens* waiver rule is inapplicable in the present case. "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually accurate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in the light of the record." (Internal quotation marks omitted.) Id. "The plain error doctrine is reserved for truly extraordinary situations [in which] the existence of error is so obvious that it effects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) Id.

[9] "[I]t is the established policy of the Connecticut courts to be solicitous of [self-represented parties] and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Although we allow [self-represented parties] some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *State* v. *Adams*, 117 Conn. App. 747, 755, 982 A.2d 187 (2009). Consequently, "[w]hen a defendant elects to proceed without the benefit of counsel, [she] takes the risk that because of [her] inexperience and lack of knowledge [of the law], [she] will suffer disadvantages to which, with proper representation, [she] would not be subject." *State* v. *Lo Sacco*, 12 Conn. App. 481, 496, 531 A.2d 184, cert. denied, 205 Conn. 814, 533 A.2d 568 (1987).

"[I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless [she] demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) Id.

In the present case, the defendant claims that the court's charge was improper because the court did not make clear that (1) she, (2) "Robert Thorne, sole proprietor, or Robert Thorne [doing business as] Bob Thorne Tree & Landscaping," and (3) Bob Thorne Tree & Landscaping, LLC, are three distinct legal entities. Or stated differently, the court did not instruct the jury as to the legal distinctions between an individual conducting business under his own name, an individual conducting business under an assumed name, e.g., "doing business as," and an LLC conducting business under its legal name. The defendant claims that it was important for the jury to know the legal distinctions because the information charged the defendant with failing to pay sales tax as required by law as the registered owner of the business "Bob Thorne Tree & Landscaping, LLC." The defendant, however, has not explained why the legal distinction is relevant in this particular case. The issue for the jury to decide was whether the defendant was the person responsible for paying the sales tax, regardless of the name of the business.

As we explained in part I of this opinion, the name of the business that owed sales tax was not an essential element of the crime of wilful failure to pay any tax

required by law. An information that includes additional details concerning an offense does not make such allegations an essential element of the crime. See *State* v. *Sam*, supra, 98 Conn. App. 38.

In the present case, the court instructed the jury in relevant part as follows: "The first element that the state must prove is that the defendant was a person required to pay sales tax under the statute. Under our law, any person who makes retail sales, as defined by our statutes, is required to pay sales tax. Person is defined in pertinent part as any individual, firm, [or] limited liability company . . . under a duty to pay such tax. Sales, as defined by our statutes, includes the rendering of certain services for a consideration . . . includ[ing] landscaping and horticultural services. Therefore, in order to find that the state's burden of proof has been satisfied as to this element, the state must prove beyond a reasonable doubt that the defendant is a person who was required to pay sales tax under the law."

The defendant has failed to explain why the legal distinction between various business entities was relevant to the jury's determining whether she, who identified herself to the department as the owner of the tree and landscaping business, had a duty to pay sales tax. The defendant, therefore, has failed to carry her burden to demonstrate that the court's instruction misled the jury and that the instruction affected the fairness and integrity of and public confidence in the judicial proceeding. For the foregoing reasons, the defendant's conviction of wilful failure to pay sales tax does not warrant reversal pursuant to the plain error doctrine.

The judgment is reversed with respect to the defendant's conviction of wilful failure to pay sales tax as charged in count four and the case is remanded with direction to render judgment of acquittal on that charge

only and to resentence the defendant on the remaining charges; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

KATIE N. CONROY *v.* AMMAR A. IDLIBI
(AC 42416)

Lavine, Alexander and Flynn, Js.*

Syllabus

The defendant, whose marriage to the plaintiff had previously been dissolved, appealed to this court from the decision of the trial court denying his motion to open the judgment of dissolution on the basis of fraud. The defendant claimed that the plaintiff had committed a fraud on the dissolution court because she misrepresented the nature of her extramarital relationship and her allegations of physical abuse by the defendant. The trial court denied the motion to open, concluding that the dissolution court was aware of the defendant's claims regarding the plaintiff's alleged misrepresentations when it issued the dissolution judgment. *Held* that the trial court did not abuse its discretion in denying the defendant's motion to open; that court correctly concluded that there was not a substantial likelihood that the outcome of a new trial would be different because the dissolution court was aware of the defendant's claims that the plaintiff had misrepresented the nature of her extramarital relationship and that the injuries the plaintiff claimed were caused by the defendant were really self-inflicted, there was no evidence that the dissolution court relied on the plaintiff's alleged misrepresentations in issuing the dissolution judgment, and the cause of the breakdown of the marriage was just one of a variety of factors the court considered in making its financial orders.

(*One judge dissenting*)

Argued September 21, 2020—officially released May 4, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Carbonneau, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

to this court, *Alvord*, *Keller* and *Bishop*, *Js.*, which affirmed the judgment of the trial court; thereafter, the court, *Connors*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Affirmed.*

Ammar A. Idlibi, self-represented, the appellant (defendant).

Opinion

LAVINE, J. The self-represented defendant, Ammar A. Idlibi, returns to this court in his continuing effort to reverse the judgment of the trial court dissolving his marriage to the plaintiff, Katie N. Conroy. In the present appeal, the defendant claims that the trial court, *Connors*, *J.*, abused its discretion (1) by denying his motion to open based on fraud (motion to open) and (2) by failing to conduct an evidentiary hearing.[1] We affirm the judgment of the trial court.

A brief review of the procedural history of the present case provides context for the defendant's claims. The plaintiff commenced an action for dissolution of marriage on May 26, 2015,[2] and a trial was conducted in May, 2016. The dissolution court, *Carbonneau*, *J.*, issued a memorandum of decision dissolving the parties' marriage and issuing certain orders on August 15, 2016.[3]

[1] The plaintiff did not file an appearance in the present appeal. We have considered the claims raised in the appeal on the basis of the record and the defendant's brief and oral argument. See *Rosario* v. *Rosario*, 198 Conn. App. 83, 84 n.1, 232 A.3d 1105 (2020).

[2] The dissolution court, *Carbonneau*, *J.*, found that the defendant had left the marital residence just prior to the plaintiff's commencing the dissolution action.

[3] In a footnote in its memorandum of decision, the dissolution court noted that on May 19, 2015, the defendant commenced a custody/visitation action against the plaintiff in which he *accused her of adultery* and committing inappropriate acts in the presence of their children. The defendant did not pursue the allegations, and the court, *Morgan*, *J.*, dismissed the case on July 2, 2015.

The court also found that the parties' three minor children had been removed from the parties' care and were in the custody of the Commissioner of Children and Families at the time of trial. As of December 10, 2018, the date the defendant's motion to open was heard, the children were still in the custody of the commissioner.

The defendant appealed to this court from the judgment of dissolution, claiming that the dissolution court had "erred (1) by finding that neither party bore greater responsibility for the breakdown of the marriage and (2) in making financial awards that were favorable to the plaintiff." *Conroy* v. *Idlibi*, 183 Conn. App. 460, 461, 193 A.3d 663, cert. denied, 330 Conn. 921, 194 A.3d 289 (2018). This court affirmed the judgment;[4] id.; and our Supreme Court denied the defendant's petition for certification to appeal. *Conroy* v. *Idlibi*, 330 Conn. 921, 194 A.3d 289 (2018). The parties have filed multiple postdissolution motions in the trial court, including motions to modify alimony filed by the defendant.[5] See *Wasson* v. *Wasson*, 91 Conn. App. 149, 151 n.1, 881 A.2d 356 (appellate courts like trial court may take judicial notice of Superior Court files in same or other cases), cert. denied, 276 Conn. 932, 890 A.2d 574 (2005). On October 29, 2018, the defendant, representing himself, filed the motion to open at issue in the present appeal. The substance of the motion to open is the defendant's claim that the plaintiff had committed a fraud upon the dissolution court because she was not truthful about the nature of her extramarital relationship and her allegations of physical abuse by the defendant. Following a hearing held on December 10, 2018, Judge Connors denied the motion to open. The defendant appealed.

The following facts as found by the dissolution court are relevant to the defendant's claims in the present

[4] This court dismissed as moot that portion of the defendant's appeal in which he challenged the dissolution court's order that, if the defendant obtains a monetary judgment against the plaintiff in a separate proceeding, it shall be considered a significant change in circumstances to warrant a review of the defendant's alimony obligation. *Conroy* v. *Idlibi*, supra, 183 Conn. App. 461 n.2.

[5] The trial court file discloses that, on January 13, 2019, Judge Connors granted a motion to modify alimony filed by the defendant and ordered him to pay the plaintiff $885 per week. On March 16, 2020, the court, *Caron*, *J.*, denied another motion to modify alimony filed by the defendant. In ruling on the motion to modify, Judge Caron found, among other things, that the plaintiff had remarried on June 4, 2020, and ruled that the defendant's alimony obligation ended on the date of the plaintiff's remarriage.

appeal. The plaintiff grew up in California. Her father died when she was two years old and left her a substantial education fund. In 2005, when she was eighteen years old, the plaintiff "began to communicate with the defendant over the Internet. The plaintiff was estranged from her mother at the time and living with her grandmother. At first, the plaintiff and the defendant discussed the plaintiff's interest in the defendant's faith, Islam. The topic of conversation quickly shifted from the defendant's faith to marriage." *Conroy* v. *Idlibi*, supra, 183 Conn. App. 462. At trial, the defendant claimed that the plaintiff wanted him to rescue her from the control of her mother and family. The defendant informed the plaintiff that their talk of a life together could only happen if they were married given his devout religious beliefs. "About three weeks after meeting online, [the] defendant flew to California, picked up [the] plaintiff, brought her to Connecticut and they married." (Internal quotation marks omitted.) Id.

The dissolution court also found that the early years of the parties' marriage were happy. The defendant's dental practice thrived, and the couple lived a lavish lifestyle. The plaintiff adhered to a specific dress code and diet, and eschewed contact with males who were not her husband. The court also found that at about the time the parties' first child was born, however, the plaintiff began to resent and resist the religious dictates of the marriage. She complained that the defendant came to control every aspect of her life. At trial, the plaintiff claimed that the defendant permitted only certain clothes and food for her and their children and that her only friends were women from their religious circle. She also claimed that she was not permitted to listen to certain music, leave her home, or communicate with her family. The plaintiff, however, had returned to California several times to see her family. At trial, she also alleged that the defendant's physical abuse of her began "about five years ago."

The dissolution court found that, at the time of trial, the defendant was forty-nine years old. He had been married twice before and had three children from those marriages. He grew up in Syria and received his dental education and training in the United States. At first, he worked as a pediatric dentist for others but, in 2007, the defendant opened his own dental practice. He earned as much as $600,000 to $900,000 per year. In 2008 and early 2009, the defendant felt a great deal of financial pressure. The plaintiff withdrew her college education fund of $132,000 and gave it to the defendant as an investment in his dental practice that he was to repay in the future. Following publicity about an incident of domestic violence between the parties, which resulted in criminal charges being filed against the defendant, the defendant's dental practice again suffered difficulties.

The dissolution court found that at trial both of the parties damaged their credibility. Detective Damien Bilotto of the Plymouth Police Department investigated an incident at the marital home in July, 2015. The court highly credited Bilotto's testimony. During the investigation, the "[p]laintiff declined to answer [Bilotto's] questions not once but twice about the sequence of events that occurred on July 29, 2015, between her and [the defendant]. Despite his thorough investigation, the detective could not rule out that [the] plaintiff's injuries were self-inflicted when she accused [the defendant] of a brutal assault." The court also found that, "[w]hile the wording of the defendant's interrogatories dated September 30, 2015, concerning [the] plaintiff's extramarital relationships may have been imprecise, [the] plaintiff's responses–under oath–were less than forthcoming. The plaintiff's recollection of her relationship with [another man] was vague. Her testimony about having lost her 'last opportunity' to attend college—at age twenty-nine—was not credible nor was her descrip-

tion of the extent and permanence of her medical conditions."

The dissolution court found that the defendant damaged his credibility due to mistakes, omissions, oversights and nondisclosures on his eleven sworn financial affidavits. The defendant explained that "he was not diligent in reviewing" his affidavits, that he "trusted his accountant," and that he is "not good" with numbers. Nevertheless, the court found that the defendant had sworn to the accuracy of the statements. See *Reville* v. *Reville*, 312 Conn. 428, 442, 93 A.3d 1076 (2014) (court entitled to rely on truth and accuracy of sworn statements).

Regarding the division of the parties' material and financial resources, the dissolution court stated: " 'There are three stages of analysis regarding the equitable distribution of each resource: first, whether the resource is property within [General Statutes] § 46b-81 to be equitably distributed (classification); second, what is the appropriate method for determining the value of the property (valuation); and third, what is the most equitable distribution of the property between the parties (distribution). *Krafick* v. *Krafick*, 234 Conn. 783, 792–93, 663 A.2d 365 (1995)." The court then made the following findings with regard to the equitable distribution of the parties' resources.

"This is a ten year marriage. The plaintiff is twenty years younger than the defendant. . . . The plaintiff suffers from temporary or treatable conditions, and the defendant is relatively healthy for his age. They lived a high lifestyle thanks to the defendant's many years of training and his earnings as a dental specialist. The lurid drama of this dissolution and other court proceedings will eventually fade from public view. The defendant's dental practice will recover, giving him a greater capacity than the plaintiff for future acquisition of

capital assets and income. However, the plaintiff is—using the defendant's words—'intelligent and capable.' [Although] her vocational skills and employability may be limited now, she has many years to seek an education or training in order to provide for herself and the support of her children.

"The seeds of this dissolution were sown at the very time the relationship began. The plaintiff was an eighteen year old high school student rebelling against her mother's 'control.' The defendant, twenty years the plaintiff's senior, cannot now be surprised that the plaintiff is once again rebelling to escape perceived control. *The court has considered her relationship with another man during the marriage.* The court *finds no direct evidence* of her and this other man ever having [had] sex. The court does not condone either party's behaviors or actions. As parents, they should each be ashamed that neither of them has cared for or supported their children for nearly a year. However, the court ascribes no greater fault for the breakdown of the marriage to either party." (Emphasis added.)

Citing General Statutes § 46b-82, the statute that governs alimony awards, the dissolution court noted that that the statute requires it to "consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to . . . § 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment in ordering either party to pay alimony to the other. . . . In particular, *rehabilitative alimony, or time limited alimony, is alimony that is awarded primarily for the purpose of allowing the spouse who receives it to obtain further education, training, or other skills necessary to attain self-suffi-*

ciency. . . . Rehabilitative alimony is not limited to that purpose, however, and there may be other valid reasons for awarding it. [Citations omitted.] *Bornemann* v. *Bornemann*, 245 Conn. 508, 539–40, 752 A.2d 978 (1998)." (Emphasis added; internal quotation marks omitted.)

Pursuant to its earlier analysis, the dissolution court concluded that "a sufficient amount of rehabilitative alimony flowing from the defendant to the plaintiff for a term allowing the plaintiff a realistic opportunity to seek education or vocational training is fair and equitable. The court understands that the one or both of these parents may in the future have a support obligation to their children. Such a future support obligation shall not be considered a substantial change of circumstances to raise or lower alimony because the court took these circumstances into account when deciding its alimony order."

In addition to dissolving the parties' marriage on the ground of irretrievable breakdown, the dissolution court ordered, among other things,[6] that the defendant shall pay the plaintiff $1250 per week for a nonmodifiable term of five years from the date of the court's decision.[7] The defendant also was ordered to pay the plaintiff a lump sum property settlement of $132,000 on or before five years from the date of the court's decision and $12,500 toward the plaintiff's attorney's fees. The parties were responsible for their individual debts. The defendant retained his interest in his various dental practices.[8]

[6] Issues regarding the parties' children were reserved to the juvenile court, which was then considering the children's best interests. The dissolution court, however, retained jurisdiction over the cost of the children's postsecondary education pursuant to General Statutes § 46b-56c.

[7] The court ordered that its alimony order terminate upon the death of either party or the plaintiff's remarriage.

[8] The court also ordered the defendant not to share, post, distribute, broadcast or disseminate in any fashion nude images of the plaintiff or those of a sexual or sexualized nature and that he not direct or allow others to

Following the rendering of the dissolution judgment, the defendant appealed to this court, claiming that the dissolution court erred (1) by finding that neither party bore greater responsibility for the breakdown of the marriage and (2) by making financial awards that were favorable to the plaintiff. See *Conroy* v. *Idlibi*, supra, 183 Conn. App. 361. With respect to his first claim, the defendant argued "that the court should have found that the plaintiff bore greater responsibility for the breakdown of the marriage because she engaged in a sexual extramarital affair." Id., 464.

This court reviewed the evidence and concluded that the "court's factual finding that neither party was more responsible than the other for the breakdown of the marriage was not clearly erroneous." Id. This court reasoned that the dissolution court "considered the evidence of the plaintiff's extramarital affair and found that it was not sexual in nature. The plaintiff, although admitting during her testimony that she had an affair . . . did not state that she had a sexual relationship with [the man]. The court was free to credit her testimony. In addition, the record provides an ample basis to conclude that, despite the evidence of the plaintiff's alleged affair both parties were responsible for the breakdown of the marriage. The plaintiff's testimony provides an account of the defendant's attempts to control varied aspects of her life and allegations of physical abuse. This left the court to balance the evidence of the plaintiff's affair with the defendant's own misconduct." Id.

With respect to the defendant's claim regarding the dissolution court's financial awards, this court reviewed the financial awards in detail. See id., 465–69. This court noted that "[a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the

do so. The defendant also was ordered to return such images to the plaintiff's dominion and control and delete any such images on any electronic device in his dominion and control.

court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented." (Internal quotation marks omitted.) Id., 467. Moreover, "[a] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in . . . dividing property as long as it considers all relevant . . . criteria in [§] 46b-81. . . . While the trial court must consider the delineated statutory criteria [when allocating property], no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case." (Footnote omitted; internal quotation marks omitted.) Id., 468.

As to alimony, this court set forth the applicable statutory provisions: "The generally accepted purpose of . . . alimony is to enable a spouse who is disadvantaged through divorce to enjoy a standard of living commensurate with the standard of living during the marriage. . . . In addition to the marital standard of living, the trial court must also consider factors in . . . § 46b-82 when awarding alimony. . . .

"[Section] 46b-82 (a) provides in relevant part that [i]n determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocation skills, education employability, estate and needs of each of the parties and the [division of property made] pursuant to [§] 46b-81 . . . ." (Internal quotation marks omitted.) Id., 468–69, quoting *Horey* v. *Horey*, 172 Conn. App. 735, 740–41, 161 A.3d 579 (2017).

This court's review of the record of the divorce proceedings led it "to conclude that the [dissolution] court properly considered the appropriate statutory factors

and that the awards made by the court were both supported by the evidence and within the parameters of the court's discretion. The defendant's claims are premised on the argument that because the court did not find that the plaintiff's affair was the cause of the breakdown of the parties' marriage, the court abused its discretion by not considering that fault when making financial awards. As previously discussed in this opinion, however, the court did not err by finding that neither party was more at fault for the breakdown of the marriage." *Conroy* v. *Idlibi*, supra, 183 Conn. App. 470–71.

After this court affirmed the judgment of the dissolution court; id., 471; the defendant filed a petition for certification to appeal to our Supreme Court. The petition for certification was denied. *Conroy* v. *Idlibi*, supra, 330 Conn. 921. Thereafter, on October 29, 2018, the defendant filed the motion to open that is the subject of the present appeal.

In his motion to open,[9] the defendant asserted that the plaintiff commenced an action for dissolution of marriage against him on May 26, 2015, and that, in June, 2015, she disclosed to her counsel that she was having sexual relations with another man. On February 29, 2016, the plaintiff's counsel submitted the plaintiff's sworn answers to the defendant's interrogatories. In response to an interrogatory asking, "[h]ave you had sexual relations with anyone other than your spouse since the date of your marriage," the plaintiff answered "no."

[9] The first twelve paragraphs of the defendant's motion to open are akin to a definitional preamble. In paragraph 5, the defendant stated in relevant part: "Fraud: consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . *Billington* v. *Billington*, 220 Conn. 212, 217–18, 595 A.2d 1377 (1991)." As we point out in this opinion, the foregoing definition of fraud does not apply in cases of marital dissolution in which a fraud upon the court is alleged. See id., 222.

The defendant's motion to open claims that, on April 4, 2016, Bilotto issued a police report, which disclosed a sexual relationship between the plaintiff and another man. The defendant claims that during the dissolution trial, on May 17, 2016, the plaintiff falsely testified under oath that the defendant had assaulted her. Moreover, he claims that, on July 7, 2016, the plaintiff testified in a civil proceeding that she had informed her counsel of her affair with another man before she signed the sworn answers to the defendant's interrogatories. On September 28, 2016, the criminal charges against the defendant were dismissed.

The motion to open continues with allegations that, in its memorandum of decision, the dissolution court credited the plaintiff's false interrogatory answer relating to her relationship with another man and that the false answer had a direct bearing on the dissolution judgment. Quoting from the memorandum of decision, the motion to open states that "[t]he court has considered [the plaintiff's] relationship with another man during the marriage. The court finds no direct evidence of her and this other man ever having sex."

In addition, the motion to open asserted that, in his appeal to this court, the defendant cited the dissolution court's crediting the plaintiff's false answer in denying her sexual relationship with another man as one of the grounds for the appeal. The defendant also claimed that approximately one year after the dissolution court rendered its judgment, the Plymouth Police Department released a record of the plaintiff's text messages that had been extracted from her cell phone. The defendant asserted that the extracted text messages disclosed a graphic sexual relationship between the plaintiff and another man spanning more than one year prior to the plaintiff's filing for a divorce. The defendant asserted that this court affirmed the judgment of the dissolution court, "including the [dissolution] court's finding that

the plaintiff did not have a sexual relationship with [another man] while married to the defendant." The defendant claimed that he was aggrieved by the effect of the plaintiff's fraud on the dissolution court's judgment due to the plaintiff's having denied that she had a sexual relationship with another man and accusing the defendant of having assaulted her.

The defendant argued in the motion to open that the "four elements of fraud are clearly met in this case"; see footnote 9 of this opinion; and there had been no laches or unreasonable delay in filing the motion to open. The defendant further argued that there was "clear proof of perjury and fraud by the plaintiff" and that there "is a substantial likelihood that the result of the new judgment will be different." The defendant sought a preliminary hearing to demonstrate probable cause to sustain the validity of the claimed fraud so that he could conduct further discovery.

Judge Connors held a hearing on the motion to open on December 10, 2018. At the conclusion of the hearing, Judge Connors denied the defendant's motion to open but did not issue a memorandum of decision.[10] The defendant did not seek an articulation of the court's decision. We, however, are able to discern the basis of Judge Connors' decision from the following colloquy that took place between the court and the defendant during the hearing:

"The Court: I read [your motion to open] today . . . but my concern is that it seems like this is now like the third bite at the apple because you've already had the opportunity to have this heard by [the dissolution court] and then the Appellate Court and then the Supreme Court and, as I understand your argument, your concern is that [the dissolution court] . . . made

[10] Judge Connors stated during argument on another motion: "So, let's deal first with the—the motion to open is denied for the reasons that I have articulated."

[its] decision based upon the fact that [the plaintiff] was not involved in a sexual relation—

"[The Defendant]: Correct.

"The Court: —with that individual.

"[The Defendant]: Yes, Your Honor. And that . . . I assaulted her also. There's two areas of fraud that I'm alleging. . . .

* * *

"[The Defendant]: [W]hen I felt that there was fraud, I thought that it had to be—the remedy would be to pursue it through the appeal process. And . . . apparently, in the appeal process you aren't able to present any evidence of allegations of fraud because the Appellate Court will look at the existing evidence and will only tackle errors which were no errors—it found no errors and upheld the judgment.

"Therefore . . . what I'm alleging is the [fraud], obviously, the same fraudulent evidence that [the dissolution court] relied was also relied on by the Appellate Court and that's how the judgment was upheld. But then I found out clearer, through some research, that there was actually . . . this avenue to file a motion to open judgment based on fraud . . . .

* * *

"The Court: Well . . . even if we took . . . this is sort of a complicated area of the law in some respects. You may be getting into what—what we call, under the law of *Oneglia* that there is an *Oneglia* hearing[11] . . . . [T]he problem that I have with your case is that the basis is you saying that your former wife had a sexual relationship with [another man] . . . [a]nd that she made false allegations that you assaulted her. . . .

[11] See *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 270, 540 A.2d 713 (1988) (postdissolution discovery not permitted unless party moving to open judgment substantiates allegations of fraud beyond mere suspicion).

Now . . . the difference between your case and the other cases is, both of those factors were known to [the dissolution court] at the time of the trial. [The dissolution judge], quite truthfully, discredited both of you in your testimony. He didn't find your former wife to be particularly honest on those issues, nor did he find you to be wholly credible on some of the financial issues. . . .

"So there's no need, in my mind, to—to open to do the—the initial hearing to see if there is probable cause because [the dissolution court] acknowledged that there was evidence that your wife was involved with [another man]. What you don't like is that [the dissolution court] said there was no concrete evidence that she was actually having sexual relations with him. Although, [the dissolution court was] well aware that your opinion was that she was having sex during the marriage and her testimony was that she was not. And then you found the information that you brought up from the cell phone, the text message. . . .

"[T]he Appellate Court has already reviewed that, as well. And I know that while it may be difficult for you to come to terms with, fault, in a divorce, is just one of the many elements—one of eighteen criteria that a judge has to consider when dividing up the assets and [the dissolution court] was well aware that your wife was involved in a relationship whether it was sexual or emotional. I mean I think most people will find that sometimes emotional relationship, from what I read, [the court] found that your former wife was involved at least for a year with this individual. . . .

"[The Defendant]: If I . . . may read from the memorandum of the decision by . . . [the dissolution judge]. . . . '[P]laintiff denied sexual relationship prior to the divorce filing with . . . anyone . . . in her sworn

answers to defendant's interrogatories, dated February 29, 2016.' . . .So he, basically, credited that.

"The Court: No, he did not. What he said was that's her testimony. . . . When judges write, we say I find or the court finds. That is not a finding by the court. What the court is saying is that that's what she testified to. He goes on to say he did not find her credible . . . and her story did not add up.

"[The Defendant]: [I]f I may go to the second page . . . .'The court has considered her relationship with another man during the marriage. The court finds no direct evidence of her and this other man ever having sex. . . . So there's . . . a finding by the court . . . [a]nd that's based on a fraud by the plaintiff. . . .

* * *

"The Court: [T]his is just to open your judgment based on fraud. And this is not the type of fraud—you're trying to say that there was a fraud because she—let's say she lied, let's use that word. . . . She lied and said she wasn't having sex with [another man] and she was. . . . The judge [was] well aware that that's what the issue was and . . . that's not going to give me enough to go back and open a judgment when [the dissolution court] knew you were saying that, the Appellate Court knew you were saying that, the Supreme Court knew you were saying that.

"So, initially, the situation with these cases, when we go back this far to open . . . we're doing the discovery to see whether there's a probable cause. . . . I would concede that had there been an issue and you didn't know about that, then maybe there was probable cause now that you have cell phone records, but even knowing that . . . and the other stuff. It's got to be likely to change the outcome. It's highly unlikely that whether she was having sexual relations with [another man] or not, would have affected [the dissolution court's] decision at all." (Footnote added.)

The defendant argued to Judge Connors, on the basis of *McPhee* v. *McPhee*, 186 Conn. 167, 177, 440 A.2d 274 (1982), that "a spouse whose conduct has contributed substantially to the breakdown of the marriage should not expect to receive financial kudos for—for his or her misconduct. Moreover, in considering the gravity of such misconduct, it is entirely proper for the court to assess the impact of the . . . spouse's conduct on the other spouse." He argued that there is nothing more grave than accusing a spouse of an assault and causing the spouse to be arrested and this could be a factor in revising the judgment of dissolution.

Judge Connors disagreed with the defendant, stating: "I strongly disagree with you. I—I've read through [the dissolution court's] decision. . . . Judge Keller, who authored the opinion for the Appellate Court, was well aware that that was the allegation. [The dissolution judge] carefully set out in his memorandum of decision that even the—the criminal case was pending—he had—he had the information. He knew about it. He questioned the veracity of [the plaintiff] and yet still found, as he did.

"As I've indicated, every case is . . . very fact specific and, as you know from your appellate experience and I think Judge Keller articulated it. On appeal, you have to show that it was clearly erroneous. It's very difficult to show that a decision was clearly erroneous and [the dissolution judge] did really a very phenomenal job of outlining what he relied upon and put that evidence in there. Had he not mentioned it [at] all, maybe there's a claim. He was aware that there was the assault charge against you. He was aware that he didn't find her to be credible in that regard, that there was the issue as to whether—you said it was self-inflicted. You denied it from the beginning and testified that it was self-inflicted. He was aware of that." Thereafter, Judge Connors denied the motion to open.[12]

[12] In his motion to open, the defendant made allegations of wrongdoing on the part of the plaintiff's counsel in certifying her answers to the defendant's

On appeal, the defendant claims that Judge Connors abused her discretion by denying the motion to open and thereby did not give him the opportunity to prove that the plaintiff committed a fraud on the dissolution court.[13] We do not agree.

"Our review of a court's denial of a motion to open [based on fraud] is well settled. We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Mattson* v. *Mattson*, 74 Conn. App. 242, 244, 811 A.2d 256 (2002).

The standard by which we review the denial of a motion to open a judgment of dissolution was established by our Supreme Court in *Varley* v. *Varley*, 180 Conn. 1, 428 A.2d 317 (1980). "The question presented

interrogatories when the plaintiff had told him of her affair with another man and that counsel took no action to correct the plaintiff's testimony, which the defendant alleged was untruthful. The defendant sought to raise his claim against the plaintiff's counsel during the hearing before Judge Connors. Judge Connors informed the defendant that the trial court was not the appropriate venue in which to raise a claim of attorney misconduct.

[13] The defendant has raised eight issues on appeal. He claims that Judge Connors erred by (1) denying his motion to open, (2) considering "the appeal of a claimed error a substitute to the motion to open," (3) assuming the substantiation of fraud will not substantially change the judgment, (4) considering that the plaintiff was not found credible on her allegations of assault, (5) using speculation and conjecture, (6) denying the defendant's discovery to substantiate the plaintiff's allegations of fraud, (7) denying the defendant a postjudgment probable cause hearing, and (8) denying the defendant the opportunity to establish whether the allegations of fraud are sufficient to open the judgment.

by a charge of fraud is whether a judgment that is fair on its face should be examined in its underpinnings concerning the very matters it purports to resolve. Such relief will only be granted if the unsuccessful party is not barred by any of the following restrictions: (1) There must have been no laches or unreasonable delay by the injured party after the fraud was discovered. (2) There must have been diligence in the original action, that is, diligence in trying to discover and expose the fraud. (3) There must be clear proof of the perjury or fraud. (4) There must be a substantial likelihood that the result of the new trial will be different." Id., 3–4.

Our Supreme Court, however, abandoned the second *Varley* requirement regarding laches or diligence in discovering fraud in *Billington* v. *Billington*, 220 Conn. 212, 222, 595 A.2d 1377 (1991). In the present case, Judge Connors analyzed the defendant's claims of fraud under the fourth *Varley* factor, concluding that there was not a substantial likelihood that the result of a new trial would be different. See *Sousa* v. *Sousa*, 173 Conn. App. 755, 772, 164 A.3d 702 (defendant failed to demonstrate substantial likelihood that had plaintiff disclosed full value of pension in affidavit, as defendant claimed, result of new proceeding would be different), cert. denied, 327 Conn. 906, 170 A.3d 2 (2017); see also *Weinstein* v. *Weinstein*, 275 Conn. 671, 704, 822 A.2d 53 (2005); A. Rutkin et al., 8A Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 52:7, p. 318.

In his appellate brief, the defendant laid out four arguments: Judge Connors improperly (1) considered the defendant's motion to open a substitute for an appeal of a claimed error, (2) concluded that the dissolution court did not find the plaintiff credible on her testimony of assault, (3) speculated that the dissolution court did not wait for the resolution of the criminal charges against the defendant to be resolved because

it did not think it was important, and (4) determined that there was no fraud on the dissolution court without holding an evidentiary hearing. The defendant's arguments lack merit as they misconstrue the court's decision.

Judge Connors did not consider the defendant's motion to open a substitute for an appeal of claimed error. By filing a motion to open, the defendant took a different route from an appeal to attack the dissolution judgment. Judge Connors recognized that no matter the legal theory, the underlying facts were the same. There was evidence before the dissolution court that the plaintiff had an extramarital relationship with another man, but the court did not find any direct evidence that the relationship was of a sexual nature. The dissolution court found multiple reasons why the parties' marriage had broken down and that there was fault on both sides. Importantly, the court did not find the defendant credible, particularly with respect to his finances, and noted that he had used the plaintiff's education fund to pay the debts of his business. The basis of the dissolution court's financial orders had to do in part with the specific facts related to the plaintiff, who had health issues at the time, was unemployed and was without an education or technical training necessary to find employment by which to support herself and to pay her share of child support. The court awarded the plaintiff five years of rehabilitative alimony.

In addition, there is no factual basis for the claim that Judge Connors improperly speculated that the dissolution court did not wait for a resolution of the assault charges against the defendant to be resolved before issuing a decision because the dissolution court did not think that those charges were important. Judge Connors explained to the defendant why it was not necessary for the criminal case to be resolved before the judgment

of dissolution was rendered. She stated: "Judge Carbonneau had every right to say, I'm going to wait until those criminal charges are resolved if he thought it was that important. . . . So, if it was something that was really going to affect his outcome one—one way or another, if he felt he didn't have enough evidence, he could have waited until the outcome of your case and he didn't. So all of this information that is so troubling to you, and I can understand why. . . . And I can understand you're unhappy with this judgment, but . . . I think even if the things that you're saying were true, you would have likely had the exact same result, nothing would have changed and you have to sort of put it . . . behind you and move on. Particularly now because . . . like I said, Judge Carbonneau was aware, the Appellate Court was aware, the Supreme Court denied it. Sir, they're all aware . . . ." The dissolution court's responsibility was to determine why the marriage had broken down and how to divide the marital assets and to award alimony, if any. Judge Connors understood the role of the dissolution court and balanced the allegations of fraud against the dissolution judgment.

During the hearing before Judge Connors, the defendant argued that the dissolution court relied on the plaintiff's alleged misrepresentation in rendering its award. The defendant claims in this court that Judge Connors improperly found that there was no fraud on the dissolution court and that it is highly likely that a new judgment will be different. When the dissolution court's memorandum of decision is read in its entirety, it is clear that the dissolution court knew that the plaintiff was not truthful about her relationship with another man and the alleged assault by the defendant. Most significantly, the dissolution court's decision indicates that the defendant knew of the plaintiff's affair at or about the time the plaintiff commenced the divorce action; see

footnote 3 of this opinion; and that he knew the results of Bilotto's investigation of the alleged assault and what Bilotto found in the plaintiff's cell phone at the time of trial. The defendant's argument before Judge Connors and this court also falters because the cause of the breakdown of the marriage is only one of the factors the dissolution court must consider in making its financial orders, a statutory requirement this court made clear in resolving the defendant's appeal from the dissolution judgment. Not only were the parties a generation apart in age, but they also came from different religions, cultures, world experiences, and educations. An experienced judge knows how to weigh the factors enumerated in §§ 46b-81 and 46b-82 when dividing marital assets and awarding alimony. "[A] trial judge need not leave insights and common sense derived from her life's experience at the courthouse door." *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 402, 186 A.3d 739 (2018).

The defendant's claim that the plaintiff perpetrated a fraud on the dissolution court fails as a matter of fact and law. Although the defendant correctly identified the elements of the tort of fraudulent misrepresentation; see footnote 9 of this opinion; there is no evidence that Judge Carbonneau relied on the plaintiff's alleged misrepresentations. Moreover, it is not the legal standard applicable to claims of fraud upon the court in dissolution actions. Our Supreme Court has concluded that "there is a distinction between fraud on the court and fraud on the adverse party in the context of a marital dissolution case." *Billington* v. *Billington*, supra, 220 Conn. 222. "[T]he concept of fraud on the court in the marital litigation context is properly confined to situations where both parties join to conceal material information from the court." Id., 225, citing *Baker* v. *Baker*, 187 Conn. 315, 322, 445 A.2d 912 (1982) (both parties to marital dissolution entered into agreement that "by its own terms specifically provided that it be concealed from the trial court"). The parties in the

present case did not conspire to conceal information from the dissolution court.

In addition to finding that the dissolution court was well aware of the defendant's claim that the plaintiff's alleged misrepresentations regarding her extramarital relationship with another man and the defendant's alleged physical assault, Judge Connors stated, without reference to authority, that it was "highly unlikely that whether [the plaintiff] was having sexual relations with [another man] or not, would have affected [the dissolution court's] decision at all." The dissolution court's memorandum of decision is replete with evidence that the dissolution court was aware of and had considered the plaintiff's relationship with another man and that the plaintiff was not credible with respect to her allegations that the defendant had assaulted her.[14]

[14] The dissolution court made the following findings of fact that defeat the defendant's assertion that the dissolution court was defrauded. On Wednesday, July 29, 2015, the plaintiff called the Plymouth Police Department to report that the defendant had forced his way into her presence and assaulted her. Bilotto was the lead detective on the case.

"Bilotto determined that [the] defendant sent the plaintiff three text messages prior to her 911 call at 6:19, 6:20 and 6:22 p.m. From these messages and the transcript of the 911 call, the detective concluded that the defendant was not in the same location as the plaintiff. He did not hear the defendant's voice on the 911 call. He heard a 'commotion,' but not screaming.

"Bilotto interviewed the plaintiff at the marital residence . . . . He found discrepancies between [the plaintiff's] verbal accounts of the incident to him and her 911 call. The plaintiff twice declined to answer his questions about the sequence of events on the night in question; once that night and later with her attorney present."

Bilotto "studied photos of the blood spatter on the floor where the injury was alleged to have occurred. He determined that the pattern was from a person in a stationary position and that this was inconsistent with the description of the incident given by the plaintiff."

"In the course of his lengthy investigation . . . Bilotto discovered a number of cell phone messages of a sexual nature between the plaintiff and [another man]. The plaintiff met [the man], currently age [sixty-four], at a bar. The children's then nanny . . . introduced them about a year prior to the plaintiff's filing for divorce on May 26, 2015. The plaintiff described [the man] as 'a friend' for about a year after they met. Their relationship changed at some point because the defendant confronted her with suggestive pictures

On the basis of our thorough review of the record, we conclude that Judge Connors properly determined that the outcome of a new trial would not be different as the dissolution court had considered the equities in making its financial awards by ordering the defendant to repay the plaintiff her education fund that he had used to pay his business debts and by providing time limited, rehabilitative alimony to enable the plaintiff to acquire employable skills so that she might be in a position to help support herself and the parties' children. "In family matters, the court exercises its equitable powers. The balancing of equities is a matter which falls within the discretion of the trial court. . . . For that reason, equitable remedies are not bound by formula but are molded to the needs of justice." (Citation omitted.) *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 271–72, 540 A.2d 713 (1988).

On the basis of our thorough review of the record, we conclude that Judge Connors did not abuse her discretion in denying the defendant's motion to open. Even if the misrepresentations alleged by the defendant were credited, it is unlikely that the outcome of a new trial would be different.

The judgment is affirmed.

In this opinion, ALEXANDER, J., concurred.

FLYNN, J., dissenting. I cannot agree that the trial court properly denied the defendant an evidentiary hearing on his motion to open based on fraud. I would conclude that the motion court erred in denying the defendant's motion to open without holding an evidentiary hearing and, accordingly, reverse the judgment and remand for another hearing on the defendant's motion at which evidence may be taken.

he claimed she'd sent to [the man]. At least some of those pictures are in evidence before this court. The plaintiff denied a sexual relationship prior to the divorce filing with [the man] or anyone else in her sworn answers to the defendant's interrogatories dated February 29, 2016."

I disagree with the decision reached by the majority, first, because the defendant was not accorded an opportunity to present his after discovered new evidence of the plaintiff's admission to adulterous conduct, a conduct which she had denied under oath in the earlier trial of her divorce.

Second, because the exercise of the court's discretion depended on issues of fact that were disputed at trial, due process required that the defendant be permitted to present his after discovered evidence.

Third, I do not agree with the motion court and the majority that the nonsexual affair, which the dissolution court attributed to the plaintiff, can be equated with the putative adultery on her part that the defendant claims his new transcript evidence shows. Adultery is a more egregious form of marital infidelity. If proved, that new evidence could work a different result in awards of alimony and property division.

Fourth, although I agree that whether any discovery was warranted was within the motion court's discretion, the motion court had to listen to the defendant and his evidence to exercise that discretion to determine if discovery were necessary to authenticate the transcript evidence.

Fifth, the defendant had but one trial where evidence was offered. Therefore, I do not agree with the motion court that he already had "three bites at the apple" because of his appeals of the initial divorce judgment, or that his divorce appeals justified denying his motion to open.

Sixth, I do not agree with the majority that the dissolution court's finding that the defendant lacked credibility as to his finances could somehow justify the motion court's denial of an evidentiary hearing. Our statutes are clear as to both alimony and property awards that

causes of the marital breakdown can be considered in the making of such awards. The dissolution court made findings as to what the defendant's financial resources were. That matrix presumably would not change. Any imperfections in his financial affidavit were not the cause of the marital breakdown because they occurred *after* the marital breakdown.

I do not disagree with much of the majority's reiteration of multiple facts found by the dissolution court. However, I do not find most of them persuasive on the issue of whether the defendant's motion to open properly was denied without hearing evidence. Most of those marshalled facts do not address the defendant's principal issue, namely, that he was entitled to an evidentiary hearing by the motion court regarding new evidence of facts the dissolution court did not hear. If heard and credited, they are after discovered evidence of the plaintiff's admission to adulterous conduct which she had denied under oath in the dissolution trial.[1]

While the action for dissolution was pending, the defendant was arrested on the complaint of the plaintiff for an alleged assault on the plaintiff. After Judge Carbonneau's judgment of dissolution had entered, that criminal charge against the defendant subsequently was dismissed by the Superior Court after a police investigation of the alleged assault. This fact looms important

[1] My analysis is guided by the following standards. An interpretation of what is required by the relevant statute presents a question of law over which our review is plenary. See *Trumbull* v. *Palmer*, 161 Conn. App. 594, 598–99, 129 A.3d 133 (2015), cert. denied, 320 Conn. 923, 133 A.3d 458 (2016). Review of whether the defendant's motion to open was properly denied is examined under an abuse of discretion standard. See *Gaary* v. *Gillis*, 162 Conn. App. 251, 255–56, 131 A.3d 765 (2016).

However, the defendant alleges that he was denied the opportunity to present evidence that the plaintiff was adulterous although she had denied it at trial. Whether due process was denied to offer evidence on a disputed fact is a question of law, over which our review is plenary. "Whether a party was deprived of his due process rights is a question of law to which appellate courts grant plenary review." *McFarline* v. *Mickens*, 177 Conn. App. 83, 100, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

in my analysis because, as part of the investigation of the alleged assault, police obtained the plaintiff's cell phone records that the defendant alleges reveal the plaintiff's admission to engaging in a sexual relationship with another man while married to the defendant. Subsequent to the dismissal of the assault charge, the defendant was able, by subpoena, to gain access to a transcript of the plaintiff's cell phone records that the police had obtained. The memorandum of decision was issued while the defendant's assault case was still pending. The dissolution court found that the plaintiff had engaged in an affair, but nonetheless found that there was no direct evidence that it was sexual in nature. The dissolution court further found: "While the wording of defendant's interrogatories dated September 30, 2015 concerning plaintiff's extramarital relationships may have been imprecise, plaintiff's responses—under oath—were less than forthcoming. Plaintiff's recollection of her relationship with George Jones was vague. . . . The court has considered her relationship with another man during the marriage. The court finds no direct evidence of her and this other man ever having sex."[2]

Ordinarily, trial courts do not cite to a lack of evidence on some point, unless that point on which evidence is lacking might make a difference to some issue decided if the evidence existed, were offered, and found to be credible. However, in this case, the dissolution court expressly *did* cite to a lack of such evidence. It found "no direct evidence of her and this other man

[2] The pertinent portion of the defendant's interrogatory to the plaintiff and her answer to it under oath, together with the notarization of it by her attorney, Jeremiah Nii Amaa Ollennu, are as follows. Question 6 of the defendant's interrogatories asked: "Have you had sexual relations with anyone other than your spouse since the date of your marriage?" The plaintiff responded, "No." The notarization on the final page is signed by Ollennu, who wrote "Esq." after his name, and the words "notary public" under the line containing his signature are crossed out, presumably indicating that he signed it as a Commissioner of the Superior Court.

ever having sex."[3] This indicates that had such direct evidence existed before the trial court, that orders of the court might have been different. Paragraphs 15 and 16 of the defendant's motion to open are the equivalent of an offer of proof. In those paragraphs, the defendant alleges nothing less than that a police transcript of the plaintiff's conversation via text message with her then attorney revealed an agreement with him to deny under oath at trial that she had been adulterous, followed by an overt act wherein she so denied it under oath before the court hearing the dissolution, which was not corrected of record by her attorney. It is undisputed that this is not a situation, as discussed in *Billington* v. *Billington*, 220 Conn. 212, 225, 595 A.2d 1377 (1991), in which both parties in marital litigation commit fraud on the court by joining to conceal material information from the court. The defendant admitted to such at oral argument before this court. However, the defendant in the present case made the claim in his motion to open that the plaintiff conspired with her attorney to deceive the court and the defendant by concealing information about her sexual affair. Although this is not the type of fraud on the court discussed in *Billington*, nonetheless the allegations, if proved true, *are* fraud. Defining fraud in the marital dissolution context in such a limited way as to not include collusion by an attorney and client to conceal material information from the court and opposing party, deprives courts of a basic function in dissolution cases, namely, to fairly make awards of property division and alimony, both of which can be substantially affected if presented with credible evidence of an extramarital sexual affair, which caused the marital breakdown.

[3] This court stated that the trial court "considered the evidence of the plaintiff's extramarital affair and found that it was not sexual in nature." *Conroy* v. *Idlibi*, 183 Conn. App. 460, 464, 193 A.3d 663, cert. denied, 330 Conn. 921, 194 A.3d 289 (2018). I agree with the defendant that this overstates what the trial court found. The trial court found only that there was "no direct evidence of [the plaintiff] and [Jones] ever having sex."

In fairness, the defendant was never accorded the right to put on later discovered evidence from the police transcript before the motion court. If found credible, that evidence would constitute direct evidence of the adulterous conduct that the plaintiff had denied under oath and that the dissolution court found lacking.

The majority holds that there was no evidence that the divorce court relied on the plaintiff's alleged misrepresentation. I disagree. That reasoning ignores the dissolution court's finding that there was no *direct* evidence that the plaintiff's affair was sexual in nature. The dissolution court could not rely on evidence it never heard and that the plaintiff withheld and expressly, falsely denied the existence of under oath.

In the defendant's motion to open the dissolution judgment on the basis of fraud, he set forth: "On October 2, 2017, approximately a year after the court issued its memorandum of decision, the Plymouth police department released record [sic] of the plaintiff's text messages that were extracted from the plaintiff's cell phones. The Plymouth police department had seized the plaintiff's cell phones to investigate the plaintiff's false allegation of assault. The extracted text messages from the plaintiff's cell phone disclosed a very graphic relation between the plaintiff and George Jones spanning for over a year prior to the plaintiff's filing of divorce. The extracted text messages from the plaintiff's cell phone disclosed communication between the plaintiff and her counsel, in which [A]ttorney Ollennu was counseling the plaintiff to mislead the court by concealing her sexual affair from the judge so the judge won't feel sorry for the defendant."[4]

[4] The defendant further alleged in his motion to open that the plaintiff had fabricated an incident of assault with self-inflicted wounds to falsely accuse the defendant of a brutal assault and falsely testified during the divorce proceedings that the defendant had assaulted her. Although the defendant wants to again probe into the merits of the plaintiff's dismissed criminal assault complaint, because the dissolution court did not find that the defendant had assaulted the plaintiff, I agree with Judge Connors that, even if he could prove

The motion court and the parties focused on the defendant's allegations of fraud, an exception to the four month rule, which necessarily implies that the motion to open was filed beyond the four month period. At the hearing on the defendant's motion to open, the motion court opined that its concern was that the motion was in effect "a third bite at the apple" because the defendant's divorce action had already been heard by the dissolution court, reviewed by the Appellate Court, and certification to appeal the decision of the Appellate Court had been denied by our Supreme Court. The motion court further opined that the problem it saw with the defendant's motion was that the dissolution court had discredited both the plaintiff and the defendant. The defendant's testimony was discredited concerning his financial situation. The motion court further held that, because the dissolution court found that the plaintiff had an affair, if the motion were granted it would not likely change the result of the case.

Without hearing any evidence about the need for further discovery, the motion court in effect "demurred." The motion court improperly equated the consequences of the nonsexual extramarital affair that the dissolution court found with adultery, despite the fact that the dissolution court had found there was "no direct evidence" that the affair was sexual in nature. The defendant newly alleged before the motion court that the affair was sexual in nature by virtue of the plaintiff's admission to it.

The General Assembly enacted a statutory provision that a judgment may be opened only if the court is moved to do so within four months of its rendering. See General Statutes § 52-212a. A recent case from our Supreme Court pointed out that it has "recognized that

that there were no assault, doing so would be unlikely to change the result of the awards in the dissolution judgment and that therefore there was no need to retry that issue.

a trial court has inherent power, independent of [any] statutory provisions, to open a judgment obtained by fraud, in the actual absence of consent, or by mutual mistake at any time." (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 469, 239 A.3d 272 (2020), citing *Kenworthy* v. *Kenworthy*, 180 Conn. 129, 131, 429 A.2d 837 (1980).[5]

I agree with the defendant's claim that the trial court erred by denying him a postjudgment probable cause hearing to determine whether any discovery beyond the testimony of the parties should be allowed in the future to substantiate the defendant's allegations of fraud. The motion court was in the best position to determine if additional discovery was necessary. But it had to listen to the defendant to find that out. Evidence to be admissible must be properly authenticated. See Conn. Code Evid. § 9-1. "All documents must be authenticated before they are admitted into evidence." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 9.1.2, p. 675. As § 9-1 (a) of the Connecticut Code of Evidence explains, the purpose of authentication is to ensure that the offered evidence "is what its proponent claims it to be." In this matter, the defendant would be obligated to show that the transcript of the text messages was accurate and constituted discourse between the plaintiff and her attorney. It is possible that further discovery might be necessary to authenticate the transcript for admissibility into evidence. See *State* v. *Garcia*, 299 Conn. 39, 57, 7 A.3d 355 (2010) (direct testimony and circumstantial evidence among ways to authenticate writing). My review of the record reveals that no

[5] Our common law in part derives from English common law. There is an historic recognition in the literature of English speaking peoples that fraud, if found to exist, must be rooted out. "The Principal Dutie of a Judge, is to suppress Force and Fraud; wherof Force is the more Pernicious, when it is Open; and Fraud when it is Close and Disguised." Sir Francis Bacon, The Essayes or Counsels, Civil and Morall, Essay LVI, Of Judicature, Edited by Michael Kiernan, Harvard University Press, 1985.

evidence was taken at the hearing on the defendant's motion to open. Although a full scale trial need not occur in order to determine probable cause for purposes of permitting further discovery, I conclude that it accords a person in the defendant's shoes entitlement to a hearing and to show through testimony the need for further discovery. See id., 257.

I next turn to our statutory scheme, which shows a continued recognition of the egregious nature of adultery as a cause of marital breakdowns. Section 46b-40 (f) of our General Statues defines " 'adultery' " as "voluntary sexual intercourse between a married person and a person other than such person's spouse." Adultery such as would constitute grounds for dissolution "will not be inferred from circumstantial evidence unless there is both an opportunity and an adulterous disposition . . . [and] without more does not necessarily compel a conclusion that adultery has occurred." (Citations omitted.) *Turgeon* v. *Turgeon*, 190 Conn. 269, 279, 460 A.2d 1260 (1983). In short, adultery, unless observed "in flagrante delicto," is hard to prove, which explains why the dissolution court did not find as a fact that it had occurred because there was "no direct evidence" of it. However, an admission to such conduct by the plaintiff on her cell phone would constitute strong evidence, if authenticated, that the conduct had occurred. This state allows for divorce upon a finding that the marriage has broken down irretrievably. See General Statutes § 46b-40 (c) (1). Nonetheless, the legislature saw fit to retain adultery as a separate ground for divorce. See General Statutes § 46b-40 (c) (3). This legislative statement evinces a recognition of how serious a form of marital infidelity adultery is. Although § 46b-40 (c) (1) "clearly establishes a state policy recognizing that a marital relationship may terminate in fact without regard to the fault of either marital partner . . . [n]o-fault divorce does not mean that the causes of a marital

breakup are always irrelevant . . . .'' (Citation omitted; internal quotation marks omitted.) *Posada* v. *Posada*, 179 Conn. 568, 572, 427 A.2d 406 (1980). Adultery, however, can still be relevant in divorce proceedings when considering property division and alimony. See General Statutes §§ 46b-81 (c) and 46b-82 (a).[6] ''[A]

[6] General Statutes § 46b-81 provides: ''(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect. (b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.''

General Statutes § 46b-82 provides: ''(a) At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order pursuant to subsection (b) of this section or an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is unable to pay the cost of such insurance or such party is uninsurable. In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and,

spouse whose conduct has contributed substantially to the breakdown of the marriage should not expect to receive financial kudos for his or her misconduct." *Robinson* v. *Robinson*, 187 Conn. 70, 72, 444 A.2d 234 (1982). Section 46b-81 (c) specifically requires a trial court to consider "the causes for the . . . dissolution of the marriage" in making decisions as to distribution of property. Similarly, § 46b-82 (a) provides that a trial court, "[i]n determining whether alimony shall be awarded, and the duration and amount of the award . . . shall consider . . . the causes for the . . . dissolution of the marriage . . . ."

In *Weinstein* v. *Weinstein*, 275 Conn. 671, 685, 882 A.2d 53 (2005), which concerns the fraud exception in the context of a motion to open a dissolution judgment, our Supreme Court stated that "[f]raud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment."[7] (Internal quotation marks omitted.)

in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment. (b) If the court, following a trial or hearing on the merits, enters an order pursuant to subsection (a) of this section, or section 46b-86, and such order by its terms will terminate only upon the death of either party or the remarriage of the alimony recipient, the court shall articulate with specificity the basis for such order. (c) Any postjudgment procedure afforded by chapter 9061 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of alimony."

[7] Furthermore, "[t]here are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud; and (3) there is a substantial likelihood that the result of the new trial will be different." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, supra, 275 Conn. 685. In the present case, where there exists no claim of undue delay, our review is limited to "whether

Although our motion to open case law defines "fraud" in the context of a motion to open similar to the definition of fraud in the inducement of the making of a contract or fraud in the execution of it, the defendant's claims do not arise out of a contractual agreement except in the broad sense that the plaintiff and defendant contracted a marriage which has been dissolved. See *Cimino* v. *Cimino*, 174 Conn. App. 1, 8–9, 164 A.3d 787 (motion to open), cert. denied, 327 Conn. 929, 171 A.3d 455 (2017); *Harold Cohn & Co.* v. *Harco International, LLC*, 72 Conn. App. 43, 50–51, 804 A.2d 218 (fraudulent inducement of contract), cert. denied, 262 Conn. 903, 810 A.2d 269 (2002).

In the more pertinent sense, the fraud alleged here relates to the plaintiff's denial of adulterous conduct at trial at the urging of an officer of the court who was her lawyer, who then did not correct his client's false statement but in fact signed the jurat after taking her oath. Black's Law Dictionary defines "fraud" as "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." Black's Law Dictionary (7th Ed. 1999), p. 670. That is the type of fraud contemplated as an exception to the four month rule within which motions to open must otherwise be made.[8] If an evidentiary hearing were to be held to determine if probable cause has been established that discovery is necessary for the defendant's newly discovered cell phone evidence, then, if probable cause is established, discovery should be ordered. If the defendant's allegations were substantiated beyond a mere suspicion, the court should have

there was sufficient proof of fraud and whether the result in a new trial would differ." Id., 686.

[8] The defendant conceded at oral argument that he was not claiming "fraud on the court" because he had not joined in it. Our Supreme Court has decided, in the case of *Billington* v. *Billington*, supra, 220 Conn. 224–25, "that the concept of fraud on the court in the marital litigation context is properly confined to situations where both parties join to conceal material information from the court."

opened the judgment for the limited purpose of discovery. "If the [party seeking to open the judgment] was able to substantiate [his] allegations of fraud beyond mere suspicion, then the court would open the judgment for the limited purpose of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing held." (Internal quotation marks omitted.) *Spilke* v. *Spilke*, 116 Conn. App. 590, 593 n.6, 976 A.2d 69, cert. denied, 294 Conn. 918, 984 A.2d 68 (2009).

The defendant also challenges the reasons given by the court for the outright denial of his motion. "There are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud; and (3) there is a [reasonable probability] that the result of the new trial will be different. . . . Additionally, the granting of such relief must not unfairly jeopardize interests of reliance that have taken shape on the basis of the judgment." (Citation omitted; internal quotation marks omitted.) *Foisie* v. *Foisie*, 335 Conn. 525, 535–36, 239 A.3d 1198 (2020).

In reviewing the reasons that the court gave for denying the motion to open, I can appreciate that all litigation must come to an end, but I do not agree that the defendant's motion to open was a "third bite at the apple" as the court found. It does not appear from this record that the cell phone evidence was known by the defendant during the defendant's dissolution trial before Judge Carbonneau. The record before us is silent as to whether it became known at the time of his earlier appeal to the Appellate Court or at the time he sought certification from our Supreme Court, but, in any event, because both appellate courts were limited to the record evidence before the dissolution court, neither appellate court could have taken new evidence or made factual findings about it.

The motion court also noted that the dissolution court discredited some of the testimony of both parties, after hearing both the plaintiff's and the defendant's evidence. The dissolution court made factual findings as to the financial circumstances of both parties. Presumably these findings stand as to the defendant's finances because they are not challenged on appeal and would be the matrix for any financial awards. However, I cannot agree that they would bar any relief to the defendant if the defendant is permitted to offer after discovered evidence in support of his motion. Some later conduct cannot cause the breakdown of a marriage that has already broken down irretrievably. This lack of credibility found on the part of the defendant[9] was not the cause of the marriage breakdown because the inconsistencies and misrepresentations in the defendant's financial affidavit occurred during the pendency of the divorce proceeding, which occurred long after the marriage breakdown had already occurred and, therefore, could not be a factor under the statutes authorizing fault in causing the breakdown to be considered in alimony and property awards. Section 46b-81 (c) expressly provides that, as to the division of marital property, that the court "shall consider" the "causes for the . . . dissolution of the marriage . . . ." Section 46b-82 (a) places a similar obligation on a court in its awards of alimony.

The defendant has made substantial allegations regarding fraud. His evidence deserves to be heard.

I would reverse the judgment and remand the motion to open for further proceedings at which the defendant is permitted to offer his evidence of the plaintiff's admission to adulterous conduct that she had denied at trial.

[9] The dissolution court determined that "[t]he mistakes, omissions, misrepresentations, inconsistencies and irregularities in his sworn financial affidavits damaged the defendant's credibility in the eyes of the court, especially in financial matters and values."

ZHE ZHENG *v.* FEIFEI XIA
(AC 43948)

Lavine, Prescott and Suarez, Js.*

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the trial court's order granting the defendant's postdissolution motion to modify child support, claiming that the court improperly ordered him to pay the defendant a certain percentage of his annual bonus income as supplemental child support. In issuing its order, the trial court deviated from the child support guidelines on the basis of the significant disparity between the parties' incomes. *Held* that the trial court's reason for deviating from the child support guidelines constituted an abuse of its legal discretion: the court made no specific finding as to why the guidelines were inequitable or inappropriate, save for alluding to the significant disparity between the parties' incomes, and that reason to deviate from the child support guidelines failed as a matter of law because, although our Supreme Court has stated that income disparity may be considered when the custodial parent has the higher income and deviation from the presumptive support amount would enhance the noncustodial parent's ability to foster a relationship with the child, that was not the situation in the present case, in which the unemployed defendant was the custodial parent who had no income aside from child support, and, accordingly, the court improperly considered the disparity between the parties' incomes in ordering the defendant to pay a certain percentage of his net bonus income as supplemental child support.

Submitted on briefs December 3, 2020—officially released May 4, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *M. Moore, J.*, granted the defendant's motion to modify child support, and the plaintiff

* The listing of judges reflects their seniority status on this court as of the date the appeal was submitted on briefs.

appealed to this court. *Reversed in part; further proceedings.*

Zhe Zheng, self-represented, filed a brief as the appellant (plaintiff).

Opinion

LAVINE, J. The self-represented plaintiff, Zhe Zheng, appeals from the judgment of the trial court granting the postjudgment motion to modify child support filed by the defendant, Feifei Xia.[1] On appeal, the plaintiff claims that the court improperly ordered him to pay the defendant 13 percent of his annual bonus as supplemental child support. In issuing its order, the trial court deviated from the child support guidelines on the basis of the "significant disparity in the parties' income." The reason to deviate given by the court is not a permissible rationale under the child support guidelines and *Maturo* v. *Maturo*, 296 Conn. 80, 99–103, 995 A.2d 1 (2010). We therefore reverse in part the judgment of the trial court and remand the case for further proceedings.

The following facts and procedural history, as disclosed by the record, are relevant to our resolution of the plaintiff's appeal. The parties were married in Stamford on March 28, 2010. Their only child was born in September, 2011. On January 26, 2012, the plaintiff commenced an action for dissolution of marriage on the basis of irretrievable breakdown. At the time the action was commenced, the plaintiff was employed as a hedge fund analyst, and the defendant was a law student. The parties entered into a separation agreement that included a detailed parenting plan, which the trial court, *Hon. Stanley Novak*, judge trial referee, incorporated into the uncontested judgment of dissolution rendered on July 23, 2013. Pursuant to the agreement, the parties

[1] The defendant did not file a brief or otherwise participate in the present appeal. We have considered the claims raised by the plaintiff on the basis of his brief and the record. See, e.g., *Rosario* v. *Rosario*, 198 Conn. App. 83, 84 n.1, 232 A.3d 1105 (2020).

share joint legal custody of their child, who is in the primary physical custody of the defendant. Judge Novak, pursuant to the separation agreement, ordered the plaintiff to pay the defendant unallocated alimony and child support in the amount of $1600 per month until August 2, 2014. On May 13, 2015, the court, *Tindill*, *J.*, ordered the plaintiff to pay the defendant $161 per week in child support. Since that time, the parties have filed numerous motions for orders of contempt and motions to modify child support. The present appeal concerns the motion to modify that was filed in early 2020.[2]

On January 22, 2020, the defendant, representing herself, filed a motion to modify child support (motion to modify), in which she represented that the plaintiff was a partner in a hedge fund who receives annual income consisting of an annual base salary, end-of-year bonuses, and partnership distributions. She also represented that, on June 29, 2017, a family support magistrate, Wayne R. Keeney, ordered the plaintiff to pay the defendant child support in the amount of $273 per week and lump sum, supplemental child support of $10,868, which was 12.97 percent of his net bonus. In her motion to modify, the defendant claimed that, as of January 15, 2020, there had been a substantial change in circumstances because the plaintiff's annual base salary had increased from $200,000 to $250,000 and because his 2019 bonus income was $466,418. The defendant, therefore, sought an upward modification of the plaintiff's child support obligation, specifically, that his basic child support obligation be increased to an amount consistent with his new gross annual income and that he pay supplemental lump sum child support that he owes on his 2019 bonus. The defendant represented that she is not employed[3]

[2] The parties' relationship is highly litigious. The trial court docket contains more than 270 entries, with at least 100 of them having been entered after the judgment of dissolution was rendered.

[3] During the hearing, the plaintiff protested the defendant's lack of employment stating that she has a master's degree and had attended law school.

and has no income other than child support. On February 5, 2020, the self-represented parties appeared before the court, *M. Moore*, *J.*, on the motion to modify.[4]

Judge Moore commenced the hearing by stating that she had "received the child support guidelines from family services, and pursuant to these guidelines . . . the [presumptive] child support is $416 per week."[5] The plaintiff questioned the percentage of the increase in child support because the increase was greater than the percentage increase in his base salary. The court explained to the plaintiff how the amount of child support is calculated. The plaintiff stated in response that, for the past couple of years, his base salary was used to calculate weekly child support because that amount was relatively stable. He also stated that his bonus varies "quite differently every year" and, for that reason, a lump sum, supplemental payment was made for each year in which he received a bonus. The plaintiff argued that his net income was more than $4000 per week and that the maximum amount under the child support guidelines is 12 percent of his net income. In response, the court stated: "So when your . . . net income [exceeds the highest amount on] the child support guidelines [schedule], I can deviate. I can determine based on all the factors what the child support figure is." The plaintiff, who remarried and has a child (qualified child) with his new wife, stated that he had one qualified child to consider and that he believed 10 percent of his net income was the proper percentage to use. The court

The defendant stated to the court that she is seeking employment but that her immigration status and lack of a green card present employability problems.

[4] The court also addressed the defendant's motion for contempt, which concerned the child's summer camp activities and who would pay the associated fees. The motion for contempt is not at issue in the present appeal.

[5] The child support guidelines worksheet filed in court on February 5, 2020, indicates that the plaintiff's weekly gross income was $4807 and that his net weekly income was $3005. The plaintiff's presumptive child support amount was $416 per week, which constituted 13.84 percent of his net income.

stated that the child support guidelines worksheet provided to it had considered the plaintiff's qualified child.[6]

The plaintiff represented that his net income from the $466,418 gross bonus that he received in 2019 was $234,736. In response to the court's inquiry as to whether the defendant agreed with the figures, the defendant stated that she agreed with the gross amount but disagreed with the plaintiff's self-reported net income for two reasons: first, that the child support guidelines provide that the deductions should consider taxes and credits and that the plaintiff had utilized the maximum tax deductions without considering tax credits, and, second, that the plaintiff received "a lot of credits back." The court stated that it understood the defendant's objection.[7] At the time of the hearing, the plaintiff had not yet filed his 2019 tax returns. The defendant presented the court with copies of past orders regarding the plaintiff's supplemental child support obligations, which demonstrated a range of percentages to be paid on various amounts of the plaintiff's annual bonus income.[8] On the basis of past orders, the

[6] Pursuant to § 46b-215a-2c (d) (A) of the Regulations of Connecticut State Agencies, "A qualified child is one: (i) who is currently living in the same household with the parent; (ii) who is a dependent of the parent; (iii) who is not a subject of the support determination; and (iv) for whom the parent has not claimed a deduction under section 46b-215a-1 (1) (*l*) of the regulations of Connecticut State Agencies."

The child support guidelines worksheet filed in court on February 5, 2020, indicates that the plaintiff's qualified child was taken into consideration when the plaintiff's child support obligation was calculated. The amount reserved for the plaintiff's qualified child was $318 per week.

[7] The court stated to the plaintiff that his accurate net income, when taxes are taken into account, are "not taxes that you decide, taxes that the government decides." The court also noted that the plaintiff had failed to include his bonus income on some of his financial affidavits. The court also found that the plaintiff had included only a portion of his bonus income on his financial affidavits, that which he had been paid to date, not the total amount.

[8] The defendant stated with respect to the prior child support orders: "[F]or 2017 bonus income, [the plaintiff] receive[d] $767,905. Even though, you know, [it] exceeds the maximum number in the guideline[s] even though

defendant requested that the plaintiff pay 12 percent of his net bonus as lump sum, supplemental child support.

At the conclusion of the hearing, Judge Moore stated in relevant part: "After conducting a hearing, the court finds a substantial change in circumstance and grants the defendant's motion for modification of child support based on the plaintiff's increase in income. The court finds the plaintiff's income for 2019 to be $666,000 gross as shown on his financial affidavit. The court finds the presumptive child support to be $416 per week and orders the plaintiff to pay said sum weekly. The court makes the finding that the application of child support guidelines in this case is inequitable and inappropriate. The court orders that the plaintiff must pay to the defendant 13 percent of his net bonuses as additional child support annually. This order is a deviation from the guidelines based on coordination of total family support and significant disparity in the parties' income. . . . [The plaintiff] shall pay . . . 13 percent of his net bonus to the defendant within seven days of his receipt of said bonus annually as additional child support. . . . The court finds [that] the plaintiff owes the defendant $30,115.68, equal to 13 percent of his bonus for 2019."[9] The court also ordered that, in future years, the plaintiff will be obligated to pay 13 percent of any bonus income he receives as lump sum, supplemental child support. The plaintiff appealed.

On appeal, the plaintiff claims that the court improperly (1) ordered him to pay 13 percent of his net 2019

[the] magistrate court still ordered him to pay . . . $47,253.72, which . . . is 17.67 percent of the net—his self-reported net, 6.15 percent of gross. So that number—I mean, for that year the bonus—the gross bonus income is far more than the number now."

[9] Our review of the transcript of the hearing discloses that the court found that the plaintiff's *net* income from his 2019 bonus was $234,736. The plaintiff does not challenge that finding. The plaintiff did not file a motion for articulation of the court's succinct order.

bonus income and future bonus income as supplemental child support, (2) abused its discretion by deviating from the child support guidelines, and (3) failed to consider his qualified child when calculating his supplemental child support obligation.[10] Notably, the plaintiff does not claim that the court improperly found a substantial change of circumstances, ordered him to pay the defendant $416 a week in child support, or ordered him to pay supplemental child support. Although the plaintiff has raised several claims on appeal, the core of his challenge to the judgment is to the *percentage* of his net income that the court ordered him to pay the defendant as supplemental child support. In support of his claim, he relies on § 46b-215a-2c (c) (1) (B) (i) of the Regulations of Connecticut State Agencies, which provides in relevant part that a supplemental order may be entered only when the percentage is "*generally consistent* with the [child support guidelines] schedule . . . ."[11] (Emphasis added.)

Although the plaintiff's principal claim is that the court improperly ordered him to pay 13 percent of his bonus as supplemental child support, the issue, in substance, is whether the court abused its discretion by deviating from the child support guidelines. We conclude that the court's reason for deviating from the child support guidelines constituted an abuse of its legal discretion; see *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 999 A.2d 721 (2010); *Maturo* v. *Maturo*, supra, 296 Conn. 99–101; and, therefore, we conclude that the

[10] We reverse, in part, the judgment of the trial court on the ground that the reason given by the court to deviate from the child support guidelines was improper. We need not reach the plaintiff's remaining claims as we are not persuaded that they are likely to arise on remand. See *State* v. *Norman P.*, 169 Conn. App. 616, 618 n.2, 151 A.3d 877 (2016) (generally speaking, if judgment is reversed and remanded for new trial, appellate court may review other claims that are likely to arise on retrial), aff'd, 329 Conn. 440, 186 A.3d 1143 (2018).

[11] This court construed the meaning of " 'generally consistent' " in *Gentile* v. *Carneiro*, 107 Conn. App. 630, 644, 946 A.2d 871 (2008).

court improperly ordered the plaintiff to pay the defendant 13 percent of his annual bonus as lump sum, supplemental child support.

The standard of review in domestic relations cases is well established. "[T]his court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . ." (Internal quotation marks omitted.) *Simms* v. *Simms*, 283 Conn. 494, 502, 927 A.2d 894 (2007). "In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Bender* v. *Bender*, 258 Conn. 733, 740, 785 A.2d 197 (2001). "Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law. . . . The question of whether, and to what extent, the child support guidelines apply, however, is a question of law over which this court should exercise plenary review." (Citation omitted; internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 367.

We begin with a review of the statutory scheme regarding child support and the guidelines. "The legislature has enacted several statutes to assist courts in fashioning child support orders. [General Statutes §] 46b-84 provides in relevant part: '(a) Upon or subsequent to the . . . dissolution of any marriage . . . the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. Any postjudgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a

party in connection with a final order for the periodic payment of child support. . . .

" '(d) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child.' " *Maturo* v. *Maturo*, supra, 296 Conn. 89–90.

General Statutes § 46b-215a provides for a commission to establish child support guidelines in order to ensure that child support awards are appropriate. See id., 90. "The . . . guidelines issued pursuant to section 46b-215a . . . and in effect on the date of the support determination shall be considered in all determinations of child support award amounts . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. *A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case*, as determined under the deviation criteria established by the Commission for Child Support Guidelines under section 46b-215a, *shall be required in order to rebut the presumption in such case*." (Emphasis added.) General Statutes § 46b-215b (a).

"The support guidelines are codified in §§ 46b-215a-1 and 46b-215a-2[c] of the Regulations of Connecticut State Agencies." (Footnote omitted.) *Hayward* v. *Hayward*, 53 Conn. App. 1, 7, 752 A.2d 1087 (1999). The preamble to the child support guidelines "explains that the guidelines are based on the income shares model,

which considers the income of both parents and presumes that the child should receive the same proportion of parental income as he or she would have received if the parents lived together. . . . Children's economic needs do not increase automatically, however, with an increase in household income. Although parents may spend more on their children in absolute dollars as their income grows, thus raising the child's station and standard of living, *the income shares model reflects the principle that spending on children as a percentage of household income actually declines as family income rises*. The preamble specifically notes that economic studies have found that spending on children declines as a proportion of family income as that income increases, and a diminishing portion of family income is spent on each additional child." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Maturo* v. *Maturo*, supra, 296 Conn. 93; see Child Support and Arrearage Guidelines (2015), preamble, § (d), pp. v–vi.

"[T]he applicable statutes, as well as the guidelines, provide *all* child support awards must be made in accordance with the principles established therein to ensure that such awards promote equity, uniformity and consistency for children at *all income levels*." (Emphasis in original; internal quotation marks omitted.) *Maturo* v. *Maturo*, supra, 296 Conn. 94–95. "[A]lthough courts may, in the exercise of their discretion, determine the correct percentage of the combined net weekly income assigned to child support in light of the circumstances in each particular case, including a consideration of other, additional obligations imposed on the noncustodial parent, any deviation from the schedule or the principles on which the guidelines are based must be accompanied by the court's explanation as to why the guidelines are inequitable or inappropriate and why the deviation is necessary to meet the needs of the child." Id., 95–96.

In the present case, the court found that "the application of [the] child support guidelines . . . is inequitable and inappropriate" and ordered the plaintiff "pay to the defendant 13 percent of his net bonuses as additional child support annually. This order is a deviation from the guidelines based on [the] coordination of total family support and significant disparity in the parties' income." The court, however, made no specific finding as to why the child support guidelines were inequitable and inappropriate, save for alluding to the significant disparity between the parties' incomes. That reason to deviate from the child support guidelines, i.e., disparity between the incomes of the parties, fails as a matter of law. Our Supreme Court has stated that "[i]ncome disparity may be considered . . . only when the *custodial parent* has the higher income and deviation from the presumptive support amount would enhance the lower income [noncustodial] parent's ability to foster a relationship with the child . . . . This consideration is unambiguously intended to protect the noncustodial parent in circumstances where the income of the custodial parent far exceeds the income of the parent obligated to pay child support . . . ." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 101. That is not the situation in the present case, in which the unemployed defendant is the custodial parent who has no income aside from child support. The court, therefore, improperly considered the disparity between the parties' incomes when it ordered the plaintiff to pay the defendant 13 percent of his net bonus income as supplemental child support. For this reason, we reverse the judgment only with respect to the lump sum, supplemental child support order.

The judgment is reversed only as to the lump sum, supplemental child support order and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ASNAT REALTY, LLC, ET AL. *v.* UNITED ILLUMINATING COMPANY ET AL.
(AC 42893)

Elgo, Cradle and Alexander, Js.

Syllabus

The plaintiffs, A Co. and E Co., sought damages from the defendants U Co., a utility company, U Co.'s parent company, and several individuals for, inter alia, fraudulent nondisclosure for concealing the true cost of environmental remediation on property the plaintiffs acquired from Q Co. Q Co. had purchased the property from U Co., which contaminated the site with hazardous materials. Prior to selling it to Q Co., U Co. had a study conducted to estimate the cost of remediation and the decommissioning of the site and designated a certain amount of money for that purpose. It was later discovered that U Co. concealed the true cost of remediating the site and that the cost was much higher than was originally estimated. The trial court granted the defendants' motion to strike several counts of the complaint, pleading fraud and unjust enrichment against the various defendants, from which the plaintiffs appealed to this court. *Held* that the trial court did not err in its decision to strike portions of the complaint that pleaded fraud and unjust enrichment, as that court properly concluded that the complaint contained broad allegations that were insufficient to satisfy the pleading requirements for fraud and that the complaint failed to allege, with the requisite specificity, that the defendants' alleged fraud was done to induce the plaintiffs to act, and failed to allege that the defendants had a duty of full and fair disclosure of known facts to the plaintiffs as it pertained to the property: the plaintiffs' claims of fraud did not plead specific acts and merely referenced the defendants' filings and representations as proof of fraudulent conduct, the complaint failed to allege that the defendants' fraudulent conduct was done with the intention or purpose to induce the plaintiffs to act to their detriment, as the complaint did not allege that the defendants had any knowledge that Q Co. would sell the site to future purchasers at the time it acquired the property, the plaintiffs were not parties to the proceedings regarding environmental remediation that preceded the plaintiffs' entering into the leasing agreement with Q Co., and, therefore, there was no special relationship that existed between the parties; moreover, the defendants' conduct with regulatory authorities and their filings with the Securities and Exchange Commission did not give rise to a duty of disclosure from the defendants to the plaintiffs; furthermore, this court declined to review the plaintiffs' claim that the trial court improperly struck their claim of unjust enrichment and that the claim should be reinstated, as that claim was inadequately briefed.

Argued November 16, 2020—officially released May 4, 2021

Procedural History

Action to recover damages for, inter alia, fraud, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the matter was transferred to the judicial district of Stamford-Norwalk, Complex Litigation Docket; thereafter, the trial court, *Lee*, *J.*, granted the defendants' motion to strike certain counts of the revised complaint and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Jules A. Epstein, with whom were *Stephen G. Walko*, and, on the brief, *Joshua L. Mallin* and *Andrea C. Sisca*, for the appellants (plaintiffs).

Elizabeth C. Barton, with whom were *Taylor C. Amato*, and, on the brief, *Andraya Pulaski Brunau*, for the appellees (defendants).

Opinion

ALEXANDER, J. The plaintiffs, Asnat Realty, LLC (Asnat), and Evergreen Power, LLC (Evergreen), appeal from the judgment of the trial court, *Lee*, *J.*, rendered after the court granted, in part, the defendants'[1] motion to strike certain portions of their revised complaint (complaint).[2] Specifically, the trial court granted the

[1] The defendants named in the plaintiffs' complaint are: United Illuminating Company, individually and as a subsidiary of UIL Holdings Corporation; UIL Holdings Corporation, individually and as the parent company to United Illuminating Company; James P. Torgerson, individually and as the chief executive officer of United Illuminating Company; Linda L. Randell, individually and as partner of Wiggin & Dana, LLP, individually and as president and general counsel for United Illuminating Company; Bruce L. McDermott, individually and as attorney with Wiggin & Dana, LLP, individually and as general counsel for UIL Holdings Corporation; Robert L. Fiscus, individually and as chief financial officer and vice chairman of UIL Holdings Corporation; James F. Crowe, individually and as senior vice president of UIL Holding Corporation; and Dennis Hrabchack.

[2] The present case concerns the allegations as pleaded in the plaintiffs' revised complaint dated July 3, 2018. The plaintiffs commenced the present action by way of complaint on or about January 2, 2014, and filed on or about January 8, 2014, in the Superior Court, judicial district of New Haven.

defendants' motion to strike counts one, three, five, six, seven, eight, nine, and ten of the complaint, pleading counts of fraud as to the various defendants,[3] and count four, pleading unjust enrichment against the defendant UIL Holdings Corporation (UIL). On appeal, the plaintiffs claim that the court erred in granting the motion because (1) the complaint sufficiently pleaded claims for both fraudulent nondisclosure and fraudulent misrepresentation, (2) the defendants had a duty to the plaintiffs to disclose truthful information, (3) the complaint pleaded the fraud claims with the requisite specificity, (4) the complaint adequately alleged that the plaintiffs relied on the defendants' misrepresentations and nondisclosure to their detriment, and (5) the complaint adequately stated causes of action against the defendants. We are not persuaded and, accordingly, affirm the judgment of the trial court.

In a comprehensive and well reasoned opinion, the trial court set forth the following relevant factual history as alleged in the plaintiffs' complaint. "[The defendant United Illuminating Company (UI)] is the former owner of a parcel of land located in New Haven, Connecticut (site), where it maintained a power plant for [sixty-three] years until 1992. In doing so, UI contaminated the site with hazardous materials. Before UI sold the site, at some time around June, 1999, the Connecticut Department of Public Utility Control (DPUC)[4] ordered

On March 2, 2018, the case was transferred and assigned to the Complex Litigation Docket in the judicial district of Stamford-Norwalk pursuant to General Statutes § 51-347b (a).

[3] Specifically, count one pleaded fraud as to United Illuminating Company, count three pleaded fraud as to UIL Holdings Corporation, and counts five through ten pleaded fraud as to James P. Torgerson, Linda L. Randell, Bruce L. McDermott, Robert L. Fiscus, James F. Crowe, and Dennis Hrabchack, respectively. Count two pleaded unjust enrichment as to UI and is still open pending the resolution of this appeal.

[4] DPUC was replaced by the current Public Utilities Regulatory Authority (PURA). See Department of Energy and Environmental Protection, Public Utilities Regulatory Authority, About Us, available at https://portal.ct.gov/PURA/About/About-Us (last visited April 20, 2021).

UI to solicit bids for remediation and decommissioning work on the site so that the DPUC could approve the sale.

"UI hired TLG Services, Inc. (TLG), to perform a study [TLG study] of the cost of remediation and decommissioning. After performing a complete study of the site, TLG concluded that remediation would cost approximately $7.6 million, and that decommissioning would cost approximately $13.2 million. On or about April 4, 2000, UI filed a motion for a protective order with the DPUC, in order to keep the TLG study confidential. The DPUC granted UI's motion for a protective order on or about May, 2000.

"On or about May 8, 2000, UI made confidential written representations to the DPUC that the TLG study revealed costs exceeding the previously estimated $8 million cost associated with decommissioning the site,[5] and through [Robert L.] Fiscus, its [chief financial officer], acknowledged to the DPUC in closed door hearings that the true cost of decommissioning was closer to $20 million. In public hearings on that same date, UI represented that remediation costs were estimated at [$2 million] rather than the significantly higher number identified by the TLG study, and that decommissioning costs were estimated at [$6 million]. . . . The plaintiffs also allege 'UI executives falsely represented in public hearings before the DPUC that the costs associated with decommissioning the site was [$8 million]. . . .'

"On August 16, 2000, UI conveyed the site to the nonparty Quinnipiac Energy, LLC (Quinnipiac Energy), which planned to operate the plant. Under the terms of that sale, UI was to pay Quinnipiac Energy $4.25 million to take the site, and the site was to be transferred

[5] It is alleged in the plaintiffs' complaint that, in 2000, "UI officials testified before the DPUC that the cost of decommissioning the site would be an estimated $8 million." .

with all permits in place to generate and sell electric power. As a further part of that sale, UI paid $1.9 million to fund a Remedial Action Plan (RAP) escrow to allow Quinnipiac Energy to remediate contamination on the site. UI repeated the $2 million RAP figure in Form 10-K statements filed with the [Securities and Exchange Commission (SEC)] in 2005, 2011, and 2013, despite the $7.6 million figure indicated in the TLG study. UI failed to update the $2 million figure in its SEC statements even after it became clear that it was not enough even to pay for the environmental studies necessary to characterize the site. In all its SEC statements, UI made no mention of the TLG study, the $7.6 million estimated cost of removing hazardous material, or the $20.8 million full decommissioning estimate. . . .

"About five years after its purchase of the site, Quinnipiac Energy divided it into two parcels known as parcel A and parcel B. Around May 6, 2005, Evergreen and Quinnipiac Energy entered into an indenture of lease agreement with an option to Evergreen to buy the site (lease agreement). The lease agreement provides that Quinnipiac Energy had rights to a fund created by a 'prior owner of the site' [UI] for environmental remediation, and that such fund shall be applied toward remediation of the site without regard to whether Quinnipiac Energy or Evergreen own it at the time of remediation. In December, 2006, Quinnipiac Energy transferred parcel A to Evergreen and parcel B to Asnat. . . .

"On February 9, 2012, the Department of Energy and Environmental Protection (DEEP) issued a cease and desist order preventing anyone from entering the site due to the presence of hazardous contaminants. In 2013, DEEP issued administrative orders to the plaintiffs and UI requiring that the plaintiffs ensure that no activity of any kind took place on the site other than activities related to the disposal of contaminants, and that no person enter the buildings located on the site other

than certain specified persons. On September 19, 2014, the Coast Guard issued an administrative order to the plaintiffs, and a substantively identical administrative order to UI, notifying them that contaminants at the site posed a threat to the public health, and directing them to submit a plan to abate such threat. Thereafter, the Coast Guard conducted its own removal activities due to a lack of compliance with its administrative orders, and initiated an enforcement action against the plaintiffs seeking reimbursement for the resulting costs. In the spring of 2017, the plaintiffs paid $700,000 to be released from the claims asserted by the Coast Guard.

" 'On or about June 6, 2015, the defendants' actions in concealing the true cost of the remediation and decommissioning, and thereby deceiving the public with the false $8 million remediation cost estimate, were exposed in a front page story in the Hartford Courant.' . . . Following the release of the story, UI entered into negotiations with DEEP and the Connecticut Attorney General. On or about September 17, 2015, DEEP and UI entered into a partial consent order requiring UI to conduct environmental investigation and remediation of the site, to make available $30 million for such investigation and remediation, and to complete the remediation within three years from the date of the order. To date, UI has taken no action to remedy the site." (Footnotes added; footnote omitted.)

On August 2, 2018, the defendants filed a motion to strike the ten count complaint in its entirety. A hearing on the motion was held on October 25, 2018, and, on February 21, 2019, the court issued a memorandum of decision on the motion granting the defendants' motion to strike counts one, three, five, six, seven, eight, nine, and ten, pleading counts of fraudulent nondisclosure as to the various defendants, and count four, pleading unjust enrichment against UIL. The court denied the motion to strike as to count two, pleading unjust enrichment against UI.

We begin by discussing the basis for our jurisdiction to consider the present appeal. It is well settled that "[t]he jurisdiction of the appellate courts is restricted to appeals from judgments that are final. . . . A judgment that disposes of only a part of a complaint is not a final judgment . . . unless the partial judgment disposes of all causes of action against a particular party or parties; see Practice Book § 61-3; or if the trial court makes a written determination regarding the significance of the issues resolved by the judgment and the chief justice or chief judge of the court having appellate jurisdiction concurs. See Practice Book § 61-4 (a)." (Citation omitted; internal quotation marks omitted.) *Tyler* v. *Tyler*, 151 Conn. App. 98, 103, 93 A.3d 1179 (2014).

In the present case, the plaintiffs filed an appeal with this court on March 11, 2019. On March 12, 2019, the plaintiffs filed a motion, pursuant to Practice Book § 61-4, for leave to appeal the court's ruling striking count one against UI and to stay discovery of the remaining count two against UI pending the resolution of the appeal.[6] On April 1, 2019, the court issued a memorandum of decision authorizing the interlocutory appeal of count one and denying the motion for a stay of discovery relating to count two.

On April 22, 2019, this court dismissed the appeal for a lack of final judgment because the plaintiffs had not filed a motion for judgment on the stricken counts pursuant to Practice Book § 10-44.[7] This court also denied,

[6] The court's decision to strike counts three through ten disposed of all causes of action against those particular defendants. The decision on those counts therefore constituted an appealable final judgment under Practice Book § 61-3.

[7] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint . . . or any count in a complaint . . . has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint . . . or count thereof. . . ."

without prejudice, the plaintiffs' motion for leave to appeal.[8] On April 24, 2019, the plaintiffs moved for entry of judgment on counts one, three, four, five, six, seven, eight, nine and ten of the complaint, and on April 25, 2019, the court rendered judgment in favor of the defendants on these counts.

Thereafter, on May 2, 2019, the plaintiffs filed a notice to appeal and a second motion for leave for interlocutory appeal as to count one. On June 14, 2019, the court granted the motion.[9] This appeal followed.

On appeal, the plaintiffs argue that the trial court erred in its decision to strike the counts of the complaint. The plaintiffs contend that the stricken counts adequately pleaded causes of action against the defendants for fraudulent nondisclosure, fraudulent misrepresentation, and unjust enrichment. We disagree.

"We begin by setting out the well established standard of review in an appeal from the granting of a motion to strike. Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been

[8] Practice Book § 61-4 (b) provides in relevant part: "If the trial court renders a judgment described in this section without making a written determination, any party may file a motion in the trial court for such a determination within the statutory appeal period, or, if there is no applicable statutory appeal period, within twenty days after notice of the partial judgment has been sent to counsel. . . . Within twenty days after notice of such a determination in favor of appealability has been sent to counsel, any party intending to appeal shall file a motion for permission to file an appeal with the clerk of the court having appellate jurisdiction. The motion shall state the reasons why an appeal should be permitted. . . . The motion and any opposition papers shall be referred to the chief justice or chief judge to rule on the motion. . . ." In the present case, the plaintiffs had filed a motion directed to the Chief Judge of this court seeking permission to appeal the interlocutory ruling as to count one against UI on April 17, 2019.

[9] On September 27, 2019, the parties filed a joint motion to stay trial, pertaining to the still active count two, pending the disposition of this appeal, which the trial court granted on October 9, 2019.

stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 350, 71 A.3d 480 (2013).

"Fraud involves deception practiced in order to induce another to act to her detriment, and which causes that detrimental action. . . . The four essential elements of fraud are (1) that a false representation of fact was made; (2) that the party making the representation knew it to be false; (3) that the representation was made to induce action by the other party; and (4) that the other party did so act to her detriment. . . . Because specific acts must be pleaded, the mere allegation that a fraud has been perpetrated is insufficient." (Internal quotation marks omitted.) *Whitaker* v. *Taylor*, 99 Conn. App. 719, 729–30, 916 A.2d 834 (2007). "All of these ingredients must be found to exist; and the absence of any one of them is fatal to recovery." *Saggese* v. *Beazley Co. Realtors*, 155 Conn. App. 734, 752, 109 A.3d 1043 (2015).

"Fraud by nondisclosure, which expands on the first three of [the] four elements [of fraud], involves the failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there was a duty to speak. . . . A lack of full and fair disclosure of such facts must be accompanied by an intent or expectation that the other party will make or will

continue in a mistake, in order to induce that other party to act to her detriment." Id., 752–53.

The plaintiffs first argue that the court erred in its determination that the complaint alleges only claims of fraudulent nondisclosure. We disagree.

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." *Caron* v. *Connecticut Pathology Group, P.C.*, 187 Conn. App. 555, 564, 202 A.3d 1024, cert. denied, 331 Conn. 922, 206 A.3d 187 (2019).

A review of the record shows that the plaintiffs represented to the court, and the court so determined, that they were asserting a single cause of action of fraudulent nondisclosure against each of the defendants. On August 2, 2018, the defendants moved for nonsuit or default arguing, inter alia, that the plaintiffs had failed to object or to file an amended complaint in response to a previously filed request to revise. The request to revise alleged, in part, that the plaintiffs had improperly joined two causes of action together in single counts and requested that the plaintiffs bifurcate the counts into separate claims of fraudulent misrepresentation and fraudulent nondisclosure. On that same date, the defendants filed a motion to strike and a motion to dismiss. On September 18, 2018, the plaintiffs filed their objection to the defendants' motion to strike and motion to dismiss. Contained within the plaintiffs' objection was a response to the defendants' motion for nonsuit or default, which stated that the "plaintiffs' July 3, 2018 revised complaint specifically indicates that a single cause of action for fraud, specifically fraud by nondisclosure, is being asserted against each of the defendants." On October 24, 2018, the trial court issued its order denying the defendants' motion for nonsuit and stating "the fraud counts in the revised complaint allege only fraudulent nondisclosure, as confirmed by the

plaintiffs in their objection to the motion. Accordingly, the failure to split the fraud counts into two was not noncompliant with the request to revise."

Fraudulent misrepresentation and fraudulent nondisclosure are separate causes of action requiring separate elements of proof. Compare *Whitaker* v. *Taylor*, supra, 99 Conn. App. 729–30, with *Saggese* v. *Beazley Co. Realtors*, supra, 155 Conn. App. 752–53. Pleadings that broadly allege fraud, without more, are insufficient to proceed under two separate theories of that cause of action. See Practice Book § 10-26; see also *Piccolo* v. *American Auto Sales, LLC*, 195 Conn. App. 486, 500, 225 A.3d 961 (2020) ("[w]here separate and distinct causes of action (as distinguished from separate and distinct claims for relief, founded on the same cause of action or transaction), are joined, the complaint is to be divided into separate counts").

In the present case, the complaint alleges counts of "fraud" against the defendants. On the basis of the allegations contained therein, the court determined that the cause of action of fraud against the defendants sounded in fraudulent nondisclosure and that the plaintiffs *affirmatively* represented fraudulent nondisclosure as their singular cause of action in counts one, three, five, six, seven, eight, nine and ten in their filings before the court. We agree with the trial court's conclusion that the complaint asserts claims of fraudulent nondisclosure.

The determinative question in evaluating the plaintiffs' claims on appeal with respect to the counts alleging fraud, therefore, is whether the complaint sufficiently pleaded claims of fraudulent nondisclosure against the respective defendants. We agree with the trial court that it does not.

In its decision, the court concluded that the plaintiffs had not adequately pleaded counts of fraudulent nondis-

closure on three separate grounds: (1) the complaint is too general to satisfy the pleading requirements for fraud; (2) the complaint does not "allege that the defendants' fraudulent conduct was intended to induce the plaintiffs to act to their detriment"; and (3) "the facts alleged show that the plaintiffs were outside the perimeter of any duty owed to them by the defendants."

First, the court concluded that the complaint contained broad allegations that were insufficient to satisfy the pleading requirements for fraud. "Where a claim for damages is based upon fraud, the mere allegation that a fraud has been perpetrated is insufficient; the specific acts relied upon must be set forth in the complaint." *Maruca* v. *Phillips*, 139 Conn. 79, 81, 90 A.2d 159 (1952); see also *Chase Manhattan Mortgage Corp.* v. *Machado*, 83 Conn. App. 183, 188, 850 A.2d 260 (2004). The plaintiffs' claims of fraud do not plead specific acts and merely reference the defendants' "filings" and "representations" as proof of fraudulent conduct. We agree with the trial court that the plaintiffs' claims "are too general to satisfy the requirements" for pleading fraud.

Second, we agree with the trial court that the complaint failed to allege, with the requisite specificity, that the defendants' alleged fraud was done to induce the plaintiffs to act. It is an essential element of any claim of fraud that the alleged fraudulent activity was made in order "to induce action by the other party." *Whitaker* v. *Taylor*, supra, 99 Conn. App. 730. In the present case, the plaintiffs' broad claims alleging the existence of an indeterminable future market of potential purchasers of the property are insufficient to properly allege the intent "to induce action" that is necessary to plead claims of fraud. Indeed, the complaint does not allege that the defendants had any knowledge that Quinnipiac Energy would sell the site to future purchasers at the time of the initial sale. The trial court correctly found that the complaint fails to allege that the defendants'

fraudulent conduct was done with the intention or purpose to induce *these* plaintiffs to act to their detriment.

Third, and central to the disposition of this appeal, the court concluded that the complaint failed to allege that the defendants had a duty of full and fair disclosure of known facts to the plaintiffs as it pertained to the property. In its decision, the court thoroughly examined the circumstances that give rise to a duty to disclose and found that neither the defendants' actions with the DPUC nor their filings with the SEC gave rise to such a duty between the defendants and the plaintiffs.

In its analysis, the court examined both our Supreme Court and Appellate Court precedent pertaining to the existence of a duty in fraudulent misrepresentation claims, as well as theories of liability for fraud committed by a third party. The court appropriately noted that "the policy considerations that support limiting the extent of a defendant's responsibility pursuant to a claim of fraudulent misrepresentation should . . . also apply to limit the extent of a defendant's duty in the context of a fraudulent nondisclosure claim."

The court found that "the complaint alleges that the DPUC ordered UI to solicit bids for the remediation and decommissioning of the site in order for the DPUC to approve UI's sale of the site to Quinnipiac Energy. . . . As such, the duty to disclose stemming from the defendants' statements to the DPUC in May, 2000, would extend to the DPUC, and likely to Quinnipiac Energy, because the defendants may be considered to have intended or reasonably expected that those statements would be communicated to them, and would influence their conduct relating to the transaction between UI and Quinnipiac Energy. . . . The same cannot be said in regard to the plaintiffs, however, *who are not alleged to have been a party to the DPUC proceedings, or to have been involved in the transaction*

between UI and Quinnipiac Energy." (Emphasis added.)

"Mere nondisclosure . . . does not ordinarily amount to fraud. . . . It will arise from such a source only under exceptional circumstances. . . . To constitute fraud on that ground, there must be a failure to disclose known facts and, in addition thereto, a request or an occasion or a circumstance which imposes a duty to speak. . . . The issue of whether a duty exists is a question of law . . . which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *DiMichele* v. *Perrella*, 158 Conn. App. 726, 731, 120 A.3d 551, cert. denied, 319 Conn. 927, 125 A.3d 203 (2015).

It is well settled that "[w]hether or not there is a duty to disclose depends on the relationship of the parties . . . or, to put it in another way, whether the occasion and circumstances are such as to impose a duty to speak . . . ." (Citations omitted.) *Roberts* v. *Paine*, 124 Conn. 170, 175, 199 A. 112 (1938). "A duty to disclose will arise if the parties share a 'special relationship.' " *DiMichele* v. *Perrella*, supra, 158 Conn. App. 732.

"In general, a special relationship that imposes a duty to disclose exists where the parties stand in some confidential or fiduciary relation to one another, such as that of principal and agent, executor and beneficiary of an estate, bank and investing depositor, majority and minority stockholders, old friends, or numerous others where special trust and confidence is reposed. In addition, certain types of contracts, such as those of suretyship or guaranty, insurance, partnership and joint adventure, are recognized as creating something in the nature of a confidential relation, and hence as requiring the utmost good faith, and full and fair disclosure of all material facts." (Internal quotation marks omitted.) Id., 732–33.

In the present case, the plaintiffs were not a party to the DPUC proceedings, and were strangers to the

defendants at the time of those proceedings and at the time of the sale of the site by the defendants to Quinnipiac Energy. We conclude that no "special relationship" existed between the parties and agree with the court's analysis that the plaintiffs' claims regarding the defendants' conduct with the DPUC does not meet the duty requirement necessary for fraudulent nondisclosure.

Likewise, the court determined that the defendants' filings with the SEC did not give rise to any duty to the plaintiffs, by the defendants, necessary to satisfy the pleading requirements of fraudulent nondisclosure. The trial court analyzed and considered the purposes of the Securities Exchange Act of 1934 (act), 15 U.S.C. § 78a et seq., and concluded that "the class of persons intended to be protected by it consists of investors in the securities market. . . . Accordingly, the plaintiffs, as purchasers of the site, do not come within the class of persons that the [act] is intended to protect. Although the statutorily required filing of a Form 10-K may give rise to a duty to speak truthfully to those that invest in, or refrain from investing in, the filer's business, the plaintiffs in the present action make no such claim. The defendants were not required to file statements with the SEC to protect real estate purchasers; they were required to file them to protect securities investors. Accordingly, although the defendants' duty to disclose truthfully likely was owed to securities investors, it was not owed to the plaintiffs here." We agree with the court's analysis of this issue and conclude that no duty of disclosure from the defendants to the plaintiffs arose from the defendants' filings with the SEC.

To support their argument that a duty does exist, the plaintiffs direct us to *Bennett Restructuring Fund, L.P.* v. *Hamburg*, Docket No. X02-CV-01-0167682-S, 2003 WL 178753 (Conn. Super. January 2, 2003) (*Bennett*). The plaintiffs assert that *Bennett* supports their argument that false statements contained in Form 10-K filings

with the SEC are sufficient to allow the plaintiffs to proceed on claims of fraud against the defendants. We are unpersuaded and find *Bennett* distinguishable from the plaintiffs' claims in this appeal. In *Bennett*, the plaintiffs were purchasers of certain notes of the defendant company and alleged that the defendants had made misrepresentations and material omissions in their Form 10-K filings with the SEC, thereby wrongfully informing potential investors as to the financial health of the company. Id., *1. In denying the defendant's motion to strike the plaintiffs' count alleging negligent misrepresentation in the preparation and filing of the 10-Ks, the court found that the "facts provable under that count could establish that the plaintiffs were, as alleged, members of a *limited group of persons—potential investors in* [*the defendant company's*] *Notes—for whose benefit and guidance the defendants prepared and filed the 10-Ks in which they made their alleged misrepresentations.*" (Emphasis added.) Id., *16. Thus, because the complaint alleged that the plaintiffs were within a class of potential purchasers of the notes, the court found that the plaintiffs had adequately pleaded a claim of negligent misrepresentation. Id.

The plaintiffs argue that *Bennett* supports the proposition that a noninvestor can proceed with fraud claims premised on SEC filings because the plaintiffs in that case were purchasers of the notes on the secondary market. This is, however, belied by the court's determinations that the plaintiffs were within a class of potential *investors* in the company and thus foreseeably would rely on filings with the SEC. See id. In the present case, the plaintiffs are not alleged to be potential investors in any of the defendant companies but, rather, are purchasers of real estate formerly owned by the defendant UI. We agree with the court that future purchasers of real estate are not within the duty to disclose truthful information that comes with the filing of Form 10-Ks with the SEC.

Finally, the plaintiffs argue that the court improperly struck their claim of unjust enrichment against UIL and that the claim should be reinstated. We conclude, however, that this claim has been inadequately briefed and, thus, decline to review it.

In their initial brief before this court, the plaintiffs state that "[t]his appeal concerns only the defendants' motion to strike the fraud claims." The plaintiffs attempt, however, to resurrect their unjust enrichment claim in their reply brief by arguing that their unjust enrichment claim was sufficiently pleaded.

"It is axiomatic that a party may not raise an issue for the first time on appeal in its reply brief. . . . Our practice requires an appellant to raise claims of error in his original brief, so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument. Although the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not include raising an entirely new claim of error." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 197, 982 A.2d 620 (2009). We therefore decline to review the plaintiffs' unjust enrichment claim.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

[10] We likewise deny the plaintiffs' alternative request for leave to replead their fraudulent nondisclosure causes of action. The plaintiffs have offered only conclusory statements and limited authority to argue that the defendants would not be prejudiced if the plaintiffs were to replead.

"Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed . . . .

CONNECTICUT HOUSING FINANCE AUTHORITY *v.* SUSANN T. MCCARTHY ET AL.

(AC 42792)

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

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the named defendant, M. At M's request, the trial court assigned the case to the foreclosure mediation program. The mediation, however, did not take place because of M's failure to attend three out of four of the required premediation meetings. Thereafter, the plaintiff filed a motion for a judgment of strict foreclosure, which the court granted following M's default for failure to plead. On August 21, 2017, the court rendered a judgment of strict foreclosure, determined the amount of the debt owed, and set M's law day. M then filed a motion to open the judgment and extend the law day, claiming that her default was due to an increase in her mortgage payments based on a dispute that arose in relation to the payment of her condominium association fees. She also filed a petition for reinclusion into the foreclosure mediation program, asserting that she wanted to modify the mortgage and retain the property. The mediation proved unsuccessful, as the plaintiff did not believe that the property was M's primary residence and M did not have the lump sum required under the modification agreement to reinstate the mortgage. Between January and August, 2018, M filed her second, third and fourth motions to open the judgement and extend the law day, indicating in each that she anticipated being able to pay off the amount required to reinstate the mortgage. The court granted all of these motions. M then filed her fifth motion to open the judgment and extend the law day, claiming for the first time that there were discrepancies regarding the reinstatement figure that needed to be resolved. The court denied the motion but extended the law day. The court also denied M's sixth and seventh motions to open the judgment, in which M reiterated her claim that the amount of the debt was disputed, but the court again set new

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The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citations omitted; internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 358–59 n.1, 241 A.3d 133 (2020).

Furthermore, an opportunity to replead would be contrary to judicial economy in a situation, where, as here, final judgment has been rendered on the motion to strike. Although Practice Book § 10-44 provides for the opportunity to replead within fifteen days after the granting of any motion to strike, such opportunity is not applicable after final judgment has been rendered on the motion.

law days. Thereafter, the court denied M's eighth motion to open the judgment and her second petition for reinclusion in the foreclosure mediation program, and she appealed to this court. *Held*:

1. The trial court did not abuse its discretion in denying M's eighth motion to open the judgment because M failed to establish good cause as required under the applicable statute (§ 49-15): M's claim on appeal was based on the premise that the court's finding as to the amount of debt, made at the time of the judgment of strict foreclosure, was erroneous, yet she failed to challenge that finding on appeal or in her first four motions to open; moreover, a showing of good cause cannot rest entirely on a claim that the original foreclosure judgment was erroneous, or the statute would serve merely as a device for extending the time to appeal a judgment; furthermore, M had numerous opportunities to complete a modification of the mortgage note or to reinstate the note and failed to do so, citing only her desire to dispute the amount of the debt.
2. The trial court did not abuse its discretion in denying M's second petition for reinclusion into the foreclosure mediation program because M failed to demonstrate the requisite good cause pursuant to the applicable statute (§ 49-31*l* (c) (5)): there was no indication that the parties would benefit from additional mediation when their two prior attempts were unsuccessful and the plaintiff had made it clear that it would not engage in further discussions relating to the amount of the debt, as that amount was finally determined by the court when it rendered judgment on August 21, 2017.

Argued December 3, 2020—officially released May 4, 2021

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant was defaulted for failure to plead; thereafter, the court, *Pittman*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Dubay*, *J.*, denied the named defendant's motion to open the judgment and her petition for reinclusion in the foreclosure mediation program, and the named defendant appealed to this court. *Affirmed.*

Daniel J. Krisch, with whom, on the brief, were *Oscar L. Suarez* and *Christopher J. McCarthy*, for the appellee (plaintiff).

Christopher G. Brown, for the appellant (named defendant).

Opinion

BRIGHT, C. J. The defendant Susann T. McCarthy[1] appeals from the judgment of the trial court denying her motion to open and vacate the judgment of strict foreclosure or extend the law day and her petition for reinclusion in the foreclosure mediation program. On appeal, the defendant claims that the trial court abused its discretion in denying her motions. We disagree and affirm the judgment of the trial court.

The following procedural history is relevant to our analysis. On March 15, 2017, the plaintiff, the Connecticut Housing Finance Authority, filed an amended complaint seeking to foreclose a mortgage on real property located at 11 Winchester Court in Farmington. In April, 2017, the defendant filed a foreclosure mediation request with the trial court, and the court, thereafter, assigned the case to the foreclosure mediation program. Mediation between the parties never took place because the defendant failed to attend the required premediation meetings with the mediator in order to complete the forms and provide the information necessary for a successful mediation. The premediation meetings occurred on May 8, May 31, June 19 and July 14, 2017. The defendant attended only the May 31, 2017 meeting. On July 17, 2017, the mediator filed a report with the court stating that a mediation would not be scheduled. The report stated that the defendant did not fully or substantially complete the forms and furnish the documents

[1] The following entities were also named as defendants: Connecticut Orthopaedic Specialist; Glenwood Place of Farmington Association, Inc.; Medical Imaging Center, PC; The Hospital of Central Connecticut at New Britain General and Bradley Memorial; and UConn Health Center Anesthesiology. Susann T. McCarthy, also known as Susann McCarthy and Susan McCarthy, is the only defendant participating in this appeal. For clarity, we refer to Susann T. McCarthy as the defendant.

that were requested by the plaintiff. The report also provided that the plaintiff supplied the requested documentation, forms, and information to the mediator and to the defendant.

On August 3, 2017, the plaintiff filed a motion for judgment of strict foreclosure. On August 10, 2017, the court granted the plaintiff's motion for default against the defendant for failure to plead. On August 15, 2017, the plaintiff filed an affidavit of debt stating that the defendant was indebted to the plaintiff in the amount of $175,010.46. The debt included escrow advances of $16,956.27. On August 21, 2017, the court, *Pittman*, *J.*, rendered a judgment of strict foreclosure, determined the fair market value of the property to be $145,000 and the debt owed to be $175,010.46, awarded the plaintiff certain other fees and costs, and set the defendant's law day for November 6, 2017. The defendant did not appeal from the court's judgment.

On October 16, 2017, the defendant filed a motion to open the judgment and extend the law day on the basis that her default on the mortgage was due to an increase in her mortgage payment that arose in relation to a dispute regarding the payment of condominium association fees. The defendant's motion gave no indication that she disputed the amount of the debt as found by the court when it rendered judgment. The court, *Dubay*, *J.*, granted the defendant's motion and extended the defendant's law day to January 22, 2018. On October 17, 2017, the defendant filed a petition for reinclusion in the foreclosure mediation program, seeking to modify the mortgage and retain the property. On October 30, 2017, the court, *Dubay*, *J.*, granted the petition.

On November 14, 2017, the parties met with the foreclosure mediator. The mediator filed a report with the court in which she stated that the defendant had requested a loan modification as an alternative to fore-

closure and that the parties would benefit from further mediation. The report also provided that the mediation session was not as productive as it could have been because the defendant had not provided the plaintiff with all of the documents it needed to consider a possible modification and the plaintiff did not sufficiently follow up with the defendant.

On November 15, 2017, the defendant filed a motion for modification of the mediation period on the basis that the plaintiff had failed to provide a document request to the defendant in a timely fashion. The defendant's motion was granted by the court.

On December 21, 2017, the parties again met with the mediator. The mediator filed a report with the court in which she stated that the parties had engaged in conduct consistent with the objectives of the mediation program and that the defendant had requested a loan modification. The report provided that the plaintiff denied the defendant's request for a loan modification because the plaintiff did not believe that the property was her primary residence, and it indicated that the mediator was not aware of any material reason to disagree with this denial. The report further provided that, if occupancy was proven, the defendant "would still need to come up with [$23,000] as . . . part of a modification agreement." There is nothing in the mediator's report that suggests that the defendant disputed the plaintiff's claim regarding the amount of money she would need to raise to complete a modification.

On January 10, 2018, the defendant filed a second motion to open the judgment and extend the law day. The defendant argued that good cause existed to open the judgment because the plaintiff had offered her a three month trial payment plan toward a permanent modification of her mortgage. Once again, the defendant did not dispute the amount of the debt or the amount she would need to pay the plaintiff to secure

a permanent modification. Instead, she represented in her motion that she "[anticipated] being able to comply with all the other requirements needed to permanently modify the mortgage." On January 22, 2018, the court, *Dubay*, *J.*, granted the motion and set a new law day for May 14, 2018.

On February 5, 2018, the mediator filed her final report with the court in which she stated that the mediation was terminated because only one session was ordered by the court and that, although the plaintiff had agreed to a second session, the case did not settle.

On May 2, 2018, the defendant filed a third motion to open the judgment and extend the law day. The defendant argued that she had completed her three month trial payment plan and stated that she needed to pay only a lump sum of approximately $23,000 to the plaintiff's servicer and certain other amounts required to release some minor judgment liens. The defendant argued further that she wanted to examine the denial letter of her loan modification and submit an appeal, and she requested an extension of the law day to do so. On May 14, 2018, the court, *Cobb*, *J.*, granted the motion and set a new law day for September 10, 2018.

On August 29, 2018, the defendant filed her fourth motion to open the judgment and extend the law day. The defendant argued that she anticipated that she would be receiving sufficient funds to reinstate the mortgage and required an additional thirty to sixty days to gain access to the funds. The defendant also requested, for the first time, a "more specific breakdown" of the reinstatement figures provided by the plaintiff's servicer and stated that the additional time was required to ensure the accuracy of the figures. On September 10, 2018, the motion was granted by the court, *Hon. Patty Jenkins Pittman*, judge trial referee, and a new law day was set for November 19, 2018.

On November 7, 2018, the defendant filed her fifth motion to open the judgment and extend the law day. The defendant argued that the reinstatement figure she had received from the plaintiff included payments from the plaintiff to her condominium association and that she had documentation showing that she had made the payments herself or that the plaintiff, in fact, had not made the payments. The defendant requested an extension of the law day to discuss the discrepancies with the plaintiff and to determine the actual reinstatement figure. The plaintiff objected to the motion arguing, inter alia, that the court, when it entered the judgment of strict foreclosure on August 21, 2017, determined the amount of the debt, which included the payments that the defendant was now questioning. The motion to open the judgment was denied by the court, *Dubay*, *J.*, but a new law day was set for January 22, 2019.

On January 22, 2019, the defendant filed her sixth motion to open the judgment and extend the law day. She argued that the escrow figures claimed by the plaintiff were excessive and that she was ready and willing to make the reinstatement payment, but needed to make sure that the escrow amount stated by the plaintiff was accurate. The motion to open the judgment was denied by the court, *Dubay*, *J.*, but the law day was extended to February 25, 2019.

On February 19, 2019, the defendant filed her seventh motion to open the judgment. The defendant requested that the court open and vacate the judgment or extend the law day because doing so would allow both parties time to ensure the accuracy of the payment requested by the plaintiff for the defendant to reinstate the mortgage. The defendant argued that there was good cause to open the judgment and to vacate or to provide an extension of the law day because the plaintiff's figures were inaccurate to "such a substantial degree." The motion to

open and vacate the judgment was denied by the court, *Dubay*, *J.*, but the law day was extended to April 8, 2019.

On March 27, 2019, the defendant filed her eighth motion to open the judgment and her second petition for reinclusion in the foreclosure mediation program. The defendant requested that the court open and vacate the judgment or extend the law day because the plaintiff's figures were "inaccurate to such a substantial degree, there is good cause to open the judgment and to vacate or to provide an extension of the law day and to order mediation" and that "[t]he additional time vacating the judgment and not resetting the law day, or entering an extended law day . . . will allow both parties to participate in a mediation with accurate information and payoff amounts, and ensure that whatever amount is required to reinstate is the accurate reinstatement amount." The defendant also contended that (1) she consistently requested the documentation that formed the basis of the reinstatement amount and the plaintiff had not provided the defendant with the requested documentation, (2) the reinstatement amount was erroneous, (3) the plaintiff did not adjust its accounting properly, (4) the plaintiff would be unjustly enriched if the foreclosure proceeded because the defendant's property would be foreclosed due to her nonpayment of an amount that she does not owe, (5) the plaintiff had a duty to inform the court of the changes it made to the reinstatement amount following its discovery of the overcharge or its decision to reduce the amount due, (6) the plaintiff's practice of demanding additional money affected the mediation results, and (7) she has proven her motivation to reinstate by consistently pursuing clarity regarding, and an itemization of, the reinstatement amount, and by providing her trial counsel with funds to be held for the stated intention of paying the reinstatement amount.

In her petition for reinclusion in the foreclosure mediation program, the defendant argued that the parties would benefit from the assistance of the mediator in determining the proper reinstatement figure due to "the [p]laintiff's recent major adjustment to the reinstatement and representations that prior reinstatements included amounts that would be credited back once paid . . . ."

On April 5, 2019, the plaintiff filed an objection directed to both the defendant's motion to open the judgment and the petition for reinclusion in the foreclosure mediation program. In its objection, the plaintiff noted the defendant's multiple attempts to open the judgment and either vacate the judgment or extend the law day. The plaintiff contended that the defendant's participation in the mediation program during the prior years was unproductive and fruitless. The plaintiff argued further that the request for mediation was simply an attempt to delay the proceedings in the case. The plaintiff also contended that the issues raised in the defendant's motion to open the judgment were moot, as the issues previously had been addressed and ruled on by the court when it rendered judgment on August 21, 2017, and made a finding as to the amount of the debt owed by the defendant.

On April 8, 2019, the defendant's motion and petition were denied by the court, *Dubay*, *J*. This appeal followed.

After filing her appeal, the defendant filed a motion for articulation, which was granted by the court. In its articulation, the court noted that the defendant had filed several motions to open the judgment. Additionally, the court stated that the motion to open and vacate the judgment or extend the law day and the petition for reinclusion in the mediation program were denied due to the reasons set forth in the plaintiff's April 5, 2019 objection, which included the failure to show good

cause as required and the court previously having made a finding of fact as to the amount of the debt owed without any timely objection being filed by the defendant. Lastly, the court stated that referral to mediation for a third time "seemed assuredly fruitless."

I

The defendant's first claim on appeal is that the court abused its discretion in denying her motion to open the judgment and vacate or extend the law day. The defendant argues that there was good cause to open the judgment because General Statutes § 49-15 provides for modifying a judgment in order to achieve an outcome fairer to the parties based on the conditions that were present at the time the motion was decided. We are not persuaded.

Section 49-15 (a) (1) provides that "[a]ny judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection."

"Unlike General Statutes § 52-212, which provides for opening default judgments generally and requires a defaulted defendant to show that he had a good defense that he was prevented from making by mistake, accident or other reasonable cause, § 49-15 prescribes only four conditions for opening a judgment of strict foreclosure: (1) that the motion be in writing; (2) that the movant be a person having an interest in the property; (3) that the motion be acted upon before an encumbrancer has acquired title; and (4) that cause, obviously good cause, be shown for opening the judgment." (Internal quotation marks omitted.) *Farmers & Mechanics*

Savings Bank v. *Sullivan*, 216 Conn. 341, 352–53, 579 A.2d 1054 (1990).

In order to be entitled to an opening of a judgment pursuant to § 49-15, the movant bears the burden of establishing the existence of good cause. See *Connecticut National Bank* v. *Zuckerman*, 29 Conn. App. 541, 546, 616 A.2d 814 (1992). "[G]ood cause for opening a [judgment] pursuant to § 49-15 . . . cannot rest entirely upon a showing that the original foreclosure judgment was erroneous. Otherwise that statute would serve merely as a device for extending the time to appeal from the judgment." (Internal quotation marks omitted.) *USAA Federal Savings Bank* v. *Gianetti*, 197 Conn. App. 814, 820, 232 A.3d 1275 (2020).

"Our review of a trial court's denial of a motion to open a judgment of strict foreclosure, which was filed more than twenty days after notice of the underlying judgment, is narrow.[2] Generally, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. . . . In the context of an appeal from the denial of a motion to open judgment, [i]t is well established in our jurisprudence that [w]here an appeal has been taken from the denial of a motion to open, but the appeal period has run with respect to the underlying judgment, [this court] ha[s] refused to entertain issues relating to the merits of the underlying case and ha[s] limited our consideration to whether the denial of the motion to open was proper. . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . Because opening a judgment is a matter of discretion, the trial

[2] In this case, the judgment of strict foreclosure was rendered on August 21, 2017, and the defendant did not appeal from that judgment. The defendant's first motion to open was not filed until October 16, 2017.

court [is] not required to open the judgment to consider a claim not previously raised. The exercise of equitable authority is vested in the discretion of the trial court and is subject only to limited review on appeal." (Citation omitted; footnote added; footnote omitted; internal quotation marks omitted.) *Bank of America, N.A.* v. *Grogins*, 189 Conn. App. 477, 483–84, 208 A.3d 662, cert. denied, 332 Conn. 902, 208 A.3d 659 (2019). Consequently, "the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *Walton* v. *New Hartford*, 223 Conn. 155, 169, 612 A.2d 1153 (1992). "In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Ruggiri*, 164 Conn. App. 479, 485, 137 A.3d 878 (2016).

The defendant asserts a variety of arguments in support of her claim. The defendant argues that the reinstatement of the mortgage would avoid foreclosure while making the lender whole for missed payments and associated costs. She contends that the conditions at the time of the motion favored opening the judgment because she had obtained the funds needed to reinstate the mortgage, and she further contends that she was justified in questioning the plaintiff's reinstatement quote. The defendant also argues that the conditions existing at the time of each of her eight motions were dissimilar. She states that she moved to open the judgment for an eighth time because the plaintiff repeatedly refused to provide documentation to explain its charges and credits "after admitting its practice of demanding more in a reinstatement quote than was owed and claiming that the $15,075 difference in [reinstatement] quotes

came from an extra suspense balance credit . . . .'' Last, the defendant argues that the law of the case doctrine did not preclude the court from departing from its finding of debt in its original judgment because the figures in the affidavit of debt underlying the debt finding are erroneous.

In response, the plaintiff argues that the court properly denied the defendant's motion to open the judgment because the court considered the finding of the amount of the debt made when the court rendered judgment on August 21, 2017, the defendant's noncompliance with the terms of her loan modification, and the explanations for her delays, and it properly concluded that the defendant did not show the requisite good cause. The plaintiff argues further that the parties never settled on a reinstatement figure and that opening the judgment would have been futile.

On review, we conclude that the court did not act unreasonably and in clear abuse of its discretion in denying the defendant's motion to open. In the August 21, 2017 judgment, the trial court made a finding as to the amount of debt, which the defendant did not challenge on appeal or in her first four motions to open. Her claims that the trial court abused its discretion are premised on her assertion that the court's finding as to the amount of the debt, made at the time it rendered judgment, was erroneous. In essence, the defendant wants to use her motion to open and her petition for reinclusion in lieu of a timely appeal to challenge the underlying judgment. This she cannot do. As noted previously in this opinion, an appeal from the denial of a motion to open cannot be used to challenge the propriety of the merits of the underlying judgment. *USAA Federal Savings Bank* v. *Gianetti*, supra, 197 Conn. App. 820; *Bank of America, N.A.* v. *Grogins*, supra, 189 Conn. App. 484. Consequently, the court's denial of the motion to open because it challenged for the first time the court's previously made finding as to the amount of the debt was in no way an abuse of discretion.

In addition, the court's denial of the last motion to open cannot be considered an abuse of discretion given the numerous opportunities, after the judgment of strict foreclosure was rendered, that the defendant was given to either complete a modification of the mortgage note or to reinstate the note. From October, 2017 to May, 2018, the trial court granted three of the defendant's motions to open the judgment on the basis of the defendant's contentions that she was seeking a modification of the mortgage note. In August, 2018, the defendant filed a fourth motion to open the judgment, which the court granted, contending that her prior loan modification efforts were unsuccessful because she did not have the $23,000 lump sum payment the plaintiff demanded, she would have such funds within thirty to sixty days, and she was prepared to reinstate the mortgage once she obtained such funds. In addition, although she noted in her motion that she had requested from the plaintiff "a more specific breakdown of the reinstatement figures" to "ensure that no overpayment will be made," she did not claim that the amount of the debt, as found by the court in August, 2017, was incorrect.

It was not until the defendant's fifth motion to open, filed on November 7, 2018, that the defendant asserted that the escrow fees claimed by the plaintiff for condominium association fees it paid on behalf of the defendant were overstated.[3] The plaintiff objected to the motion, noting that the fees in question were paid by the plaintiff in 2011, and were part of the debt found by the court in the August 21, 2017 judgment. Consequently,

[3] The defendant had asserted in her first motion to open that good cause existed to open the judgment because her default was the result of an increase in her mortgage payment that arose "due to [the plaintiff] having paid condominium association fees that had been disputed on and off over the years for various reasons." Subsequent to the first motion to open, the defendant did not raise this issue again until the defendant's fifth motion to open, filed on November 7, 2018, when she, for the first time, clearly articulated that she believed the plaintiff was overcharging her for such fees.

the plaintiff argued that the defendant could no longer dispute the amount of such fees. The court denied the motion to open but, nonetheless, extended the defendant's law day. The same result occurred with respect to the defendant's sixth and seventh motions to open; the motions were denied, but the defendant's law day was extended, giving her additional time to reinstate the mortgage note. It was only in response to the defendant's eighth motion to open, filed on March 27, 2019, more than eighteen months after the court rendered the judgment of strict foreclosure, that the court denied the motion and did not extend the defendant's law day.

In light of the numerous opportunities that the court gave the defendant to resolve this matter postjudgment, either by way of modification or reinstatement, and in light of the fact that the only reason the defendant has not reinstated the mortgage note is her desire to dispute portions of the debt owed that were determined by the court when it rendered judgment, we cannot conclude that the court's denial of the defendant's eighth motion to open constituted an abuse of discretion.

II

The defendant's second claim on appeal is that the trial court abused its discretion in denying her petition for reinclusion in the foreclosure mediation program. The defendant contends that the parties were likely to benefit from mediation because the only impediment to reinstatement was an agreement on the reinstatement amount. In addition, the defendant argues that there was a substantial change in circumstances because she obtained the funds to reinstate after the previous mediation.

"This court reviews mortgage foreclosure appeals under the abuse of discretion standard. . . . A foreclosure action is an equitable proceeding. . . . The determination of what equity requires is a matter for the discretion of the trial court. . . . In determining

whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Bayview Loan Servicing, LLC* v. *Park City Sports, LLC*, 180 Conn. App. 765, 780, 184 A.3d 1277, cert. denied, 330 Conn. 901, 192 A.3d 426 (2018).

General Statutes § "9-31*l* (c) (5) provides in relevant part that the court may refer a foreclosure action brought by a mortgagee to the foreclosure mediation program at any time, for good cause shown . . . . When determining whether good cause exists, the court shall consider whether the parties are likely to benefit from mediation and, in the case of a referral after prior attempts at mediation have been terminated, whether there has been a material change in circumstances. Therefore, for a referral after prior attempts at mediation have been terminated, showing good cause requires showing both that the parties are likely to benefit from mediation and that a material change in circumstances has occurred." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Morawska*, 165 Conn. App. 421, 425–26, 139 A.3d 747 (2016).

In the present case, the record shows that the defendant was given two opportunities to participate in the foreclosure mediation program and that those opportunities failed to yield a fruitful result. Furthermore, the plaintiff made it clear to the court in its opposition to the petition for reinclusion that it would not engage in any further discussions regarding the amount due from the defendant to reinstate the mortgage because that amount had been determined finally by the court when it rendered judgment on August 21, 2017. Thus, we conclude, on the basis of our review of the record, that

the trial court acted well within its discretion in denying the petition for reinclusion on the ground that the defendant had not shown that the parties were likely to benefit from mediation.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

LANCE W. *v.* COMMISSIONER OF CORRECTION* (AC 39968)

Elgo, Cradle and Suarez, Js.

Syllabus

The petitioner, who previously had been convicted of several crimes, including murder and arson in the first degree, filed a second petition for a writ of habeas corpus, claiming that D, his first habeas appellate counsel, rendered ineffective assistance in the petitioner's appeal to this court from the denial of his first habeas petition. A police investigator, M, had determined that a fire at the petitioner's home, in which the victim died, had been intentionally set with an accelerant, and S, the state medical examiner who performed an autopsy on the victim, testified that, because of the lack of soot in the victim's bodily organs and low level of carbon monoxide in the victim's blood, she concluded that the victim had died prior to the fire. The first habeas court, in denying the first habeas petition, concluded, inter alia, that the petitioner had presented no newly discovered evidence that proved his claim of actual innocence and failed to establish that the scientific evidence admitted at his criminal trial was false or invalid. The court also rejected the petitioner's assertions that his trial counsel, N, was ineffective in challenging the expert testimony of M and S and had a conflict of interest in representing the petitioner in a civil matter against his homeowners insurer. On the petitioner's appeal to this court, D challenged only the first habeas court's rejection of the petitioner's claims that N had a conflict of interest and had inadequately cross-examined M and S as to the cause of the victim's death and the cause of the fire. This court affirmed the judgment of the first habeas court. In his second petition

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to use the petitioner's full name or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

for a writ of habeas corpus, the petitioner alleged that D was ineffective for having failed to challenge the first habeas court's rejection of his claims that he is actually innocent, that his conviction was based on scientifically invalid evidence, and that N was ineffective in challenging certain expert testimony adduced by the state pertaining to fire science evidence and the cause of the victim's death. The second habeas court rejected the petitioner's claims that D had rendered ineffective assistance and rendered judgment denying the petition for a writ of habeas corpus. On the granting of certification, the petitioner appealed to this court. *Held*:

1. The habeas court did not err in concluding that D's decision not to pursue an actual innocence claim did not constitute ineffective assistance, as the petitioner did not present affirmative proof of his innocence or demonstrate that there was a reasonable probability that he would have prevailed on an appeal from the first habeas court's denial of that claim; the petitioner's assertion that he is actually innocent due to the unreliability of the scientific evidence at his criminal trial was unpersuasive in that unreliable evidence cannot logically constitute affirmative proof of actual innocence, and, even if the petitioner had proven that the evidence was unreliable, such a determination, although it might undermine the jury's guilty verdict, is not affirmative proof of his innocence.
2. The petitioner could not prevail on his claim that D rendered ineffective assistance in having failed to challenge the first habeas court's rejection of the petitioner's assertion that his right to due process was violated because his conviction was based on false and invalid scientific evidence: the evidence the petitioner presented to establish that there were alternative explanations relative to the conclusions reached by M and S as to the cause of the fire and the victim's death fell short of proving that their conclusions were false or scientifically invalid, and the jury had been made aware of, and presumably considered, the existence of alternative explanations, the existence of which M and S acknowledged on cross-examination at the criminal trial; accordingly, this court was not left with a firm belief that the petitioner most likely would not have been convicted if the jury had been presented with additional competing evidence such as the opinions of expert witnesses he presented at the first habeas trial who disagreed with M and S as to the cause of the fire and the victim's death, and, thus, it was not likely that the petitioner would have prevailed on an appeal from the rejection of his due process claim.
3. The habeas court properly concluded that D did not render ineffective assistance in deciding not to pursue the petitioner's claim that N was ineffective in challenging the testimony of M and S that pertained to the cause of the fire and the victim's death: the petitioner's contention that N should have presented expert testimony that focused on M's alleged failure to follow the scientific method was unavailing, as N's choice of experts did not give rise to a claim of deficient performance,

M followed the essential steps in the scientific method, a finding by the first habeas court that the petitioner did not argue was clearly erroneous, and it was unnecessary for N to present expert testimony to refute M's testimony that an accelerant was the only possible source of a pour pattern found on the floor of the home, M having conceded on cross-examination that there were other reasonable explanations for the pour pattern that did not involve accelerants; moreover, in claiming that N was ineffective in failing to present evidence that undercut S's opinion as to the time of the victim's death, the petitioner ignored the fact that N presented evidence of that nature by way of requiring S to acknowledge having examined the body of another burn victim who did not have soot in her lungs or carbon monoxide in her blood, and the evidence the petitioner presented at the first habeas trial did not undermine S's opinions any more than her own confession did; furthermore, even if N's challenge to the testimony of M and S could be considered deficient, the petitioner failed to prove that he was prejudiced, as N demonstrated through effective cross-examination that the conclusions of M and S were not beyond reproach, and, as the jury, faced with the concessions by M and S, still found the petitioner guilty, it was not reasonably probable that D would have succeeded in demonstrating that N's counsel was constitutionally ineffective.

Argued January 4—officially released May 4, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza*, *J.*, granted in part the respondent's motion to dismiss the petition; thereafter, the matter was tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Erica A. Barber, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *David M. Carlucci*, senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Lance W., appeals from the judgment of the habeas court denying his petition

for a writ of habeas corpus alleging ineffective assistance of his first habeas appellate counsel.[1] On appeal, the petitioner claims that the habeas court erred in rejecting his claim that his first habeas appellate counsel was ineffective in failing to challenge on appeal the first habeas court's rejection of his claims that (1) he is actually innocent of the crimes of which he was convicted, (2) his constitutional right to due process was violated because his conviction was based on scientifically invalid evidence, and (3) his trial counsel was ineffective in challenging the expert testimony adduced by the state pertaining to the cause of the victim's death and the fire science evidence. We affirm the judgment of the habeas court.

The following facts, as recited by our Supreme Court in upholding this court's affirmance of the petitioner's conviction on direct appeal, are relevant to our resolution of the petitioner's claims. "On November 19, 1994, at approximately 3:19 a.m., Ronald McClain and Sheila McClain, neighbors who lived across the street from the [petitioner on Hillside Avenue in Plymouth], awoke to screams from the [petitioner's] children. Ronald McClain observed an orange glow coming from the left side of the [petitioner's] house. He also observed the [petitioner's] two children on the roof of the front porch, a ladder against the front porch and the [petitioner] standing at the bottom of the ladder. [Ronald] McClain called 911 and went downstairs to let the [petitioner and his children] into [McClain's] home. The children were screaming that their house was on fire and that they could not find their mother [Wendy W.]. The [petitioner] stated that his wife was in the house, that he could not get her out and that he did not know if she

[1] Although the petitioner had filed additional prior habeas petitions, they have no bearing on the issues presented in this appeal. For ease of reading, we therefore refer to the petition from which the claims raised herein arise, which was filed on July 25, 2005, as the first habeas action.

had come home. The children remained at the McClain home while the [petitioner] and Ronald McClain returned to the burning house. The [petitioner] again stated that he did not know if his wife had come home that evening.

"The firefighters arrived a few minutes later and found the [petitioner] outside the house, confused and attempting to put water on the fire with a garden hose. The [petitioner] told the firefighters that he did not know his wife's whereabouts. Later, the [petitioner], while he pointed to the den, told fireman Frederick Telke, 'Yes, she's in here, she's in here.' When asked if he was sure, the [petitioner] walked to the driveway and pointed to his wife's car.

"Firefighters entered the home and approached the den, where the fire was concentrated, but were unable to remain due to the high temperatures, heavy smoke and unstable floor. The body of the victim . . . was later found in this area. Firefighters also entered the second floor of the house and found only smoke damage. They did not hear any smoke detector alarms.

"Several hours later, Officer Gerald Allain of the Plymouth [P]olice [D]epartment questioned the [petitioner]. The [petitioner] stated that the victim smoked cigarettes and that he recalled the smoke alarms going off. He stated that the thick smoke forced him to his knees [and that] he took the children to the porch roof.

"On November 19, 1994, the [petitioner] gave a signed, written statement to the police. He indicated that the victim slept on the couch because their marriage was 'on the rocks.' That same day, the [petitioner] told the victim's uncle, James Castiola, that he knew what had happened. He stated that the victim had come home, and had lain down on the couch, [near] approximately fifty videotapes. While on the couch, the victim had lit a cigarette and had fallen asleep. The [petitioner] told Castiola that the fire had been accelerated by the

videotapes, which cannot be put out when they catch fire.

"State Trooper Kevin McGurk was assigned to determine the cause and origin of the fire. He examined the [petitioner's] home the following morning and determined that the fire originated in the den. McGurk discovered a pour pattern [consisting of a line of holes] leading up to the area of origin, which indicated that an accelerant had been used. On the basis of his observations, McGurk concluded that the fire had been intentionally set. Other officers executed a search warrant on the [petitioner's] home and retrieved an empty bottle of bleach from the basement and a can of acetone from the storage shed. Joseph Cristino, a forensic analysis engineer, examined the two smoke detectors retrieved from the [petitioner's] home. [Cristino found that it was 'highly improbable' that the first floor smoke detector was working at the time of the fire and that, had the battery been connected to the second floor detector, there was a high probability that it would have worked at the time of the fire.]

"A notebook also was seized from the [petitioner's] bedroom dresser. The parties stipulated that the notes contained therein were written in the [petitioner's] handwriting. The [petitioner] was a member of the fire brigade at work and had received training in chemical fires and hazardous materials. The [petitioner] was familiar with spontaneous combustion caused by the combination of alkalies and acids. The [petitioner] admitted writing various phrases in the notebook, such as 'lock box in shed,' 'tool box,' 'acetone,' 'alcohol clorox,' 'alm foil,' 'dry run,' 'rope kds drs,' 'straps,' 'pillow,' 'oil in can,' 'rid of stuff,' 'glvs,' 'hat,' 'shirt,' 'cigs,' and 'ldr.' The [petitioner] stated that these abbreviations could have been a camping list, but that he did not know why he wrote these abbreviations." *State* v. *Wargo*, 255 Conn. 113, 117–19, 763 A.2d 1 (2000).

"On direct examination, [the state's associate medical examiner, Malka] Shah testified about the results of the autopsy that she had performed on the victim. Shah explained that the victim's body had been burned beyond recognition, and that the victim could be identified only by reference to her dental records. Shah further stated that the victim's body was so badly charred that she was unable to conduct an examination of the victim's skin. Shah, however, indicated that she was able to examine the victim's internal organs, including her lungs. Shah stated that, on the basis of her examination of those organs, the victim 'definitely' had died prior to the fire." Id., 119–20. "Shah explained that the lack of soot in the victim's lungs and larynx and on the victim's tongue, coupled with the low level of carbon monoxide in her blood, led her to conclude that the victim 'was definitely dead before the fire.' " Id., 120 n.7. "Moreover, although Shah testified that she could not determine either the cause of the victim's death or the manner in which she had died, Shah's examination of the victim's internal organs revealed that the victim had not died of natural causes." Id., 120.

The petitioner was convicted of one count of murder in violation of General Statutes § 53-54a (a), two counts of arson in the first degree in violation of General Statutes § 53a-111 (1) and (4), one count of tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1), and two counts of risk of injury to a child in violation of General Statutes (Rev. to 1993) § 53-21. As noted, his conviction was affirmed by this court and our Supreme Court.

On July 25, 2005, the petitioner filed an action seeking a writ of habeas corpus (first habeas action) on the following bases: (1) that he is actually innocent of the crimes of which he was convicted; (2) that his right to due process was violated because the expert testimony presented at his criminal trial regarding the cause of

the victim's death and the cause and origin of the fire was false and unreliable; (3) that his trial attorney provided ineffective assistance because he had a conflict of interest in representing him in a civil contingent fee matter against his homeowners insurance carrier and in the criminal matter giving rise to the present habeas petition; and (4) that his trial attorney was ineffective in his cross-examination of the witnesses who testified as to the cause of the victim's death and the fire science evidence.

Following a ten day trial, the habeas court, *Schuman*, *J.* (first habeas court), issued a memorandum of decision dated January 20, 2011, in which it rejected all four of the petitioner's claims and denied his petition. The habeas court thereafter granted the petitioner's petition for certification to appeal to this court.

On appeal, the petitioner, who was then represented by Attorney Christopher Y. Duby, challenged only the first habeas court's rulings that the petitioner's trial counsel had a conflict of interest and inadequately cross-examined the state's expert witnesses regarding the cause of the victim's death and the cause of the fire in accordance with *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), which was decided a few months after the conclusion of the petitioner's criminal trial. *Wargo* v. *Commissioner of Correction*, 144 Conn. App. 695, 73 A.3d 821 (2013), appeal dismissed, 316 Conn. 180, 112 A.3d 777 (2015). This court affirmed the judgment of the first habeas court. Id.

The petitioner thereafter filed the present habeas action, alleging ineffective assistance of Duby in appealing from the first habeas court's denial of his first habeas petition.[2] Specifically, the petitioner claimed that Duby

[2] The petitioner also alleged prosecutorial misconduct, and ineffective assistance of his trial counsel, appellate counsel, and his first habeas counsel. The habeas court dismissed those allegations and the petitioner has not challenged that ruling.

was ineffective in failing to challenge the first habeas court's rejection of his actual innocence and due process claims. The petitioner further claimed that Duby was ineffective in failing to "adequately and effectively present the claim that the petitioner's right to [the] effective assistance of trial counsel was violated."

On November 17, 2016, the habeas court, *Sferrazza*, *J.*, issued a memorandum of decision, following an evidentiary hearing, concluding that the petitioner failed to prove that Duby's performance was deficient or that the petitioner was thereby prejudiced. Accordingly, the habeas court denied the petition for a writ of habeas corpus. The habeas court thereafter granted certification to appeal and this appeal followed.

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Citations omitted; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 11–13, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020). With these principles in mind, we turn to the petitioner's specific claims of ineffective assistance of his first habeas appellate counsel.[3]

I

The petitioner first claims that the habeas court improperly concluded that Duby did not render ineffective assistance by failing to challenge on appeal the first habeas court's rejection of his contention that he was

[3] The transcripts of the petitioner's criminal trial were not introduced into evidence at the petitioner's second habeas trial. He sought to rectify the record to include them, but that motion was denied. This court granted review of the denial of the petitioner's motion to rectify, but denied the relief requested therein. The petitioner now asks this court to take judicial notice of those transcripts. We decline to revisit this issue.

actually innocent of the crimes of which he was convicted. We disagree.

"Habeas corpus relief in the form of a new trial on the basis of a claim of actual innocence requires that the petitioner satisfy . . . two criteria . . . . [T]he petitioner [first] must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime. . . .

"As to the first prong, [our Supreme Court has] emphasized . . . that the clear and convincing standard . . . is a very demanding standard and should be understood as such, particularly when applied to a habeas claim of actual innocence, where the stakes are so important for both the petitioner and the state. . . . [That standard] should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory. . . . [The standard requires] extraordinarily high and truly persuasive demonstration[s] of actual innocence. . . .

"Moreover, actual innocence [must be] demonstrated by *affirmative proof* that the petitioner did not commit the crime. . . . Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime . . . that a third party committed the crime, or that no crime actually occurred. . . . Clear and convincing proof of actual innocence does not, however, require the petitioner to establish that his or her guilt is a factual impossibility. . . . In part for these reasons, [our Supreme Court has]

emphasized . . . that truly persuasive demonstrations of actual innocence after conviction in a fair trial have been, and are likely to remain, extremely rare." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Bowens* v. *Commissioner of Correction*, 333 Conn. 502, 518–19, 217 A.3d 609 (2019).

The first habeas court rejected the petitioner's claim of actual innocence with little discussion, concluding that "the petitioner offered no newly discovered evidence, as our case law defines that phrase." *Wargo* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000584 (January 20, 2011) (*Schuman, J.*). The first habeas court further held: "[T]he petitioner did not prove by clear and convincing evidence that he is actually innocent. Even the petitioner's experts concluded that the cause of death and the cause of the fire should remain undetermined. Thus, the evidence is not clear and convincing that the victim died on her own accord and that the fire was accidental." Id.

In the present action, the habeas court rejected the petitioner's argument that Duby was ineffective in failing to challenge the first habeas court's denial of his actual innocence claim. The habeas court agreed with the first habeas court's conclusion that the petitioner produced no newly discovered evidence that affirmatively proved his actual innocence.

The petitioner now argues that he "is actually innocent due to the inherent unreliability of the scientific evidence presented at [his] criminal trial." The petitioner's argument is unpersuasive in that unreliable evidence cannot logically constitute affirmative proof of actual innocence.[4] Moreover, even if the petitioner had

[4] The petitioner also contends that the "expert testimony leading to a criminal conviction later shown to be unreliable under prevailing scientific standards may qualify as 'newly discovered' evidence in collateral appeals." Because we agree with the habeas court and the first habeas court that the petitioner failed to present affirmative proof of his actual innocence, we need not address this argument.

proven that the scientific evidence presented by the state at the underlying criminal trial was unreliable, such a determination might undermine the jury's guilty verdict, but it is not affirmative proof of the petitioner's innocence. See *Bowens* v. *Commissioner of Correction*, supra, 333 Conn. 520 ("[s]imply casting doubt on the reliability of a state's witness, even a star witness, fails to qualify as affirmative proof of innocence"); *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 803, 138 A.3d 908 (2016) (discrediting evidence on which conviction rested does not revive presumption of innocence). On the basis of the foregoing, we agree that the petitioner failed to present proof that would tend to establish that he could not have committed the crime, a third party committed the crime, or that no crime actually occurred. Because the petitioner did not present affirmative proof of his innocence, he has failed to demonstrate that there was a reasonable probability that he would have prevailed on an appeal from the first habeas court's denial of his actual innocence claim. Accordingly, the habeas court did not err in concluding that Duby's decision not to pursue the petitioner's actual innocence claim on appeal did not constitute ineffective assistance of counsel.

II

The petitioner next claims that Duby provided ineffective assistance of counsel by failing to challenge the first habeas court's rejection of his claim that his constitutional right to due process was violated because his conviction was based on false and scientifically invalid evidence, specifically, the expert testimony of Shah and McGurk, pertaining to the cause of the victim's death and the cause and origin of the fire. We are not persuaded.

In *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 800, our Supreme Court acknowledged that Connecticut courts have not yet resolved the question of

whether the state's unknowing use of allegedly false evidence violates due process.[5] The court explained: "Although [a] majority of the federal circuit courts require a knowing use of perjured testimony by the prosecution to find a violation of due process . . . the United States Court of Appeals for the Second Circuit has held that, when false testimony is provided by a government witness without the prosecution's knowledge, due process is violated . . . if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted. . . . *Ortega* v. *Duncan*, 333 F.3d 102, 108 (2d Cir. 2003)." (Citation omitted; internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, supra, 801.

In *Horn*, the court expressly declined to adopt *Ortega* or otherwise resolve the issue of whether an unknowing use of false evidence could furnish the basis for habeas relief, instead concluding that the petitioner had not established conclusively that the witnesses had committed perjury and that, even without the witnesses' testimony, there was no reasonable probability that the petitioner would not have been convicted. Id., 801–802. Accordingly, the court concluded that the petitioner had not been deprived of his constitutional due process right to a fair trial. Id., 802.

Similarly, the first habeas court here concluded that, even if the petitioner's due process claim was cognizable under *Ortega*, he failed to prove that the evidence adduced at his criminal trial was false or scientifically invalid. The first habeas court reasoned: "[T]he petitioner does not present evidence of any materially false testimony, such as a witness recanting on an issue of fact. Rather, the petitioner presents only different experts who disagree with the experts who testified at

[5] The petitioner does not allege, nor was there any evidence, that the state knowingly presented or failed to correct false testimony.

the criminal trial on matters of opinion, such as the cause of the fire and the cause of death. There is no reason or authority for granting habeas relief solely on that basis, lest habeas become simply an opportunity for a prisoner to retry his case using different experts." *Wargo* v. *Warden*, supra, Superior Court, Docket No. CV-05-4000584.

Even if we assume without deciding that the petitioner set forth a valid due process claim under *Ortega*, we agree with the first habeas court's conclusion that the petitioner failed to establish that the scientific evidence admitted at his criminal trial was false or scientifically invalid. The petitioner argues that he presented evidence at his first habeas trial that "a forensic pathologist cannot properly conclude that the absence of soot deposits in the throat or lungs, and the lack of elevated carbon monoxide levels in the blood, means that a victim was dead before a fire started." The petitioner further contends that he presented evidence at his first habeas trial "to establish that there was an alternative explanation for the straight line of holes" that was discovered in the room in which the victim's body was found. As described by the petitioner's expert in this action, however, the evidence presented at his first habeas trial established "alternate explanations" to the conclusions reached by the state's experts in the petitioner's underlying criminal trial. The existence of alternative explanations falls short of proving that the expert opinions rendered by Shah and McGurk were false or scientifically invalid. The first habeas court's conclusion that the evidence presented by the petitioner at his first habeas trial amounted to differing expert opinions, versus proof that the evidence was scientifically invalid, was therefore consistent with the expert testimony adduced by the petitioner at his habeas trial here.

Moreover, both Shah and McGurk, on cross-examination at the petitioner's criminal trial, acknowledged the

existence of alternative explanations for their conclusions regarding the cause of the victim's death and the cause and origin of the fire. As the petitioner aptly notes in his brief to this court, Shah conceded at the petitioner's criminal trial that she had performed an autopsy on another burn victim on the same day as the autopsy of the victim in this case and that the other victim also had no soot or carbon monoxide in her lungs. Similarly, when he was cross-examined at the petitioner's criminal trial, McGurk acknowledged that there were "other explanations for the burn pattern other than the use of an accelerant." Therefore, the jury was made aware of, and presumably considered, the existence of alternative explanations to the conclusions reached by Shah and McGurk.

On the basis of the foregoing, we agree with the first habeas court that the petitioner failed to prove that his conviction was based on false or scientifically invalid evidence, and we are not left with a firm belief that the petitioner would most likely not have been convicted if the jury had been presented with additional competing evidence such as that adduced by the petitioner at his first habeas trial. We therefore conclude that it is not likely that the petitioner would have prevailed on an appeal from the first habeas court's rejection of his due process claim and that the habeas court did not err in holding that the petitioner failed to meet his burden of demonstrating that Duby's decision not to pursue that claim in his appeal from the first habeas court's decision constituted ineffective assistance of counsel.

III

Finally, the petitioner claims that Duby was ineffective in failing to pursue on appeal his claim that his trial counsel, M. Hatcher Norris, was ineffective in challenging the expert testimony adduced by Shah and McGurk pertaining to the cause of the victim's death

and the cause of the fire.[6] The petitioner now argues that Duby should have challenged the first habeas court's rejection of his claim that Norris was ineffective in challenging Shah's testimony because "evidence undercutting Shah's claims concerning the time of death would have substantially weakened the state's case against [him]." As to McGurk, the petitioner argues that Duby should have pursued on appeal his claim that Norris failed to present evidence rebutting McGurk's opinion that the only possible source of the line of holes was an ignitable liquid and that he should have emphasized McGurk's failure to employ the scientific method when he investigated the fire. We disagree.

We begin by noting that "[a] claim such as [that raised by the petitioner here], which concerns the ambit of cross-examination, falls short of establishing deficient performance. . . . An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy. . . . The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance." (Citation omitted; internal quotation marks omitted.) *Ruiz* v. *Commissioner of Correction*, 195 Conn. App. 847, 861, 227 A.3d 1049, cert. denied, 335 Conn. 915, 229 A.3d 729 (2020).

In assessing the petitioner's claim that Norris was ineffective in challenging Shah's testimony, the first habeas court found, inter alia, that Norris "made the essential point that the absence of soot and carbon

[6] Although, as noted; see footnote 3 of this opinion; the transcripts of the petitioner's underlying criminal trial were not introduced as evidence before the habeas court in this matter, and are, therefore, not available for our review, we are able to assess the petitioner's claim from the recitation of facts set forth by our Supreme Court and the first habeas court. The petitioner does not contend that those facts were erroneous. He challenges the legal conclusions drawn from those facts, and we address those arguments herein.

monoxide in the victim's body did not necessarily imply that the victim died before the fire. Norris emphasized this point by eliciting the ironic fact that, on the same day [that Shah performed the autopsy in this case], Shah did an autopsy of another burn victim who died with no soot or carbon monoxide in her lungs." (Footnote omitted.) *Wargo* v. *Warden*, supra, Superior Court, Docket No. CV-05-4000584. The first habeas court concluded: "There is no evidence . . . that further questioning [of Shah] would have benefited the petitioner. Even the petitioner's pathology expert at the [first] habeas trial could not cite any discussion in the literature of victims of flashover fires who had died without soot or carbon monoxide in their body." Id. "Norris had also prepared commendably for cross-examination by retaining his own pathologist as an expert consultant, speaking to another noted pathologist, and doing research and reading in the field." Id.

In arguing that Duby should have pursued his claim that Norris was ineffective in failing to present evidence that undercut Shah's claims concerning the time of the victim's death, the petitioner ignores the fact that Norris did present evidence of that nature by way of requiring Shah herself to acknowledge the fact that she had examined the body of another burn victim who did not have soot in her lungs or carbon monoxide in her blood. As the first habeas court explained, the evidence that the petitioner presented at his first habeas trial did not undermine Shah's opinions any more than her own concession did. We therefore agree with the first habeas court's conclusion that Norris did not render ineffective assistance of counsel in his challenge to Shah's opinion as to the time of the victim's death.

In rejecting the petitioner's claim that Norris was ineffective in his challenge to McGurk's testimony, the first habeas court reasoned, inter alia: "On cross- and recross-examination, Norris brought out that McGurk found no 'rainbow effect,' which one might expect from

the pouring of an ignitable liquid, that forensic tests revealed no evidence of accelerants in the floor or in the petitioner's clothing, that McGurk could not say what type of accelerant was used, that there were explanations for the pattern on the floor that did not involve accelerants, and that McGurk turned the property back to the petitioner after the fire, which he would not have done if he suspected arson at the time." Id. The first habeas court further explained: "The petitioner presented the testimony of Christopher Wood as an example of the type of expert testimony that Norris should have presented. Wood is a fire protection engineer who did prove knowledgeable and articulate on the [witness] stand. Prior to his testimony, Wood had tested the hypothesis that an accidental fire that goes to flashover could produce a burn pattern similar to the line of holes in this case. Wood demonstrated that a similar burn pattern could occur as a result of, and directly over, a gap or seam in the carpet padding, which would leave the floor with less protection. Norris, however, had no obligation to call an expert who would have conducted a similar experiment or who would have provided similar testimony. The choice of which expert to call is largely a matter of professional judgment." Id.

The petitioner argues that Duby should have pursued on appeal his claim that Norris provided ineffective assistance of counsel when he failed to "challenge McGurk's testimony with scientific evidence flatly refuting his claims" "that the only possible source of the line of holes was an ignitable liquid . . . ." He asserts that Norris should have focused on McGurk's alleged failure to employ the scientific method by presenting the testimony of an expert such as Wood. "A trial attorney is entitled to rely reasonably on the opinion of an expert witness . . . and is not required to continue searching for a different expert [or for multiple experts]." (Citation omitted; internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, 172 Conn.

App. 535, 542–43, 160 A.3d 1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017). Thus, Norris' choice of experts does not give rise to a claim of deficient performance. Moreover, the first habeas court found that "McGurk did follow the essential steps in the scientific method. In particular, McGurk used deductive reasoning in testing his hypothesis that the fire was incendiary by eliminating all reasonable alternative explanations."[7] *Wargo* v. *Warden*, supra, Superior Court, Docket No. CV-05-4000584. The petitioner has not argued that the first habeas court's finding was clearly erroneous.

The petitioner's argument is also unpersuasive in light of the fact that Norris elicited from McGurk on cross-examination a concession that there were explanations for the pattern on the floor that did not involve accelerants. It was therefore unnecessary for Norris to present expert testimony to refute McGurk's initial testimony that the only possible source of the pattern on the floor was an accelerant.

Even if Norris' challenge to the testimony of Shah and McGurk could be considered deficient, the petitioner failed to prove that he was thereby prejudiced. The

[7] Specifically, the first habeas court found: "The petitioner has pointed to no case law authority holding that McGurk's methodology was not generally accepted in the scientific community. Cf. *State* v. *Sharp*, 395 N.J. Super. 175, 180–82, 928 A.2d 165 (2006) (fire causation opinion based on process of elimination technique admitted under [test in *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923)). The petitioner instead relies on the National Fire Protection Association 921 Guide for Fire and Explosion Investigations (1995 Ed.) (NFPA 921), which provides that the scientific method is the systematic approach recommended in fire investigations. The NFPA 921 then defines the scientific method as containing six steps: recognizing the need for investigation, defining the problem, collecting data, analyzing the data, developing a hypothesis, and testing the hypothesis through deductive reasoning. . . .

"The petitioner also supplies no authority that, to be admissible at the time of trial, cause and origin testimony had to follow the scientific method outlined in the NFPA 921. In any case, the testimony recited [previously] establishes that McGurk did follow the essential steps in the scientific method. In particular, McGurk used deductive reasoning in testing his hypothesis that the fire was incendiary by eliminating all reasonable alternative explanations." (Citation omitted.) *Wargo* v. *Warden*, supra, Superior Court, Docket No. CV-05-4000584.

petitioner argues that, "[h]ad the jury been made aware of this critical scientific evidence, there is a reasonable probability that the outcome of the trial would have been different." This argument is unpersuasive because, as noted herein, Norris was able to demonstrate through his effective cross-examination of Shah and McGurk that their conclusions were not beyond reproach. Shah was forced to acknowledge before the jury that not all victims who die in a fire have soot in their lungs and carbon monoxide in their blood. Similarly, McGurk acknowledged that there were reasonable explanations for the cause and origin of the fire that did not involve accelerants. Faced with those concessions by Shah and McGurk, the jury still found that the petitioner was guilty beyond a reasonable doubt of the crimes with which he had been charged. It is therefore not reasonably probable that Duby would have succeeded in demonstrating that Norris' counsel was constitutionally ineffective. Accordingly, the habeas court properly concluded that Duby's decision not to pursue this claim on appeal did not constitute ineffective assistance of counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

MARY CUNNINGHAM *v.* GERARD CUNNINGHAM (AC 43297)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the decision of the trial court granting the defendant's motion for a domestic relations order relating to distributions from his pension plan. In the trial court's memorandum of decision dissolving the parties' marriage, the court ordered that the defendant's pension benefit held with his employer, D Co., be divided with the plaintiff. The defendant subsequently filed a motion seeking the entry of a domestic relations order with regard to the pension benefit, attached

to which was a proposed order and a schedule, the terms of which were agreed to by the parties, setting forth the plaintiff's share of the defendant's pension income as of the date of dissolution. The court subsequently entered a domestic relations order that incorporated the language of the defendant's proposed order, and the plaintiff's appeal followed. *Held*:

1. The plaintiff's claim that the trial court improperly modified the property distribution set forth in the dissolution judgment by requiring her to assign a portion of the joint survivor annuity to a third party was unavailing: the court's order effectuated the dissolution judgment by ensuring that any survivor benefit that the plaintiff received is based on the value of the pension benefit as of the time that the dissolution judgment was rendered, which value was the basis of the parties' calculation of the plaintiff's annual pension benefit; thus, the order did not impermissibly modify the judgment, but merely protected its integrity and ensured that the plaintiff did not receive an unintended windfall.
2. The plaintiff could not prevail on her claim that the court's postjudgment order constituted an impermissible modification of the dissolution judgment because the order required the plaintiff to share in the cost of the joint survivor annuity election: in the dissolution judgment, the court ordered the defendant to elect a 50 percent joint and survivor annuity, and the postjudgment order merely stated that the defendant had elected payment in the form of a 50 percent joint and survivor annuity with the plaintiff as the survivor annuitant and that both parties would share, in proportion, the cost of the election of that annuity; the order did nothing more than confirm that the election of the annuity resulted in a cost to both parties in the form of a lesser current pension benefit.
3. The plaintiff's claim that the trial court improperly ordered that both parties would share equally in any future reductions in the defendant's pension benefit that may result from decreased contributions to the pension plan by D Co. was unavailing: the plaintiff could not prevail in her argument that the issue of future reductions in the defendant's pension benefit was not ripe for adjudication by the trial court because the court's order merely clarified and effectuated the dissolution judgment and, to the extent that the court rendered a judgment addressing a potential future contingency, it did so when it rendered the dissolution judgment; moreover, the dissolution judgment provides that the parties are to share equally in the pension benefits that were vested and accrued as of the date that the dissolution judgment was rendered, and the court's postjudgment order was consistent with that judgment, which was entered in order to protect the integrity of its original judgment and to clarify any ambiguity that might result from D Co.'s reduction or termination of such benefits, and substantial deference was accorded to the court's clarification of its own order, its interpretation of which was not manifestly unreasonable; furthermore, the court did not improperly modify the dissolution judgment by adopting a formula that could result in a reduction of the plaintiff's pension benefit, because the court's

order did no more than effectuate the dissolution judgment by clarifying that her share of the benefit was subject to reductions to the same extent that the defendant was affected.

Argued November 19, 2020—officially released May 4, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Shay*, *J.*, rendered judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court, *Gruendel*, *Bear* and *Flynn*, *Js.*, which affirmed the trial court's judgment; thereafter, the court, *Shay*, *J.*, granted the defendant's motion for a domestic relations order, and the plaintiff appealed to this court. *Affirmed.*

Joseph T. O'Connor, for the appellant (plaintiff).

Thomas M. Shanley, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Mary Cunningham, appeals from the judgment of the trial court granting the motion of the defendant, Gerard Cunningham, for a domestic relations order relating to distributions from his pension plan. On appeal, the plaintiff claims that the court improperly modified the property division set forth in the parties' 2011 dissolution judgment by (1) requiring the plaintiff, at the defendant's direction, to assign a portion of her 50 percent joint survivor annuity from the defendant's pension benefit to a third party, (2) requiring the plaintiff to share in the cost of the 50 percent joint survivor annuity election under the pension plan, and (3) adopting a formula that could result in an unjustified reduction to the plaintiff's marital portion of the retirement benefit that she receives under the pension plan. We disagree and affirm the judgment of the trial court.

The following facts and procedural history are necessary to our determination of the issues presented on appeal. On March 9, 2011, the trial court rendered a dissolution judgment, terminating the parties' marriage. In its memorandum of decision, the court issued orders regarding the distribution of the nonqualified, nonfunded pension plan benefit (pension benefit) provided to the defendant by his employer, Deloitte Consulting, LLC (Deloitte). In particular, the court ordered: "Effective as of the date of this memorandum of decision, that portion of the [defendant's] Deloitte . . . [non]-qualified, [non]funded [p]lan . . . through his employment and vested and accrued as of the date of this memorandum of decision, net after an adjustment for federal and state taxes in the event that the [defendant] incurs any such tax on the portion distributed to the [plaintiff], shall be divided by means of [a] domestic relations order . . . which shall be prepared by the [defendant's attorney] or at his direction, at his sole expense, 50 percent to the [defendant] and 50 percent to the [plaintiff]." (Emphasis omitted.) The court further ordered: "Unless the parties shall otherwise agree, the [defendant] shall elect a 50 percent joint and survivor annuity, so called, and in the event that the [defendant] shall predecease the [plaintiff] prior to drawing his pension [benefit], the [plaintiff] shall be entitled to 100 percent of that portion of the [pre]retirement benefit vested and accrued as of the date of this memorandum of decision. Any benefit vesting and accruing thereafter shall belong to the [defendant]. The foregoing notwithstanding, it is the intention of the court that for purposes of calculating the coverture period for either the retirement or [pre]retirement benefit, that the numerator of the fraction shall be equal to the length of time in whole months, beginning with the first day of the month in which the parties were married and ending with the last day of the month in which the marriage was dissolved, and that the denominator shall be equal to the

length of time in whole months, beginning with the first day of the month in which the [defendant] commenced employment with Deloitte and ending with the last day of the month in which the marriage was dissolved. The [plaintiff] and her attorney shall be entitled to any and all information regarding the [pension plan] necessary for a review of the [domestic relations order]. The court shall retain jurisdiction to deal with any issues which may arise with regard to the preparation and filing of the [domestic relations order] and the division of the [pension benefit]." (Emphasis omitted.) In its memorandum of decision, the court also noted that "[n]either party offered any evidence as to the present value of this retirement benefit, however, each has offered a proposed distribution of this marital asset, if, as and when it is paid."

The plaintiff appealed from that judgment of dissolution, claiming, inter alia, that the trial court abused its discretion in the manner in which it divided the pension benefit. See *Cunningham* v. *Cunningham*, 140 Conn. App. 676, 678, 59 A.3d 874 (2013). This court disagreed and affirmed the trial court's judgment. See id.

In March, 2019, the defendant filed a motion seeking the entry of a domestic relations order with regard to the pension benefit. The defendant attached to his motion a proposed order. Attached to the proposed order as exhibit A was a schedule, the terms of which were agreed to by the parties on the defendant's retirement on June 2, 2018, setting forth the plaintiff's share of the defendant's pension benefit as of the date of dissolution. According to exhibit A, after various deductions, the plaintiff was to receive 41 percent of the net pension benefit, based on the value of the pension benefit at the time of dissolution, to be paid to the defendant, or $84,261. This amount was subject to annual cost of living adjustments. Relevant to this appeal, the proposed order addressed three issues. First, the order

provided that, if the defendant predeceased the plaintiff, the plaintiff's survivor benefit would be capped at $84,261 plus cost of living adjustments. Pursuant to the proposed order, any benefit above that amount would be paid either by Deloitte or the plaintiff to "the account designated by the [defendant] at his discretion, before his death or if not by the [defendant's] executor." The defendant requested this language because, although the $84,261 the plaintiff was to receive reflected the value of the plaintiff's survivor benefit based on the value of the defendant's pension benefit on the date of the marital dissolution in 2011, the defendant continued to work at Deloitte for seven years postdissolution, thereby increasing the value of his pension benefit. The defendant's proposed order would preclude the plaintiff from receiving a survivor's benefit based on the increased value postdissolution and would allow the defendant to designate a third party to receive that portion of the survivor benefit based on the postdissolution increase in the value of the pension benefit.

Second, the proposed order provided that the plaintiff and the defendant would share equally the cost of the defendant's selecting the survivor annuity option for his pension benefit. The "cost" of the election simply was that the defendant's pension benefit during his life was reduced because a benefit would continue to be paid to the plaintiff or other designee on the defendant's death.

Third, the proposed order provided that the parties would share "equally in any future reductions implemented by Deloitte . . . ." The defendant included this language because the pension plan was nonfunded, and, as a result, his pension benefit was tied to Deloitte's economic performance. Thus, it was possible that, if Deloitte had a poor economic year, his pension benefit would be reduced from the base number in place at the time he retired. In that event, the defendant sought

in the proposed order that the plaintiff's share of the pension benefit be reduced by the same percentage that his share would be reduced.

The plaintiff filed an objection to the defendant's motion on several grounds. As to the proposal that capped the plaintiff's survivor benefit at $84,261, the plaintiff argued that any such order would constitute an impermissible modification of the court's property distribution orders entered at the time of dissolution. As to the proposal that the parties share equally the cost of the survivor benefit election, the plaintiff argued that the order would impose an obligation on her not contemplated by the court's dissolution judgment. Finally, with respect to the defendant's proposed language that the parties equally share the risk of a reduction in the defendant's pension benefit, the plaintiff argued that the proposed order was speculative and unnecessary because there had been no such reduction and, if one were to occur, the proposed order improperly applied such reduction evenly to both parties when the defendant should bear the risk of any reduction so long as the value of his pension benefit, even after any reduction, is greater than the value of the benefit at the time of the dissolution of the marriage.

The court conducted a hearing on the defendant's motion on May 23, 2019. After receiving additional briefs from the parties, the court ordered that the defendant make certain changes to his proposed domestic relations order and resubmit it to the court for its signature. None of the changes requested by the court related to the provisions proposed by the defendant that are the subject of this appeal. On September 18, 2019, after receiving the revised proposed order from the defendant, the trial court entered a domestic relations order regarding the pension benefit (2019 order), which incorporated the language from the defendant's proposed order. Incorporated into the court's order is the same exhibit A that was attached to the defendant's proposed order. This appeal followed.

I

The plaintiff first claims on appeal that the court improperly modified the property distribution set forth in the dissolution judgment by requiring her to assign a portion of the 50 percent joint survivor annuity to a third party, at the defendant's direction, where the dissolution judgment required the defendant simply to name the plaintiff as beneficiary of a 50 percent joint survivor annuity. The defendant maintains that the 2019 order was not a modification of the property distribution orders entered as part of the dissolution judgment, but was, instead, necessary to effectuate the dissolution judgment, to ensure that the plaintiff would receive her share of the pension benefit, while also preventing her from receiving benefits that accrued after the date of the dissolution judgment, in accordance with the clear language of the dissolution judgment. We agree with the defendant.

We begin with the relevant standard of review. "Because [t]he construction of a judgment is a question of law for the court . . . our review of the . . . claim is plenary. As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Perry* v. *Perry*, 156 Conn. App. 587, 593, 113 A.3d 132, cert. denied, 317 Conn. 906, 114 A.3d 1220 (2015).

It is well established that pension benefits are a form of property. See *Thomasi* v. *Thomasi*, 181 Conn. App. 822, 850, 188 A.3d 743 (2018). "Although the court does not have the authority to modify a property assignment,

a court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. . . . Where a decision as to whether a court has subject matter jurisdiction is required, every presumption favoring jurisdiction should be indulged. . . . Thus, if the . . . motion . . . can fairly be construed as seeking an effectuation of the judgment rather than a modification of the terms of the property settlement, this court must favor that interpretation. . . .

"[W]e have recognized that it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Citation omitted; internal quotation marks omitted.) *O'Halpin* v. *O'Halpin*, 144 Conn. App. 671, 677–78, 74 A.3d 465, cert. denied, 310 Conn. 952, 81 A.3d 1180 (2013).

"A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the [subject matter] intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Internal quotation marks omitted.) *Morton* v. *Syriac*, 196 Conn. App. 183, 199, 229 A.3d 1129, cert. denied, 335 Conn. 915, 229 A.3d 1045 (2020). "In order to determine the practical effect of the court's order on the original judgment, we must examine the terms of the original judgment as well as the subsequent order." *Stechel* v. *Foster*, 125 Conn. App. 441, 447, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011).

In its 2011 dissolution judgment, the court applied the present division method of deferred distribution in its determination of the percentage of the pension benefit to which each of the parties was entitled.[1] The court

[1] "Under the present division method [of deferred distribution], the trial court determines at the time of trial, the percentage share of the pension

awarded 50 percent of the defendant's pension benefit to the defendant and 50 percent of the benefit to the plaintiff, subject to a coverture fraction formula provided by the court. The court further ordered that "the [defendant] shall elect a 50 percent joint and survivor annuity, so called, and in the event that the [defendant] shall predecease the [plaintiff] prior to drawing his pension, the [plaintiff] shall be entitled to 100 percent of that portion of the [pre]retirement benefit vested and accrued as of the date of this memorandum of decision."[2] (Emphasis omitted.) The judgment further provides that "[a]ny benefit vesting and accruing thereafter shall belong to the [defendant]." The court retained jurisdiction to deal with any issues that may arise with regard to the preparation and filing of the domestic relations order and the division of the pension benefit. See *Cunningham* v. *Cunningham*, supra, 140 Conn. App. 686 ("[the trial court], having determined the formula for the division of the assets received by the defendant pursuant to the [pension plan], had discretion to retain jurisdiction to effectuate its judgment by deal[ing] with any issues which may arise with regard to the preparation and filing of the [domestic relations order] and the division of the [nonqualified plan]" (internal quotation marks omitted)).

benefits to which the nonemployee spouse is entitled. . . . In other words, the court will declare that, upon maturity, a fixed percentage of the pension be distributed to each spouse." (Internal quotation marks omitted.) *Bender* v. *Bender*, 258 Conn. 733, 758, 785 A.2d 197 (2001). "One disadvantage of delaying distribution of the pension benefits is the cost of prolonging the parties' entanglement with each other." (Internal quotation marks omitted.) Id., 759.

[2] "If some event, such as the death, resignation or dismissal of the owning spouse, occurs so as to prevent the vesting of the pension benefits, the nonowning spouse may lose his or her retirement security. This risk would, of course, exist had the parties remained married. In order to minimize this risk, however, the court may choose . . . to require the owning spouse to provide survivorship benefits or life insurance." *Bender* v. *Bender*, supra, 258 Conn. 760.

It is undisputed that, because the pension plan was a nonqualified, nonfunded plan, Deloitte has refused to undertake the responsibility to pay the plaintiff her percentage of the pension benefit directly. Consequently, the defendant is required to make payments to the plaintiff of her share of the pension benefit after the defendant receives payments of the entire benefit from Deloitte. It also is undisputed that the defendant retired in 2018, and began receiving benefits pursuant to the pension plan. Finally, it is undisputed that, at that time, the parties agreed to the calculation of the plaintiff's share of the pension benefit and that agreement is set forth in exhibit A to the 2019 order. As had been ordered by the court, the defendant elected a 50 percent joint survivor annuity and has been making direct payments to the plaintiff pursuant to the dissolution judgment and exhibit A.

At issue in this claim is paragraph 10 of the 2019 order. It provides in relevant part: "If [the defendant] is the first to die, [the plaintiff] will receive both the marital and the [non]marital portions of the survivor annuity benefit directly from the [pension plan]. Upon the [defendant's] death, any and all joint survivor benefits that exceed the monthly amount that was payable to the [plaintiff] prior to the [defendant's] death, which amount represented the [plaintiff's] marital portion of the [pension plan] benefit, to the extent the said amount exceeds $84,261 (including any [cost of living] adjustments), the said amount shall be subsequently paid by Deloitte to the account designated by the [defendant] at his discretion, before his death or if not by the [defendant's] executor. To effectuate the foregoing, the [plaintiff] shall direct Deloitte to pay said excess amount directly to the said account providing the [defendant's] executor copies of the forms for approval ten . . . days prior to submission to Deloitte (a current copy of said form attached as exhibit B and a confirmation from Deloitte attached as exhibit C hereto) and a fully exe-

cuted copy. [The defendant's estate] shall be deemed a third-party beneficiary to this agreement. Only if Deloitte will not subsequently make direct payments, [the plaintiff] shall make payments to the said account within ten . . . days of receiving said payments."

The plaintiff argues that paragraph 10 modifies the property distribution in the dissolution judgment because it eliminates her right under the judgment to receive 100 percent of the survivor annuity to be paid on the defendant's death and, instead, caps her survivor benefit at $84,261, plus cost of living adjustments. The defendant agrees that paragraph 10 has the effect of limiting the survivor benefit that the plaintiff will receive to less than 100 percent of the survivor benefit that Deloitte would pay on the defendant's death. The defendant argues that such a result is consistent with the dissolution judgment, merely effectuates the judgment, and in no way modifies the judgment. We agree with the defendant.

As this court noted in its decision on the defendant's appeal from the dissolution judgment: "The parties do not dispute that . . . the plaintiff will receive 41 percent of the defendant's [pension benefit] *valued as of the date of the dissolution of the marriage*." (Emphasis added.) *Cunningham* v. *Cunningham*, supra, 140 Conn. App. 685. Furthermore, the dissolution judgment explicitly provides that "[a]ny benefit vesting and accruing [after the date of dissolution] shall belong to the [defendant]." Paragraph 10 of the 2019 order effectuates the dissolution judgment by ensuring that any survivor benefit that the plaintiff receives is based on the value of the pension benefit at the time of the dissolution judgment, which is reflected in exhibit A and is the basis for the parties' calculation of the plaintiff's annual $84,261 pension benefit. Because the defendant continued to accrue value in the pension plan after the dissolution judgment was rendered and until he retired, the court needed a mechanism to ensure, as required by

the dissolution judgment, that the increased value of the pension benefit that accrued and vested after the date of the dissolution judgment "belong[ed] to the defendant." In fact, at the hearing on the defendant's motion, the court, in stating its intention to enter an order substantially as submitted by the defendant, indicated that, without paragraph 10, if the defendant predeceased the plaintiff, the plaintiff "may get the entire [survivor benefit] as . . . the alternate payee. But that clearly is not what the court intended." Furthermore, the court anticipated at the time that it rendered the dissolution judgment that an order like the 2019 order might be necessary by stating in the judgment that the court retained jurisdiction "to deal with any issues which may arise with regard to . . . the division of the [pension benefit]." Paragraph 10 of the 2019 order is entirely consistent with the court's retention of jurisdiction.

Viewing paragraph 10 of the 2019 order in conjunction with the dissolution judgment, we conclude that paragraph 10 does not modify the dissolution judgment, but merely protects the integrity of that judgment and ensures that the plaintiff does not receive an unintended windfall.[3] Accordingly, the plaintiff's claim is without merit.

II

Next, the plaintiff claims that the 2019 order constitutes an impermissible modification of the 2011 dissolution judgment because the order requires the plaintiff

[3] When it entered the 2019 order, the court also was concerned with the defendant realizing an unintended windfall if the plaintiff were to predecease the defendant. Consequently, paragraph 11 was included in the order. Paragraph 11 provides: "Death of Alternate Payee: If [the plaintiff] is the first to die, her marital share of the [pension plan] benefit shall revert to the [defendant] and shall be paid by [the defendant] to an account designated by [the plaintiff] at her discretion, before her death or if not then paid to the executor of the estate of [the plaintiff] within ten . . . days of receipt of said payment. The [defendant's] payments shall be reduced by the [defendant's] prior year effective federal, state, and local tax rate." Although the plaintiff objects to paragraph 10 of the order, she has no objection to paragraph 11.

to share in the cost of the 50 percent joint survivor annuity election. We are not persuaded.

As set forth in part I of this opinion, because the construction of a judgment is a question of law for the court, our review of the plaintiff's claim is plenary. See *Perry* v. *Perry*, supra, 156 Conn. App. 593.

Paragraph 9 of the 2019 order provides: "The [defendant] elected payment in the form of a 50 percent joint and survivor annuity with the [plaintiff] as the survivor annuitant, as ordered. The [plaintiff] shall proportionately share the cost of the 50 percent joint and survivor annuity. The [defendant] has commenced benefit payments at the earliest date permitted by the [pension plan]." At oral argument before this court, the defendant's counsel stated that the referenced costs at issue in the second claim are solely the reduced current monthly retirement benefits that the parties receive as a result of the election of the 50 percent future joint survivor annuity. In essence, the parties are paying for the cost of the survivor annuity by receiving a lesser benefit during the defendant's lifetime. This court asked the plaintiff's counsel at oral argument whether he accepted the representation of the defendant's counsel that the defendant is not seeking any additional costs that previously have not been incorporated into the court's orders. The plaintiff's counsel stated that he perceived the representation to be a judicial admission and that this court can "take that out or leave it in . . . ." The plaintiff has identified no other "costs" associated with the survivor annuity election.

In the dissolution judgment, the court ordered the defendant to elect a 50 percent joint and survivor annuity. Paragraph 9 of the 2019 order merely states that the defendant elected payment in the form of a 50 percent joint and survivor annuity with the plaintiff as the survivor annuitant and that both parties would share, in proportion, the cost of the election of that annuity. We agree with the defendant that paragraph 9 does

nothing more than confirm that the election of the survivor annuity resulted in a "cost" to both parties in the form of a lesser current pension benefit. Accordingly, we conclude that the order does not constitute an impermissible modification of the dissolution judgment.

III

Last, the plaintiff claims that the court improperly ordered that both parties share equally in any future reductions in the defendant's pension benefit that may result from decreased contributions to the pension plan by Deloitte. At issue is the following language from the 2019 order: "In accordance with Deloitte's calculation as set forth in exhibit A and confirmed in exhibit C, attached hereto, the [plaintiff] shall receive an annual pretax payment in the amount of $84,261 (or $7021.75 monthly), and said amount shall be reduced by federal, state and local taxes paid by the [defendant] if, as and when the [defendant] receives payments from Deloitte. As a [non]qualified, [non]funded benefit each party shares equally in any future reductions implemented by Deloitte (i.e., a 2 percent reduction by Deloitte in any year reduces both [parties'] benefits by 2 percent)." (Emphasis omitted.) The defendant argued before the court that, because Deloitte refused to make any payments directly to the plaintiff, such language was required in the 2019 order *to clarify* what the defendant would be obligated to pay the plaintiff as her share of the pension benefit if the payments he received from Deloitte were reduced.

The plaintiff makes several arguments in response. The plaintiff first contends that the issue of what the defendant's obligation might be if Deloitte reduces future payments to the pension plan was not ripe for adjudication. Second, the plaintiff contends that the court erred in materially changing the dissolution judgment and that it did so without evidentiary support. Third, the plaintiff argues that the court improperly

implemented a formula that would unjustifiably reduce the plaintiff's marital portion of the benefit. We are not persuaded by any of these arguments.

A

We first address the plaintiff's contention that, because the possibility that Deloitte might someday reduce its payments under the pension plan is hypothetical, the issue was not ripe for adjudication by the court. "[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Footnote omitted.) *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 569, 858 A.2d 709 (2004). "The problem is best seen in a twofold aspect, requiring [the court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. . . . [W]e will decide a case only when it presents a live controversy which can be resolved by relief that is within the court's power to grant." (Internal quotation marks omitted.) *Forcier* v. *Sunnydale Developers, LLC*, 84 Conn. App. 858, 865, 856 A.2d 416 (2004).

"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." (Internal quotation marks omitted.) Id.

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . [and we therefore] must be satisfied that the case before [us] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Internal

quotation marks omitted.) *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 847, 158 A.3d 405 (2017). "The difference between an abstract question and a case or controversy is one of degree . . . and is not discernible by any precise test." (Internal quotation marks omitted.) *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 297, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). Because an issue regarding justiciability raises a question of law, our appellate review is plenary. See *Office of the Governor* v. *Select Committee of Inquiry*, supra, 271 Conn. 569.

We are not persuaded by the plaintiff's ripeness argument because it is founded on an incorrect premise. The plaintiff assumes that the language in the 2019 order providing that the parties would share equally the impact of any reductions in Deloitte's contributions to the pension plan constitutes a new order of the court or an impermissible modification of the dissolution judgment. For the reasons set forth in parts III B and C of this opinion, we conclude that it is neither. The court's order merely clarifies and effectuates the dissolution judgment. Thus, to the extent that the court rendered a judgment addressing a potential future contingency, it did so when it rendered the dissolution judgment in 2011. Furthermore, the plaintiff concedes in her principal brief that "[i]t was known at the [dissolution] trial, that there was/is a possibility that the [pension plan] benefit could be reduced in the future based upon certain limitations under the [plan]." Consequently, when the court ordered, as part of the dissolution judgment, that the parties would share equally in the defendant's pension benefit, the plaintiff understood that there was a possibility that her share could be negatively impacted by a reduction in Deloitte's contributions. In fact, she agrees that at some level of reduction her share of the benefits necessarily would be impacted, and that the size of the impact would be contingent on the amount by which Deloitte reduces

its contribution. For example, if Deloitte ceased payments to the pension plan completely and the defendant's pension benefit was reduced to zero, the plaintiff's share of the benefit would also be reduced to zero. The plaintiff does not argue that it was error for the court at the time of the dissolution to render a judgment that included such a contingency. Nor would such an argument have any merit. The circumstances in this case are akin to a court ordering, at the time of dissolution, that the parties sell the marital home and evenly split the proceeds of the sale, and then issuing a clarifying order that the parties are also to share equally in the costs of selling the home. It cannot reasonably be argued that, because the sales price of a property or its closing costs are unknown at the time of the judgment, the court would be without jurisdiction to issue a clarifying order because the issue is unripe. The same is true in this case. The plaintiff's ripeness argument is without merit.

B

As to the merits of the plaintiff's challenge to the court's order that both parties share equally in any future reductions in the defendant's pension benefit that may result from decreased contributions to the pension plan by Deloitte, the plaintiff first posits that, "[b]y simply adopting the defendant's request, without offer or inquiry into the defendant's current [pension plan] benefits, the trial court made a material change to the judgment . . . ." The plaintiff provides no analysis in support of this assertion, but merely cites to two Supreme Court cases and to two cases from this court. The plaintiff then concludes her "argument" by stating: "This error is compounded by the fact that the court made such orders without evidence as to the amount of the defendant's current [pension plan] benefit. Orders entered without [proper] evidentiary support constitute [plain] error." We disagree that the 2019 order materially changed the dissolution judgment with respect to

how the parties share the defendant's retirement benefit under the pension plan.

"It is well settled that [c]ourts have continuing jurisdiction . . . to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers . . . . When an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events, therefore, a trial court may, at any time, exercise its continuing jurisdiction to effectuate its prior [judgment] . . . by interpreting [the] ambiguous judgment and entering orders to effectuate the judgment as interpreted . . . ." (Internal quotation marks omitted.) *Dicker* v. *Dicker*, 189 Conn. App. 247, 260, 207 A.3d 525 (2019).

"Although a trial court may interpret an ambiguous judgment, this court has emphasized that a motion for clarification may not . . . be used to modify or to alter the substantive terms of a prior judgment . . . and we look to the substance of the relief sought by the motion rather than the form to determine whether a motion is properly characterized as one seeking a clarification or a modification. . . .

"In order to determine whether the trial court properly clarified ambiguity in the judgment or impermissibly modified or altered the substantive terms of the judgment, we must first construe the trial court's judgment. It is well established that the construction of a judgment presents a question of law over which we exercise plenary review. . . . In construing a trial court's judgment, [t]he determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . In addition . . . because

the trial judge who issues the order that is the subject of subsequent clarification is familiar with the entire record and, of course, with the order itself, that judge is in the best position to clarify any ambiguity in the order. For that reason, substantial deference is accorded to a court's interpretation of its own order. . . . Accordingly, we will not disturb a trial court's clarification of an ambiguity in its own order unless the court's interpretation of that order is manifestly unreasonable." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, 159 Conn. App. 194, 198–99, 122 A.3d 713 (2015).

The dissolution judgment in the present case provides that the parties are to share equally the value of the pension benefit that was vested and accrued as of the date of the dissolution judgment. In order to protect the integrity of its original judgment and to clarify any ambiguity that may result from Deloitte's reduction or termination of such benefit, the court ordered that both parties share equally in any future reductions implemented by Deloitte. The provision in the court's 2019 order is consistent with its dissolution judgment. Furthermore, substantial deference is accorded to the court's clarification of its own order. The court, *Shay*, *J.*, effectuated and implemented its own order to clarify any ambiguity that might result in the event that Deloitte reduces or terminates its payments under the pension plan by requiring that both parties share equally in any reduction in said scenario. Accordingly, we conclude that the court's interpretation of its own order was not manifestly unreasonable.[4]

[4] We further reject the plaintiff's plain error argument. First, the plaintiff fails to explain why the court would need to take evidence before issuing a clarifying order. Second, "[t]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest

C

The plaintiff's last contention is related to her second argument. She argues that the court improperly modified the dissolution judgment by adopting a formula that could result in a reduction of her pension benefit under circumstances in which any reduction to the total benefit received by the defendant should, according to the plaintiff, be borne entirely by him. The plaintiff concedes that the parties agreed in exhibit A that the marital portion of the pension benefit on the date of the dissolution judgment was expected to be $276,230. The plaintiff argues that her portion of the benefit is calculated on the basis of that amount. Thus, the plaintiff contends that, if, as a result of reduced contributions from Deloitte, the defendant's gross pension benefit reaches $276,230 or less, then and only then would the plaintiff's share of the benefit be reduced in proportion with the defendant's share of the benefit. The plaintiff argues, however, that because the defendant's gross pension benefit has continued to grow postjudgment, any reduction in the pension benefit that leaves the defendant with at least $276,230 is the defendant's burden alone. In contrast, the defendant contends that the plaintiff is not entitled to a set amount that is reduced only if Deloitte reduces the benefit to an amount less than $276,230. According to the defendant, the plaintiff's approach would disproportionally and artificially place the impact of any contribution reduction on the postjudgment portion of the pension benefit, when in fact, any such reduction would decrease the defendant's benefit as a whole. The defendant argues that if the

injustice. . . . An appellant cannot prevail . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Cane*, 193 Conn. App. 95, 126, 218 A.3d 1073, cert. denied, 334 Conn. 901, 219 A.3d 798 (2019). In the present case, the plaintiff has not demonstrated that the court erred, let alone that it committed an error so clear and so harmful as to constitute a manifest injustice.

entire benefit is reduced, then each constituent part of the benefit is also reduced by a proportionate amount. Consequently, according to the defendant, consistent with the dissolution judgment, the 2019 order ensures that the parties share equally the defendant's pension benefit as of the date of dissolution. We agree with the defendant.

As set forth in parts I and II of this opinion, because the construction of a judgment is a question of law for the court, our review of this claim is plenary. See *Perry* v. *Perry*, supra, 156 Conn. App. 593.

The dissolution judgment clearly provides that the parties are to share equally in the defendant's benefits under the pension plan. This includes not only the amount based on the value of the defendant's benefit at the time of the dissolution judgment, but also to adjustments to that value, for example, upward cost of living adjustments. Similarly, the plaintiff's share of the benefit is subject to deductions for federal, state and local taxes. Those taxes can change over time, which may result in the plaintiff receiving a larger or smaller net distribution. Nevertheless, the plaintiff does not claim that she is entitled to have her net benefit calculated based on the tax rates in effect at the time of dissolution. Changes to the defendant's total pension benefit, and, hence, to the plaintiff's share of the benefit, due to a funding reduction by Deloitte are no different. The 2019 order does no more than effectuate the dissolution judgment by clarifying that the plaintiff's share of the benefit is subject to such reductions to the same extent that the defendant is affected. For the reasons set forth in part III B of this opinion, we give substantial deference to Judge Shay's interpretation of his own order and conclude that his interpretation was not manifestly unreasonable.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ZAIRE RAULIN LUCIANO (AC 42263)

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

Syllabus

Convicted of the crimes of assault in the second degree and conspiracy to commit assault in the first degree in connection with a fight at a bar, the defendant appealed to this court. One victim of the fight, C, suffered a head wound as a result of being punched, and the other victim, T, was struck by a bat and suffered, inter alia, a fractured ankle. Although there was evidence that the defendant exchanged punches with C, no evidence was presented that the defendant wielded the bat or as to the identity of the person who did. The defendant claimed, inter alia, that the evidence was insufficient to support his conviction. *Held*:

1. The evidence adduced at trial was insufficient to support the defendant's conviction of conspiracy to commit assault in the first degree: there was no evidence presented or any reasonable inference that could have been drawn that a relationship existed between the defendant and the unidentified person who wielded the bat or that they engaged in any coordinated action, and an inference by the jury that the defendant had entered into an agreement with that person would be based on impermissible conjecture; moreover, the brief nature of the incident supported the conclusion that, even if the defendant saw the individual with the bat while he continued to exchange punches with C for a short period of time, there could not have been an inference that his continued participation in the fight supported an inference of an agreement with the bat wielding individual, and, accordingly, a judgment of acquittal of that crime was directed.
2. There was insufficient evidence presented at trial to establish that C's injuries were caused by means of a dangerous instrument, as C did not testify and the evidence established only that the defendant had exchanged punches with C and C was later transported to a hospital, and, accordingly, a judgment of acquittal of assault in the second degree was directed.

Argued February 4—officially released May 4, 2021

Procedural History

Amended information charging the defendant with the crimes of assault in the first degree, assault in the second degree, and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B.*

Fischer, *J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; verdict and judgment of guilty of the crimes of assault in the second degree and conspiracy to commit assault in the first degree; subsequently, the court denied the defendant's motions for a new trial and to vacate the conviction, and the defendant appealed to this court. *Reversed; judgment directed.*

Erica A. Barber, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Seth R. Garbarsky*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Zaire Raulin Luciano, appeals from the judgment of conviction, rendered after a jury trial, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (2), and one count of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-59 (a) (1).[1] On appeal, the defendant claims that the evidence was insufficient to support (1) his conviction of conspiracy to commit assault in the first degree and (2) his conviction of assault in the second degree.[2] We agree with the defendant and, accordingly, reverse the judgment of the trial court.

[1] The defendant also was charged with one count of assault in the first degree in violation of § 53a-59 (a) (1). The jury found him not guilty of that charge.

[2] The defendant also raises on appeal a claim of instructional error. Specifically, he claims that the court, in charging the jury, "improperly omitted the scienter requirement that the defendant intended that a dangerous instrument be used to carry out the assault" and maintains that the omission "diluted the state's burden of proof [and] deprived the defendant of due process and his right to trial by jury." We do not reach the defendant's claim of instructional error because we conclude that the evidence was insufficient to support the defendant's conviction and we reverse the judgment of conviction on that basis.

The jury was presented with evidence of the following facts. On the evening of April 22, 2016, Jason Torello was having a few beers at home in North Branford. He had recently lost someone close to him and was "sort of a homebody." Torello's good friend, Edward Corradino, called to ask if he wanted to go out. Although Torello declined, Corradino stopped by his house and convinced him to go to Bar 80 (bar), which was approximately a mile from Torello's house. They arrived at the bar around 9 p.m. and went inside. The bar was fairly empty. They sat at a table, and Torello had four to eight beers. Torello also had taken Xanax, which was prescribed to him for anxiety, and had snorted one line of cocaine, and he described himself as intoxicated. Corradino also was drinking and using drugs.

Outside the front entrance to the bar, a large group of "Hispanic, Latino looking" men were standing around and smoking cigarettes. Corradino and Torello went outside in front of the bar to smoke cigarettes two or three times throughout the night. At around 10 p.m., Torello and Corradino were outside smoking cigarettes when Rob Burgos,[3] who knew Torello but had not seen him in a long time, reintroduced himself. The two made small talk for less than a minute before Torello went back inside the bar and Burgos walked back toward the group of men.

Sometime after midnight, Torello and Corradino went outside to smoke another cigarette. Someone from the same group of men present earlier told Torello that he could not smoke in front of the bar and that he had to go around the back of the building by the dumpster. Torello responded by saying "that sounds pretty weird" that there is a group of people smoking but he cannot smoke his cigarette. Then he said, "Anybody planning to do anything?" According to Torello, "things kind of

[3] Burgos' last name is spelled both "Bergos" and "Burgos" throughout the transcripts. Throughout this opinion, we refer to him as Burgos.

hit the fan" at that point. Torello used his cell phone to call his father to come help him.[4] While Torello was still holding his cell phone, a stocky Hispanic man with "lighter skin" and "short hair" walked up to him. "Fists started flying," and Torello and the man exchanged blows. Torello could not make much of a fist because he still had his cell phone in his hand.

The two had not been fighting for very long when another individual came from Torello's left and hit him in the head with a "bat, something metal." Torello did not get a good look at the bat, and testified that "it could have been a pipe, one of the extendo baton things." Torello tried to grab it but it slid out of his grasp, and the next swing hit Torello in the head. Torello lost consciousness for about thirty seconds and fell to the ground. More than one person continued to beat Torello with "bat hits, kicks, [and] punches."

Meanwhile, the defendant had squared up with Corradino, and the two exchanged punches. Out of Torello's peripheral vision, he could see the defendant "in [Corradino's] face." At some point, Corradino fell on top of Torello. Torello never saw the defendant with a bat. At some point, the group of men took off. Torello saw a few of them leaving in a black BMW, and he believed that he saw the defendant and Burgos leave together in a red Corvette.[5] Torello, however, was unsure whether Burgos was involved in the fight or whether he was present with the group of Hispanic men outside the bar just before the fight started.

Edwin Serrano, a friend of the defendant's father, who had known the defendant for seven years, testified at trial to other events leading up to the fight. According to Serrano, he arrived at the bar at the same time as

[4] Torello had a pistol in the car but he never retrieved it.

[5] Surveillance video from a nearby business showed a Corvette leaving the plaza where the bar is located. The video was transferred to a thumb drive, but it was lost.

the defendant. Later in the evening, Serrano was outside smoking a cigarette with the defendant when he saw three white men around twenty-five or twenty-seven years old walk into the bar. One of the men appeared intoxicated and said "something racist against [Hispanic] people." The comment was not directed at anyone in particular. About twenty minutes later, Serrano was outside with the defendant smoking another cigarette when he saw the man who he thought had made the racist comment come outside. Serrano then saw three other men, one of whom had a bat, approach from Serrano's left. Serrano was not able to describe the men because it "happened so fast." According to Serrano, the defendant put his hands up and said, "Whoa, whoa, whoa, whoa." Serrano went back into the bar and did not see the fight. The defendant stayed outside.

Kelsey Henninger was inside the bar when the fight broke out. Henninger had dated Burgos but the two were on "a break," and she did not know that he was going to be at the bar that night. Henninger knew the defendant through Burgos, and she knew Torello from middle school. At some point during the evening, Henninger saw Burgos and the defendant with a group of people that she had never seen before.

Through the bar window, Henninger saw people running outside and "a lot of chaos." She went outside and saw Torello on the ground and vehicles leaving the parking lot. Henninger testified that she then went back inside and met Burgos as he was coming in from the back door of the bar. According to Henninger, Burgos told her that there was "a fight." Henninger never saw the defendant after the fight. Henninger testified that she and Burgos left the bar together.[6]

Officer Henry Browne of the North Branford Police Department was at a gas station 100 to 200 yards away

[6] Henninger's testimony conflicts with Torello's testimony that he believed he saw Burgos leave with the defendant.

from the scene when he was dispatched to the bar for an "active fight."[7] He responded within seconds and saw two vehicles leaving the property as he arrived.[8] A woman yelled to Officer Browne for help, and he found Corradino and Torello, both of whom were injured and appeared to be in shock but were able to answer questions. Corradino was bleeding from a wound on his head and was "pacing around." He told Officer Browne that he was hit in the head. Torello was lying on the ground and had sustained an injury to his leg. Torello and Corradino told Officer Browne that they could not identify who had assaulted them. By this time, Torello's father had arrived and was trying to render aid to him. Paramedics also arrived and began attending to Torello and Corradino. Officer Browne spoke with people at the bar.[9]

Torello was taken to Yale New Haven Hospital (hospital), where he underwent surgery for a fractured ankle.[10] He told the treating physician that he did not know whether he had been struck in the ankle or had fallen on it.

Sean Anderson, an acting lieutenant and sergeant in the detective bureau, and his colleague, Detective Robert Deko, both of the North Branford Police Department, began investigating the fight a few days after it happened. They located the red Corvette that had been seen leaving the bar,[11] obtained a search and seizure

[7] The recording of the 911 call reporting the fight no longer existed at the time of trial.

[8] Officer Browne was not close enough to identify the two vehicles leaving the property.

[9] Officer Browne did not take any photographs of the scene.

[10] Tests conducted at the hospital revealed the presence of cocaine, benzodiazepine, and alcohol in Torello's system. Xanax is a common prescription form of a benzodiazepine.

[11] Officer Browne had received information that the license plate of the Corvette had two "B's" in the plate number. Officers were then able to determine the full plate number. The vehicle was registered to the defendant's mother.

warrant, and had it towed to the police station. Detective Nieves of the New Haven Police Department processed the Corvette. Nieves seized from inside the Corvette a white polo shirt with a diagonal stripe, a pair of jeans, a Walgreen's receipt,[12] and a bank statement in the defendant's name. Both the shirt and jeans had brown stains on them, and presumptive tests revealed the presence of blood. A presumptive test on the driver's side headrest also revealed the presence of blood. Nieves took swabs from various areas of the vehicle, and the clothing and swabs were sent to a laboratory run by the division of scientific services of the Department of Emergency Services and Public Protection (laboratory) to be analyzed for DNA. Buccal swabs from the defendant, Torello, and Corradino also were sent to the laboratory.

Michael Bourke, a DNA analyst with the laboratory, performed an analysis of and made comparisons between the DNA profiles generated from the buccal swabs and the DNA profiles derived from the clothing and car swabs and prepared a report of his findings. With respect to the clothing, the defendant was included as a contributor to the DNA profile generated from the interior of the shirt collar and the stain on the jeans, and Torello and Corradino were eliminated as contributors to both profiles. With respect to the stain on the shirt, Corradino was included as a contributor, Torello was eliminated as a contributor, and the comparison with the defendant was inconclusive.

Both Corradino and the defendant were included as contributors to the genetic profiles generated from swabs taken from the gear shift and driver's side headrests of the Corvette, and Torello was eliminated as a contributor to both. Corradino was included as a contributor to the genetic profile generated from a swab

[12] The Walgreens receipt was timestamped about six hours before the fight. The police seized surveillance footage from Walgreens, which footage showed the Corvette and a man wearing a white polo shirt with a diagonal stripe.

taken from the passenger side armrest, while both Torello and the defendant were eliminated.

About two weeks after the fight, Corradino showed Torello a photograph of the defendant, and Torello identified the defendant[13] as one of the men who had been involved in the fight.[14] In discussions with the police, Torello shared this information. The defendant was arrested and charged by way of an amended long form information dated July 27, 2018. The first count alleged assault in the first degree of Torello in violation of General Statutes §§ 53a-8 and 53a-59 (a) (1). The second count alleged assault in the second degree of Corradino in violation of §§ 53a-8 and 53a-60 (a) (2), and the third count alleged conspiracy to commit assault in the first degree in violation of §§ 53a-48 (a) and 53a-59 (a) (1).

A trial was held in July and August, 2018. The state presented the testimony of Torello, Officer Browne, Lieutenant Anderson, Henninger, Detective Nieves, Adrienne Socci,[15] and Bourke. The defendant presented the testimony of Serrano. Neither Corradino nor Burgos testified at trial. The state issued a subpoena to Burgos, and, although he appeared on the date requested, he failed to return the next day as instructed. The court issued a capias for Burgos' arrest. When he had not been located the following day, the state rested its case-in-chief. That same day, the court put on the record the state's intention to proceed under a theory of *Pinkerton*[16] liability, rather than pursuing a theory of accessorial liability, as to counts one and two. After the parties

[13] The police did not take any written statements from Torello or Corradino during their investigation.

[14] Torello subsequently filed a civil action against the defendant, seeking money damages.

[15] Socci is an orthopedic surgeon, who performed surgeries on Torello's ankle following the fight.

[16] "In *Pinkerton* v. *United States*, [328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)], the United States Supreme Court concluded that under the federal common law, a conspirator may be held liable for criminal offenses committed by a coconspirator if those offenses are within the scope

informed the court that they had no further evidence, the trial court denied the defendant's motion for a judgment of acquittal.

The jury found the defendant not guilty of the assault of Torello, count one, but found the defendant guilty of counts two and three. Thereafter, the court sentenced the defendant to eight years of incarceration, execution suspended after five years, followed by three years of probation, on each count, to run concurrently. This appeal followed.

Before turning to the defendant's claims on appeal, we set forth the well established principles that guide our review. "[A] defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . [F]or the purposes of sufficiency review . . . we review the sufficiency of the evidence as the case was tried . . . . [A] claim of insufficiency of the evidence must be tested by reviewing no less than, and no more than, the evidence introduced at trial. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and

of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. . . . We note that our Supreme Court first recognized the *Pinkerton* theory of liability as a matter of state law in *State* v. *Walton*, 227 Conn. 32, 40–54, 630 A.2d 990 (1993)." (Citation omitted; internal quotation marks omitted.) *State* v. *VanDeusen*, 160 Conn. App. 815, 843 n.16, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015).

inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical." (Citations omitted; internal quotation marks omitted.) *State* v. *VanDeusen*, 160 Conn. App. 815, 822–23, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015).

"When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment." (Internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 238, A.3d (2020).

"Finally, on appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *VanDeusen*, supra, 160 Conn. App. 823.

I

The defendant's first claim on appeal is that there was insufficient evidence to support his conviction of conspiracy to commit assault in the first degree. We agree with the defendant.

Pursuant to § 53a-48 (a), "[a] person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy." "Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Internal quotation marks omitted.) *State* v. *Allan*, 311 Conn. 1, 12, 83 A.3d 326 (2014). Pursuant to § 53a-59 (a) (1): "A person is guilty of assault in the first degree when . . . With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ."

"To obtain a conviction for conspiracy to commit assault in the first degree in violation of §§ 53a-48 (a) and 53a-59 (a) (1), as charged, the state bore the burden of proving beyond a reasonable doubt that the defendant (1) intended that conduct constituting the crime of assault in the first degree be performed, (2) agreed

with one or more persons to engage in or cause the performance of such conduct and (3) that any one of those persons committed an overt act in pursuance of such conspiracy." *State* v. *Wells*, 100 Conn. App. 337, 347, 917 A.2d 1008, cert. denied, 282 Conn. 919, 925 A.2d 1102 (2007). "[W]hile the state must prove an agreement [to commit assault with a dangerous weapon], the existence of a formal agreement between the conspirators need not be proved because [i]t is only in rare instances that conspiracy may be established by proof of an express agreement to unite to accomplish an unlawful purpose. . . . [T]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts. . . . Further, [c]onspiracy can seldom be proved by direct evidence. It may be inferred from the activities of the accused persons. . . . A conspiracy can be formed [however] in a very short time period . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Millan*, 290 Conn. 816, 826, 966 A.2d 699 (2009).

On appeal, the defendant argues that "there is no evidence, nor any reasonable inference that can be drawn, that the defendant knew the unidentified person wielding a bat, much less that he entered into an agreement with that person to cause serious physical injury to another person." He further maintains that "the evidence, viewed in the light most favorable to the state, suggests that the defendant may have exchanged punches with Corradino, and Corradino's blood was on the defendant's clothing and in his vehicle. A spontaneous response to violence coupled with mere presence does not support a conspiracy conviction."

The state responds by highlighting the "evidence leading up to the actual altercation." As argued by the state, the jury could have credited Serrano's testimony that

the defendant heard Torello say "something racist against [Hispanic] people." The state continues: "As a Hispanic man himself, it could be inferred that this made the defendant angry. In addition, a rational trier of fact could have credited those portions of Torello's testimony that placed Burgos and the defendant together, along with a group of other, older, Hispanic looking men."[17] The state recounts the evidence that, just prior to the fight, an individual from the group of Hispanic men told Torello that he could not smoke in front of the bar, and that Torello responded by asking if anyone was "planning to do anything?" As argued by the state, the defendant and his "compatriots" then attacked Torello and Corradino. The state further responds that, "given the fact that this group of men was at a bar, it is reasonable to infer that they did not carry the bat into the bar with them and, therefore, the defendant's cohort had retrieved the weapon in anticipation of starting a fight with Torello, in retaliation for Torello's previous racist comment." The state contends that "based on the concerted, simultaneous attack of Corradino and Torello by the defendant and his cohorts, it was reasonable to infer that the defendant and his companions had planned out the attack in advance."

The state's version of events, however, relies on a chain of inferences too tenuous to be reasonably drawn. There was no evidence presented or any reasonable inference that could be drawn that there existed a relationship between the defendant and the unidentified individual with the bat. Thus, the jury would have been required to resort to speculation to infer (1) that the unidentified individual with the bat was the defendant's "compatriot" or "cohort," and (2) that the attack was "concerted." The only evidence in the record with respect to the bat is found in the testimony of Torello and Serrano. Torello testified that while he was exchang-

[17] Serrano testified that both he and the defendant are Hispanic.

ing blows with the unidentified man who had walked up to him, another individual coming "somewhere from [his] left" hit him in the head with the bat.

We cannot find support for the state's representation in its appellate brief, without record citation, that "the defendant's own witness, Serrano, *testified that the defendant saw the bat* prior to the actual assault." (Emphasis added.) Because Serrano's testimony is the only evidence from which the jury could have inferred that the defendant saw the bat, we review it in some detail. In addition to Serrano's testimony regarding the racist comment and the individual who he thought had made such comment come outside the bar, Serrano testified to the following regarding the bat: "[A]ll I remember is three guys coming from this side, basically one guy with the bat—with a bat started and [the defendant] came and said, Whoa, Whoa, Whoa, Whoa"; that the defendant was standing "right next to" Serrano; and that the defendant "tried to like break it up and say, whoa, whoa." On cross-examination, Serrano further testified: "Me and [the defendant] was talking, and then we just seen one gentleman come out, come outside, went this way—went this way. That's when three gentleman came with a bat. They came with a bat and started hitting that—the gentleman that went that way . . . . And [the defendant] said, whoa, whoa, whoa, whoa." Serrano testified that the three men with the bat were "[b]asically like walking real fast," and that "it happened so fast" that he did not know what the men looked like. He further testified that the defendant did not walk to the three guys with the bat, but stood where he was and said, "Whoa, whoa, whoa, whoa."

On redirect, the following colloquy occurred between defense counsel and Serrano:

"Q. [H]ow long did this entire event take place when you were outside with [the defendant] and you saw this altercation with the bats? It was pretty fast; right?

"A. Yes.

"Q. Okay. And how far was [the defendant] from the person who was being assaulted, when you testified he had his hands up saying, no, no, no?

"A. Basically like where you at.

"Q. The distance from me to you?

"A. Um-hm.

"Q. Okay. And that was [the defendant's] distance from the person with the bat; correct?

"A. Actually, he was like—he had his hands up and the guy with the bat was like over here.

"Q. Behind him?

"A. Yeah.[18]

"Q. And so—

"A. And that's when I went—that's when I went inside the bar.

"Q. Okay. And when you had testified—When [the prosecutor] was asking you about witnessing the event that evening with [the defendant] between the person being struck, how far away was he from the person being struck? [The defendant]?

"A. Like he would—Like—

"Q. It happened pretty quick; right?

"A. It was—It was like that.

"Q. Okay. Very quick; correct?

"A. Um-hm.

[18] In its appellate brief, the state represents the distance between the defendant and the three men with the bat to be approximately ten feet. In support of this distance, the state represents that "Serrano referred to the distance between the defendant and the man with the bat by referencing the distance between the witness box and defense counsel." It further notes that the prosecutor in closing argument "referred to this testimony, without objection, as placing the defendant 'about ten or twelve feet away' when he tried to break up the fight."

"Q. Okay. Thank you." (Footnote added.)

We note that Serrano's account of the evening was both internally inconsistent and conflicted with other evidence in the case. He first testified that he did not speak to the defendant on the evening of the fight but later testified that he both spoke with and played pool with the defendant. He testified that, after the defendant said, "Whoa, whoa, whoa, whoa," the defendant went "right back in the bar" but later testified that the defendant remained outside when he went back into the bar.

Lastly, and most importantly, although Serrano testified that "the three gentlemen came with a bat and started hitting that—the gentleman that went that way," he later acknowledged that he did not see anyone get hit with a bat.

The following exchange occurred between the prosecutor and Serrano:

"Q. And so these three guys, one of them had a bat; right?

"A. Um-hm.

"Q. And were they saying something, are they excited about something?

"A. They just came, they was like—and the accident like happened so fast, that I looked, and I was like, Oh, and then I went inside.

"Q. Yeah. Right. You didn't want to be around for that; right?

"A. No.

"Q. No. And so these three guys with the bat, they started hitting this other guy; right?

"A. I guess.

"Q. So you don't even know?

"A. (Laughs.)

"Q. You didn't see the guy?

"A. Yeah.

"Q. All right. You have to just say no if you don't mind.

"A. Yeah.

"Q. All right. Thank you. And so you see three guys with a bat and you go I don't want any part of this, you go back inside; right?

"A. Yes."

We recognize that a jury may "credit part of a witness' testimony and . . . reject other parts." (Internal quotation marks omitted.) *State* v. *Rhodes*, supra, 335 Conn. 249–50. Serrano's testimony places the defendant in close proximity to the individual with the bat and suggests that the defendant tried to break up the fight by saying, "Whoa, whoa, whoa, whoa," but Serrano never specifically testified that the defendant saw the bat. Even if the jury reasonably could infer that the defendant saw the bat, on the basis of Serrano's testimony, any further inference that the defendant had entered into an agreement with that unidentified individual impermissibly would be based on "possibilities, surmise or conjecture." (Internal quotation marks omitted.) *State* v. *Green*, 261 Conn. 653, 668, 804 A.2d 810 (2002).

The defendant relies on two cases from our appellate courts in support of his contention that the cumulative force of the evidence is insufficient to establish his guilt. In *Green*, our Supreme Court affirmed the judgment of the Appellate Court setting aside the defendant's conviction of conspiracy to commit murder on the ground of insufficient evidence. Id., 655–57. In *Green*, several members of a gang, carrying handguns, went to a housing complex to settle a dispute with the defendant. Id., 658. The gang members approached the housing complex and found the defendant standing and talking with three people, one of whom, Duane Clark, saw the gang members approaching and exclaimed, "Shoot

the motherfucker." Id. A gunfight ensued, during which one of the gang members, Tyrese Jenkins, was fatally wounded. Id. A witness to the gunfight testified that he saw the defendant shoot Jenkins. Id. The defendant and Clark were tried together, and the jury found Clark guilty of criminal possession of a pistol or revolver but not guilty of murder and conspiracy to commit murder. Id., 659. The jury found the defendant guilty of murder as an accessory, conspiracy to commit murder, and criminal possession of a pistol or revolver. Id., 655. On appeal, the defendant claimed, inter alia, that there was insufficient evidence to support his conviction of conspiracy to commit murder. This court agreed; see *State* v. *Green*, 62 Conn. App. 217, 224, 774 A.2d 157 (2001); as did our Supreme Court. See *State* v. *Green*, supra, 261 Conn. 673.

Our Supreme Court first recognized that the jury "could not have found that the defendant conspired with Clark to commit murder because Clark was acquitted of conspiracy to commit murder by the same jury that convicted the defendant of that offense."[19] Id., 670. The court then reviewed the evidence to determine whether the jury reasonably could have found that the defendant conspired with the other two people with whom he was standing and talking, Bobby Cook and Ryan Baldwin. Id., 671. The court found the record devoid of any evidence of a "prearranged plan to kill Jenkins," noting that there was no evidence to establish that Cook or Baldwin knew about any dispute between Jenkins' gang and the defendant. Id. The court further determined that the evidence was insufficient to establish

[19] We disagree with the state's contention that the unique circumstances of *Green* renders it wholly inapplicable. Although our Supreme Court concluded that the jury necessarily must have rejected the state's claim that the defendant had conspired with Clark to kill the victim, our Supreme Court thereafter analyzed, in the light most favorable to sustaining the verdict, whether sufficient evidence existed to establish that the defendant had conspired with the other two people with whom he was standing and talking. *State* v. *Green*, supra, 261 Conn. 671.

that the defendant and Cook or Baldwin had agreed to kill Jenkins upon Jenkins' arrival to the housing complex. Id. The court explained that the evidence at trial had established only "that the defendant, Cook and Baldwin simultaneously reached for their guns, apparently in response to Clark's statement, 'shoot the motherfucker,' when Jenkins and his cohorts approached while wielding their guns." Id. Recognizing that "[a] conspiracy can be formed in a very short time period," the court stated that the evidence arguably could support a finding that the defendant had agreed with Clark to shoot Jenkins, but, because the jury found Clark not guilty of the charge of conspiracy to commit murder, that finding compelled the conclusion that the jury had rejected the state's claim that the defendant had conspired with Clark to kill Jenkins. Id.

In *Green*, the state argued that the defendant and his companions were members of a gang and, thus, the jury reasonably could have inferred that Cook and Baldwin, as members of the same gang as the defendant, knew of the dispute between the defendant's alleged gang and Jenkins' gang, and that Cook, Baldwin, and the defendant had agreed to kill Jenkins and his fellow gang members. Id., 672. The court rejected that argument, stating that the only evidence as to the relationship among Cook, Baldwin, and the defendant suggested that they "were friends who associated with each other" in the housing complex. Id. The court summarized the evidence in support of an inference that the defendant conspired with Cook or Baldwin as follows: "(1) the defendant, Cook and Baldwin were friends; (2) the defendant may have had a dispute with certain members of [Jenkins'] gang, including Jenkins; and (3) the defendant, Cook and Baldwin simultaneously drew their guns and started shooting as Jenkins and his fellow gang members approached, apparently in response to Clark's instruction to 'shoot the motherfucker.' " Id., 672–73. The court found this evidence to constitute "too

weak a foundation upon which to base an inference of an agreement, however swiftly formed, to kill Jenkins." Id., 673.

The defendant also relies on *State* v. *Smith*, 36 Conn. App. 483, 651 A.2d 744 (1994), cert. denied, 233 Conn. 910, 659 A.2d 184 (1995), in which this court reversed the defendant's conviction of conspiracy to commit assault in the first degree. Id., 484. In *Smith*, the victim, Walter Traynham, and his two friends confronted Harold Smith regarding a motor vehicle accident and shooting that occurred two weeks earlier. Id. Harold Smith also had two friends with him at the time of the confrontation, and the confrontation escalated and one of Traynham's friends punched Harold Smith in the face. Id. Harold Smith went into a nearby store and returned with the defendant. Id., 484–85. After Traynham's group left and walked up the street, the Smith group, which included the defendant, followed them into a convenience store. Id., 485. There was neither a discussion among the members of the Smith group nor any visible weapons while they were walking. Id. When the defendant entered the store, he and Traynham began fighting. Id. A member of the Smith group shouted, "Shoot him, shoot him," pulled a gun, and began shooting at two members of Traynham's group. (Internal quotation marks omitted.) Id. At this point, the defendant drew a revolver and shot Traynham. Id. Noting that the defendant was not present at the initial altercation and the lack of any evidence suggesting that the defendant knew that any other person in the Smith group had a gun and intended to use it to cause serious physical injury to Traynham, this court found the evidence insufficient to support an inference that the defendant entered into an agreement with anyone to commit the crime of assault in the first degree. Id., 487.

As in *Smith* and *Green*, the facts in the present case are wholly insufficient to support an inference that the defendant entered into an agreement with the unidenti-

fied individual with the bat to commit the crime of assault in the first degree. We note that the facts in *Smith*, in which the defendant not only knew his alleged coconspirators but also walked with them down the road to follow the victim into a store, and those in *Green*, in which the defendant's alleged coconspirators were friends of his, are even stronger than the facts of the present case, in which no relationship between the defendant and the unidentified bat wielding person was evinced.

The state argues that the evidence supported a conclusion that the defendant "knew of the bat's existence during the course of the assault and continued to participate." Citing *State* v. *VanDeusen*, supra, 160 Conn. App. 826–27, the state argues that the jury reasonably could have inferred that, having seen the bat "in his cohort's possession," the defendant must have realized that he intended to use it against the victims. As argued by the state, the defendant's "subsequent participation in the group assault fully supported an inference that he had the requisite intent to agree with at least one other person to bring about all the elements of assault in the first degree." We disagree.

In *VanDeusen*, the defendant led her acquaintance, Charles Knowles, who was armed with a handgun, to the victim's house to fight the victim. *State* v. *VanDeusen*, supra, 160 Conn. App. 819–20. The defendant saw that Knowles was armed. Id., 820. Upon arriving at the victim's house, the defendant called the victim and asked her to come outside. Id. When the victim refused to come outside, Knowles fired his handgun at the house. Id. One of the bullets pierced the front door window and lodged in an interior wall. Id. The defendant was convicted of conspiracy to commit assault in the first degree, attempt to commit assault in the first degree as an accessory, and risk of injury to a child. Id., 817. The defendant appealed to this court claiming, inter alia, that there was insufficient evidence to support her

conviction. Id., 823–24. With respect to her claim that there was insufficient evidence to prove that she had the requisite intent that she or another participant caused serious physical injury to another person, this court referenced testimony that the defendant admitted that she had seen the gun behind Knowles' belt buckle and, further, that she had seen him transfer it to his lap *on the way* to the victim's house. Id., 826. Despite knowledge that he was armed with the gun, the defendant led Knowles to the house and then called the victim "in an attempt to lure her" outside. (Internal quotation marks omitted.) Id., 827. The defendant later fled the scene with Knowles, helped him dispose of the gun, and lied to the police about her involvement. Id., 827–28. On the basis of this evidence, this court determined that the jury could have reasonably inferred that the defendant possessed the requisite intent. Id., 828.

In contrast with *VanDeusen*, in which the defendant knew that her acquaintance was armed with a handgun and continued to lead him to the victim's house, there was no evidence in the present case of any relationship between the defendant and the unidentified individual with the bat. In the present case, accepting the state's position that the jury reasonably could infer that the defendant saw the unidentified individual with the bat, and nonetheless continued to exchange punches with Corradino, would not support a further inference that the defendant had the requisite intent to agree with at least one other person to bring about all of the elements of assault in the first degree. That is, the lack of any evidence of a relationship between the defendant and the unidentified individual is fatal to the state's argument.

Moreover, the brief nature of the incident further supports our conclusion that, even were the jury to infer that the defendant saw the unidentified individual with the bat, the defendant's continued exchange of

punches with Corradino for a short period of time does not support the inference of an agreement. First, we note that, according to Torello's testimony, he already was exchanging punches with an unidentified man when the individual approached and hit him with the bat. Moreover, Serrano was not even able to describe the men with the bat because "it happened so fast." Lastly, through the bar window, Henninger saw people running outside and "a lot of chaos." Although a conspiracy can be formed in a very short time period; see *State* v. *Millan*, supra, 290 Conn. 826; the brief nature of the incident in the present case when considered together with the lack of any evidence of a prior relationship between the defendant and the unidentified individual with the bat, renders the link between the continued participation in the fight following perception of the bat and the inference of agreement too tenuous.

We are mindful that "the requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts." *State* v. *Crosswell*, 223 Conn. 243, 256, 612 A.2d 1174 (1992). Our appellate courts have upheld convictions for conspiracy when the state presented evidence that the coconspirators acted in concert. See id. (defendant stood by silently when gun was displayed in order to gain entry and then used to intimidate occupants of premises is evidence from which jury might reasonably have inferred defendant's acquiescence in this enlarged criminal enterprise); *State* v. *Faust*, 161 Conn. App. 149, 168 and n.4, 127 A.3d 1028 (2015) (evidence sufficient to infer agreement to commit robbery when two men acted in concert and engaged in coordinated robbery, whereby first man had gun and stayed with victims, while second man moved throughout other rooms in store and demanded to know where cashbox was located), cert. denied, 320 Conn. 914, 131 A.3d 252 (2016); *State* v. *VanDeusen*, supra, 160 Conn. App.

826–27 (with knowledge that coconspirator had weapon "at the ready," defendant continued guiding coconspirator to victim's house and called victim in attempt to lure her outside); *State* v. *Elsey*, 81 Conn. App. 738, 747, 841 A.2d 714 (jury could have based at least part of its decision regarding conspiracy charges on defendant's decision to come to scene of crime with coconspirators, stay at scene while crimes were committed and leave scene with coconspirators), cert. denied, 269 Conn. 901, 852 A.2d 733 (2004).[20]

In the present case, we conclude that the jury could not reasonably infer the requisite agreement from the proof of the separate acts of the defendant and the unidentified individual with the bat or from the circumstances surrounding the commission of these acts. Here, there was no evidence presented that the defendant and the unidentified individual with the bat engaged in any coordinated action or had any relationship whatsoever. Even in the light most favorable to the state, the cumulative weight of the evidence suggested only that, while the defendant exchanged punches with Corradino, an unidentified individual beat Torello with a bat, not that

[20] The state also points to the defendant's "flight from the scene with one of his compatriots, both of whom tracked Corradino's blood into the defendant's Corvette," as supportive of the conclusion that they had conspired to commit assault in the first degree. Although the jury was permitted to consider whether the defendant's flight from the bar reflected consciousness of guilt, the evidence regarding the defendant's leaving the bar, even when considered together with the other evidence presented during trial, was too weak a foundation to permit an inference of an agreement. There was no evidence presented that the passenger in the defendant's car was the unidentified individual with the bat. Cf. *State* v. *Young*, 157 Conn. App. 544, 553, 117 A.3d 944 (sufficient evidence to establish conspiracy when defendant and coconspirator arrived at scene of shooting together, fired weapons simultaneously in same direction, fled scene together, disposed of weapons beneath porch of nearby building, and attempted to hide in school), cert. denied, 317 Conn. 922, 118 A.3d 549 (2015). Moreover, Torello testified that he thought he saw Burgos leave with the defendant. However, Torello was "unsure" whether Burgos had been involved in the fight or even whether he was with the group of Hispanic men outside the bar just before the fight started.

the two did so pursuant to a mutual plan. Accordingly, the jury would have been required to resort to speculation to infer the existence of an agreement.

On the basis of the foregoing, we conclude that the evidence adduced at trial was insufficient to support the defendant's conviction of conspiracy to commit assault in the first degree.

II

The defendant's second claim on appeal is that there is insufficient evidence to sustain his conviction for assault in the second degree. He argues, inter alia, that even "assuming arguendo that an agreement with a still as yet unidentified third party can be shown, the state presented no evidence that said individual caused physical injury to Corradino with a dangerous instrument."[21] The state agrees with the defendant and acknowledges that the defendant's conviction of assault in the second degree should be reversed. We agree with the parties.

The defendant was charged in count two with assault in the second degree as to Corradino, which required proof beyond a reasonable doubt that Corradino's injuries were caused by a dangerous instrument. See General Statutes § 53a-60 (a) (2) ("[a] person is guilty of assault in the second degree when . . . with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of

[21] The defendant also argues that because there was insufficient evidence to support his conviction of conspiracy to commit assault in the first degree, the defendant's conviction of assault in the second degree cannot be sustained as a matter of law. Noting that the state charged him with assault in the second degree pursuant to a theory of conspiratorial liability under the *Pinkerton* doctrine, the defendant maintains that the jury first would have had to convict him of the underlying charged conspiracy. See footnote 16 of this opinion. We need not address this argument because we agree with the parties that insufficient evidence was presented to establish that Corradino's injuries were caused "by means of a dangerous instrument," and we reverse his conviction of assault in the second degree on that basis.

a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm''). As the state acknowledges, no such evidence was presented. Corradino did not testify at trial. Torello testified that the defendant squared up with Corradino, and the two exchanged punches. He further testified that Corradino had fallen on top of him at some point. Officer Browne testified that upon his arrival at the scene, he encountered Corradino, who was bleeding from his head. Officer Browne testified that Corradino told him that he was "hit in the head,'' and a photograph was entered into evidence depicting Corradino's head injury. Officer Browne additionally testified that both Torello and Corradino were transported to the hospital. On this record, we agree with the parties that insufficient evidence was presented to establish that Corradino's injuries were caused "by means of a dangerous instrument" and, therefore, the defendant's conviction of assault in the second degree under § 53a-60 (a) (2) should be reversed.[22]

The judgment is reversed and the case is remanded with direction to render judgment of acquittal.

In this opinion the other judges concurred.

[22] The state argues that the proper remedy should be a remand with direction to modify the defendant's conviction to reflect the lesser included offense of assault in the third degree in violation of General Statutes § 53a-61 (a) (1). The state acknowledges, however, that this court's remand order is controlled by our Supreme Court's decisions in *State* v. *Petion*, 332 Conn. 472, 499–507, 211 A.3d 991 (2019), and *State* v. *LaFleur*, 307 Conn. 115, 140–42, 51 A.3d 1048 (2012), pursuant to which the state is not entitled to a modification of the judgment to reflect a conviction of the highest lesser included offense supported by the evidence when, as here, the jury was not instructed on such lesser included offense. The state raises the argument that "*LaFleur*, and by extension *Petion*, were wrongly decided for preservation purposes." To the extent that the state urges this court, in some form, to question the correctness of those rulings, we observe, as the state recognizes, that as an intermediate court of appeals, we are unable to overrule, reevaluate or reexamine controlling precedent of our Supreme Court. See *State* v. *Johnson*, 143 Conn. App. 617, 628, 70 A.3d 168, cert. denied, 310 Conn. 950, 82 A.3d 625 (2013).

JOSEPH S. ELDER *v.* 21ST CENTURY MEDIA NEWSPAPER, LLC, ET AL.
(AC 42779)

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

Syllabus

The plaintiff attorney sought damages from the defendant reporter, K, and the defendant publishers for, inter alia, defamation in connection with an article written by K and articles published by the publishers. The articles concerned a Superior Court decision that resulted in the plaintiff's one year suspension from the practice of law for a violation of the Rules of Professional Conduct. The defendants filed motions for summary judgment claiming that, as a matter of law, the published matter was not actionable because the plaintiff's claims were barred by the fair report privilege, which applies to the publication of defamatory matter in an accurate report of an official action or proceeding. The trial court granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly rendered summary judgment in favor of the defendants: this court declined to address the plaintiff's unpreserved claim that the evidence supporting the defendants' motions was insufficient because it was improperly authenticated, as that claim was not raised before the trial court; moreover, the plaintiff's claim that the defendants failed to submit proof of their reliance on a government document as the source of the articles was unavailing because the defendants were not required to submit such proof to avail themselves of the fair report privilege and the articles were protected by that privilege because they conveyed substantially fair, true and accurate accounts of an official action or proceeding, as they contained language that was substantially similar to that of the court decision, the defendants were not required to conduct an impartial investigation as to the underlying facts of that decision, and their omission of facts that might have placed the plaintiff under less harsh public scrutiny and the inclusion of a quotation that was not attributed to a government document or proceeding did not render the articles substantially inaccurate; furthermore, the plaintiff's claims of malice failed as a matter of law because the defendants were not required to submit evidence to rebut his claims of malice because the articles were fair and accurate abridgments of the court decision, and the plaintiff's state constitutional law claims were not considered because they were inadequately briefed, and any rights under the state constitution did not defeat and were not inconsistent with the fair report privilege.

Argued January 13—officially released May 4, 2021

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the motions for summary judgment filed by the named defendant et al., and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Joseph S. Elder, self-represented, the appellant (plaintiff).

William S. Fish, Jr., with whom was *Alexa T. Millinger*, for the appellees (named defendant et al.).

Christopher M. Wasil, with whom, on the brief, was *Michael D. Blanchard*, for the appellee (defendant CBS Radio, Inc.).

Opinion

BELLIS, J. The issue in this case is the extent to which reporters and news publishers are protected from civil liability for defamation when reporting on a court decision that described the outcome of disciplinary proceedings against an attorney and the basis for those proceedings. The plaintiff, Joseph S. Elder, appeals from the summary judgment rendered by the trial court in favor of the defendants 21st Century Media Newspaper, LLC; 21st Century Media, LLC; CBS Radio, Inc., as successor in interest to CBS Corporation; Matthew Kauffman; and The Hearst Corporation (defendants)[1] on the

[1] Hearst Media Services Connecticut, LLC, was incorrectly named in the complaint as "The Hearst Corporation" and will be referred to herein as such. The Hearst Corporation is the current publisher of several Connecticut newspapers, including The Middletown Press, New Haven Register, The (Torrington) Register Citizen, and The (Norwalk) Hour. The first three newspapers previously were published by 21st Century Media Newspaper, LLC, which is owned by 21st Century Media, LLC, before The Hearst Corporation acquired the assets of 21st Century Media, LLC, in June, 2017. Kauffman was at all relevant times employed by the Hartford Courant, which is not a party to this appeal.

We note that counsel has indicated that CBS Radio, Inc., as successor in interest to CBS Corporation, is now known as Entercom Media Corp. We

basis of the fair report privilege. On appeal, the plaintiff claims that (1) the evidence supporting the defendants' motions for summary judgment was insufficient, (2) the defendants failed to demonstrate actual reliance on a government document or proceeding, (3) the court erred by finding that the defendants' publications were fair and accurate accounts of the government document on which they claimed to have relied, (4) the defendants did not rebut his claims of malice, which entitled him to a trial on the merits of those claims, and (5) his right under article first, § 10, of the Connecticut constitution to redress for injuries to his reputation and his right to a trial by jury on that claim, defeat the fair report privilege. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to the plaintiff's claims on appeal. The plaintiff is an attorney licensed to practice law in Connecticut. On March 2, 2015, the Office of Disciplinary Counsel commenced an action in the Superior Court against the plaintiff (disciplinary action) alleging violations of several provisions of the Rules of Professional Conduct. The disciplinary action arose from two phone calls made in 2004, during which, according to the Office of Disciplinary Counsel, the plaintiff misrepresented his identity to an individual he later discovered to be a police officer conducting an investigation regarding certain legal advice that the plaintiff allegedly had given

refer herein to that entity as CBS Radio, Inc., as that was the name of the entity at the time it filed its motion for summary judgment and the court rendered its decision thereon.

The defendant The Sun Publishing Company did not file a motion for summary judgment and is not involved in this appeal. The defendant The Day Publishing Company filed a separate motion for summary judgment on April 2, 2019, which was granted on November 26, 2019. The plaintiff has not taken an appeal of that summary judgment decision. The defendant Wesley Spears filed a separate motion for summary judgment on February 17, 2021, which has not yet been ruled on, and he is not involved in this appeal. The plaintiff withdrew his complaint against the defendant Comcast Corporation on May 2, 2019, and he withdrew his complaint against the defendant The Record-Journal Publishing Company on December 16, 2019.

to a client, who was a suspect in a separate investigation (suspect). See *Disciplinary Counsel* v. *Elder*, Superior Court, judicial district of Hartford, Docket No. CV-15-6057682-S (July 29, 2015), rev'd, 325 Conn. 378, 159 A.3d 220 (2017). The court, *Robaina, J.*, found by clear and convincing evidence that the plaintiff had misrepresented himself to that police officer by claiming to be Wesley Spears, another Connecticut attorney, in violation of rule 4.1 of the Rules of Professional Conduct. Accordingly, the court rendered judgment suspending the plaintiff from the practice of law for a period of one year (suspension decision).

On August 1, 2015, the Hartford Courant published an article titled, "Attorney Suspended for a Year." M. Kauffman, "Attorney Suspended for a Year," Hartford Courant, August 1, 2015, p. B1. That article was written by Kauffman, and it summarized the suspension decision. The opening paragraph read, "Joseph Elder, a Hartford attorney who impersonated a fellow lawyer 11 years ago, spawning a long-running feud between the pair, will be barred from practicing law for a year, a Superior Court judge has ruled." Shortly thereafter, The Middletown Press, New Haven Register, The Register Citizen, and The Hour all published similar articles (2015 articles) reporting on the suspension decision.[2]

On May 2, 2017, nearly two years after the publication of the 2015 articles, our Supreme Court reversed the suspension decision on statute of limitations grounds. See *Disciplinary Counsel* v. *Elder*, 325 Conn. 378, 393, 159 A.3d 220 (2017). Kauffman wrote an additional article detailing the Supreme Court's decision. M. Kauffman, "Attorney's Suspension Overturned," Hartford Courant, April 27, 2017, p. B4. In August 2017, the plaintiff commenced the present action by way of a nineteen

[2] See "Hartford Lawyer Suspended for Impersonating Fellow Lawyer," The Middletown Press, August 3, 2015, p. A6; "Hartford Lawyer Suspended for Impersonating Fellow Lawyer," The Register Citizen, August 3, 2015, p. A6; "Hartford Lawyer Suspended for Impersonating Lawyer," The Hour,

count complaint dated July 27, 2017, against ten defendants claiming that they defamed him by publishing the 2015 articles.[3] Specifically, the plaintiff argued that the 2015 articles' use of the word "impersonating" to describe his actions was "false, misleading and defamatory," and that the 2015 articles failed to "mention that the caller intentionally lied about his identity and that he was posing as a drug dealing criminal defendant, never identifying himself as an investigating police officer," which, the plaintiff argued, "painted an incomplete and misleading account of the incident . . . ." The plaintiff claimed that he "sustained damages, and continues to sustain damages, on account of said publications." The plaintiff filed an amended complaint dated September 27, 2017, in which he brought counts against each defendant for defamation and false light invasion of privacy. The counts alleged that (1) the defendants published substantially similar defamatory statements in the 2015 articles when reporting on the disciplinary actions and the suspension decision and (2) the 2015 articles constituted an invasion of his privacy.

On February 23, 2018, the defendants filed answers and simultaneous motions for summary judgment. In their answers, the defendants admitted that they had published the 2015 articles but denied that the plaintiff sustained damages. They also asserted numerous special defenses, including the fair report privilege. Their motions for summary judgment focused on that privilege as a bar to the plaintiff's claims. On February 14, 2019, the trial court rendered summary judgment as to all the defendants in this appeal. The trial court agreed with the defendants that the fair report privilege barred the plaintiff's claims because the defendants fairly and accurately reported on the suspension decision. On

August 2, 2015, p. 2; "Connecticut Lawyer Suspended for Impersonating Colleague," New Haven Register, August 1, 2015.

[3] The plaintiff did not allege that Kauffman's article reporting on the Supreme Court's May 2, 2017 decision was defamatory.

March 6, 2019, before filing this appeal, the plaintiff sought to reargue and for reconsideration of the summary judgment decision. The grounds for reconsideration were that (1) the defendants had to prove reliance on a government source for the fair report privilege to apply and (2) the plaintiff's right of redress for injuries to his reputation, guaranteed by article first, § 10, of the Connecticut constitution, superseded the fair report privilege. The court denied the motion to reargue and for reconsideration on March 20, 2019.

On April 7, 2019, the plaintiff appealed from the summary judgment decision. On June 28, 2019, the plaintiff filed a motion seeking an articulation of the court's alleged failure to address his argument that his right to remedy injury to his reputation under the Connecticut constitution, including his right to a jury trial on such a claim, was superior to the fair report privilege. On October 17, 2019, the court provided an articulation of its summary judgment decision. In the articulation, the court explained that the plaintiff's state constitutional claims had been inadequately briefed because, among other things, they contained no analysis of the factors outlined in *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992). Additional facts will be set forth as necessary.

I

The plaintiff claims that the evidence supporting the defendants' motions for summary judgment was insufficient because it was improperly authenticated. Specifically, he argues that the defendants "failed to submit supporting proof of required facts by means of affidavits based on personal knowledge, certified transcripts of testimony under oath, or any other proof in a form rendering it admissible at trial to show that there was no genuine issue as to any material fact and that each such defendant was entitled to judgment as a matter of law, as required by Practice Book § 17-45." The defen-

dants argue that the plaintiff never raised such an argument before the trial court and, therefore, that it was not preserved properly for our review. We agree with the defendants.

Our review of a trial court's decision to grant a motion for summary judgment is well settled. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." (Citation omitted; internal quotation marks omitted.) *Home Ins. Co.* v. *Aetna Life & Casualty Co.*, 235 Conn. 185, 202, 663 A.2d 1001 (1995). "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 450, 820 A.2d 258 (2003).

The record reflects that the plaintiff did not object to any of the evidence offered by the defendants in support of their motions for summary judgment on the ground that such evidence would be inadmissible at trial. Although the plaintiff's memorandum of law in opposition to the defendants' motions for summary judgment states that "[the] motion does not include any

affidavit citing any author's or reporter's reliance upon [the suspension decision] or any other government document," and that "[the] motion does not include any supporting affidavit attaching [the defendants'] written notes, records and/or drafts demonstrating their reliance upon any government record or proceeding regarding the preparation of the subject articles," it contains no other reference or argument with respect to the authentication issue that now makes up an entire section of the plaintiff's brief on appeal.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal." (Internal quotation marks omitted.) *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426, 143 A.3d 661, cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016). We repeatedly have held that "[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *Council* v. *Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Citations omitted; internal quotation marks omitted.) *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000); see also Practice Book § 60-5. Accordingly, we decline to address this claim.[4]

II

The plaintiff next claims that the trial court erred in granting the motions for summary judgment because

[4] In any event, we fail to see the import of the plaintiff's claim in light of the defense relied on by the defendants in their summary judgment motions. As set forth more fully in this opinion, the fair report privilege requires a comparison of the statements at issue with the decision or proceeding on which those statements report. There is no dispute over the statements at issue; they are the published articles that are the basis of the plaintiff's complaint. There also is no dispute as to the proceeding on which those

the defendants did "not [submit] any proof of reliance on a government document as the source of the complained of publications." He argues that "[t]he naked assertions of fair report privilege without any factual verification that the authors of the complained of defamatory articles relied upon any government document, let alone [the suspension decision], are legally insufficient to support the motions for summary judgment." We disagree.

The fair report privilege is well established. "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." 3 Restatement (Second), Torts, Report of Official Proceeding or Public Meeting § 611, p. 297 (1977). "If the report is accurate or a fair abridgment of the proceeding, an action cannot constitutionally be maintained for defamation. . . . The privilege exists even though the publisher himself does not believe the defamatory words he reports to be true, and even when he knows them to be false and even if they are libel per se. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding." (Citation omitted.) *Burton* v. *American Lawyer Media, Inc.*, 83 Conn. App. 134, 138, 847 A.2d 1115, cert. denied, 270 Conn. 914, 853 A.2d 526 (2004); see also 3 Restatement (Second), supra, § 611, comment (a), p. 298.

The plaintiff cites only *Bufalino* v. *Associated Press*, 692 F.2d 266 (2d Cir. 1982), cert. denied, 462 U.S. 1111, 103 S. Ct. 2463, 77 L. Ed. 2d 1340 (1983), as support for this claim. In that case, the United States Court of Appeals for the Second Circuit reviewed a Pennsylvania ruling in which the trial court held that the fair report

articles report; it was the disciplinary hearing before Judge Robaina that resulted in the published opinion on which the defendants reported.

privilege applied to insulate the media defendant from liability for alleged defamatory statements. The defendant had published in certain Pennsylvania newspapers two reports that identified the plaintiff as a person with "alleged mob ties." (Internal quotation marks omitted.) Id., 270. The defendant in that case offered on appeal "a number of . . . official records which, it [argued] . . . establish financial, family, and social ties between [the plaintiff] and persons identified by state and federal officials as participants in organized crime." Id. Those records, however, were not before the trial judge, and the Second Circuit held that, "[e]ven were we to accept the accuracy of these additional records, it is apparent that [the defendant] did not rely upon them in preparing its reports, but instead discovered them in preparation for the present litigation. We believe that the lack of reliance is dispositive of the issue of [fair report] privilege." Id., 270. "We thus conclude that [the defendant] is not entitled to summary judgment on the basis of records upon which it did not actually rely." Id., 271.

Bufalino stands in stark contrast to the facts of the present case and lends the plaintiff no support. Here, the defendants are not relying on any materials to support their defense other than the 2015 articles and the suspension decision, all of which were before the trial court, which held that "[a]ll of the newspaper articles may clearly be understood as reporting on a court decision. Moreover, the plaintiff cites no authority for the proposition that the defendants are obliged to submit proof of reliance on a government source in order to avail themselves of the fair report privilege." No such requirement exists under the facts of this case, where the defendants do not claim that they were relying on information outside of the decision on which they were reporting, and the plaintiff's argument to the contrary fails.

III

The plaintiff next claims that the court erred in granting the motions for summary judgment on the basis of the fair report privilege because the 2015 articles were not "fair and accurate accounts of the government document relied upon." We disagree.

"[T]he fair reporting privilege requires the report to be accurate. It is not necessary that it be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings . . . . The accuracy required is to the proceedings, not to the objective truth of the [alleged] defamatory charges." (Citations omitted; internal quotation marks omitted.) *Burton* v. *American Lawyer Media, Inc.*, supra, 83 Conn. App. 140. Further, the fair report privilege affords leeway to "an author who attempts to recount and popularize an . . . event. . . . The author's job is not simply to copy statements verbatim, but to interpret and rework them into the whole. . . . A fussy insistence upon literal accuracy would condemn the press to an arid, desiccated recital of bare facts." (Internal quotation marks omitted.) Id., 140–41. As the trial court in the present case noted, "[t]he author of a news article reporting on a judicial decision has no duty to conduct an impartial investigation of the underlying facts of the case"— "[t]he only question is whether the news article represents a substantially accurate report of the court decision upon which it is reporting." See also *Burton* v. *American Lawyer Media, Inc.*, supra, 141–42. Additionally, "the determination of whether the contents of a newspaper article are privileged as fair reporting is an issue of law" over which we exercise plenary review. Id., 138.

Much of the plaintiff's claim concerns the 2015 articles' use of the word "impersonating" to describe his actions, the characterization of the legal advice he ren-

dered that formed the basis of the police investigation, and certain alleged omissions regarding that investigation. He argues that the suspension decision "claimed to be the source of the claimed fair report privilege does not include . . . any finding that the plaintiff was guilty of impersonation," and that "the defendants' references in their complained of publications to 'impersonation' and the plaintiff's alleged rendition of legal advice 'to ignore the police,' together with their knowing omission of the fact of the police officer's deceptive posturing as a criminal defendant, negate the application of the conditional privilege of fair report."

Having compared the 2015 articles to the suspension decision, we conclude that none of the plaintiff's allegations is sufficient to defeat the fair report privilege. First, the 2015 articles contained substantially similar language with respect to impersonation—Kauffman's article in the Hartford Courant read "Joseph Elder, a Hartford attorney who impersonated a fellow lawyer 11 years ago, spawning a long-running feud between the pair, will be barred from practicing law for a year, a Superior Court judge has ruled"; M. Kauffman, supra, "Attorney Suspended for a Year," Hartford Courant, p. B1; and the other 2015 articles reported that "[a] Connecticut judge has suspended a Hartford attorney for impersonating a fellow lawyer 11 years ago." See footnote 2 of this opinion. In comparison, the suspension decision provides that the police officer "spoke to [the plaintiff] who again misidentified himself as Attorney Spears" and that "[t]he court finds that [the plaintiff] violated rule 4.1 [of the Rules of Professional Conduct] by misrepresenting himself to a third person . . . . In addition, the court finds that he failed to correct the misrepresentation at any time," and that when the officer called the plaintiff, the officer "identified himself as a prospective client and [the plaintiff] identified himself as Attorney Spears." *Disciplinary Counsel* v. *Elder*, supra, Superior Court, Docket No. CV-15-6057682-S. Use

of the word "impersonating" in the news articles accurately describes the conduct detailed in the suspension decision.

Second, although the 2015 articles omit the court's finding that when the plaintiff was first called by the police officer, that officer identified himself not as a police officer but as a prospective client, "[a]s long as the matter published is substantially true, [a media defendant is] constitutionally protected from liability for a false light invasion of privacy, regardless of its decision to omit facts that may place the plaintiff under less harsh public scrutiny." *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 132, 448 A.2d 1317 (1982). The statement that the plaintiff was suspended for "impersonating" Spears was substantially true even with that detail omitted.

Additionally, we agree with the trial court that the 2015 articles do not "[advance] the proposition that [the plaintiff] had advised the [suspect] to ignore the police . . . ." (Internal quotation marks omitted.) Instead, as the court noted, they accurately reported that the *officer* was "intent on finding out who had advised the [suspect] to ignore the police," that the suspect had "entered the home based upon what he claimed to be the advice of his counsel," and that the police officer "then attempted to find out the name of the attorney that had given [the suspect] the advice to enter the property under the belief that the attorney had committed an offense and that he had violated ethical canons." (Emphasis omitted; internal quotation marks omitted.) Those statements are substantially fair, true, and accurate, and, accordingly, they are protected by the fair report privilege.

Finally, the plaintiff argues that a quotation attributed to Spears that "every judge, appellate court and jury" had concluded that the plaintiff impersonated Spears, which was republished in the 2015 articles, "did not

come from any government document or proceeding" and, therefore, is unprotected by the fair report privilege.[5] (Internal quotation marks omitted.) Although Spears' quote was not in the suspension decision, that deviation has little effect on our analysis. As our Supreme Court stated in *Strada* v. *Connecticut Newspapers, Inc.*, 193 Conn. 313, 320, 477 A.2d 1005 (1984), "[a]ny deviations from or embellishments upon the information obtained from the primary sources relied upon were miniscule and can be attributed to the leeway afforded an author who attempts to recount and popularize an . . . event." (Internal quotation marks omitted.) In light of our determination that use of the word "impersonating" accurately described the plaintiff's conduct as detailed in the suspension decision, we are not persuaded that the quotation attributed to Spears renders the 2015 articles substantially inaccurate such that it would remove them from the umbrella of the fair report privilege. The pertinent issue in this case is whether the 2015 articles represented a substantially accurate account of the judicial decision. Because we conclude that they did, the plaintiff's argument fails.

IV

The plaintiff's next claim is that the court erred in granting the motions for summary judgment because the defendants did not submit "any evidence to rebut

[5] With respect to CBS Radio, Inc., this claim is not properly preserved. The quotation attributed to Spears was not specifically alleged in the plaintiff's complaint as a defamatory statement as to any defendant but Spears, and it was not addressed by the trial court. The plaintiff did, however, in his memoranda in opposition to the motions for summary judgment filed by Kauffman, 21st Century Media Newspaper, LLC, 21st Century Media, LLC, and The Hearst Corporation, argue that the quotation attributed to Spears was not from a government document or proceeding and that "there [is] no fair report privilege for a reporter's non-government sources." No such argument appears in his memorandum in opposition to the motion for summary judgment filed by CBS Radio, Inc. Accordingly, we address this issue on its merits only with respect to Kauffman, 21st Century Media Newspaper, LLC, 21st Century Media, LLC, and The Hearst Corporation.

the plaintiff's claims of malice" and the plaintiff was "entitled, in any event, to a trial on the merits as to his claims of malice." We disagree.

In its memorandum of decision, the court stated that "[t]he argument that malice defeats the fair report privilege is . . . unavailing, as it relies on the proposition that the [2015] articles are not fair and accurate renditions of the [suspension decision]. The court has found to the contrary." In *Burton*, this court stated that, "[i]f the report is accurate or a fair abridgment of the proceeding, an action cannot constitutionally be maintained for defamation. . . . The privilege exists even though the publisher himself does not believe the defamatory words he reports to be true, and even when he knows them to be false and even if they are libel per se. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding." (Citation omitted.) *Burton* v. *American Lawyer Media, Inc.*, supra, 83 Conn. App. 138. Because we hold that the 2015 articles were fair and accurate abridgements of the suspension decision, the plaintiff's claim of malice fails as a matter of law. Accordingly, the defendants were not required to rebut the plaintiff's claim, and the plaintiff was not entitled to a trial on its merits.

V

Finally, the plaintiff argues that the court erred in granting the motions for summary judgment in favor of the defendants because "such summary adjudication [constituted] a violation of his state constitutional right of redress for injuries to his reputation guaranteed by article first, § 10, of the constitution of . . . Connecticut, and of his right to a trial by jury on his claims for redress for injuries to his reputation . . . ." We disagree.

The trial court addressed this issue in its articulation dated October 17, 2019, and explained that it did not

consider the plaintiff's state constitutional law claims because they were inadequately briefed. Specifically, the court stated that "[t]he [plaintiff] provides the identical argument regarding article first, § 10, in the various opposition memoranda to the defendants' motions for summary judgment that include a history of § 10 and other sections of article first of the constitution of Connecticut, a discussion of commentary related to the importance of reputation and honor, a reference to the English common-law practice of conducting jury trials in libel cases and a discussion of the importance of redress for injury to reputation. What the plaintiff did not do in his various memoranda was to provide the court with an identification of the precise contours of the protection afforded by article first, § 10. Neither did the plaintiff offer any analysis of how to address tension between the article first, § 10 right to a remedy by due course of law for injury to reputation and the fair reporting privilege. While any analysis of the competing weight to be provided to the article first, § 10 remedy by due course of law and the fair reporting privilege requires discussion of the nature and source of the privilege, none was provided by the [plaintiff]." Additionally, the court noted that "the [plaintiff's] memoranda are also bereft of any mention of the factors articulated in *State* v. *Geisler*, [supra, 222 Conn. 685][6] that must be applied to analyze Connecticut constitutional claims and which permit a reasoned and principled consideration of the meaning and contours of article first, § 10." (Footnote added; footnote omitted.)

The plaintiff's state constitutional claim on appeal is virtually identical to his arguments in previous memoranda that were before the trial court. He provides no

[6] The six *Geisler* factors are: "(1) the text of the operative constitutional provisions; (2) related Connecticut precedents; (3) persuasive relevant federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of our constitutional forebears; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies." *State* v. *Lockhart*, 298 Conn. 537, 547, 4 A.3d 1176 (2010).

analysis of the nature and source of the fair report privilege, which the trial court correctly noted would be required for us to construe this claim. We disagree, however, with the trial court's statement that "failure to provide an analysis of the constitution of Connecticut under *Geisler* renders such claims unreviewable" in this context. *Geisler* analysis is indeed required when a litigant claims that our state constitution affords broader protection than the United States constitution,[7] but such analysis is not required when the provision of the state constitution invoked has no federal analog. In those cases, as in the present case, a party does not necessarily need to conduct a *Geisler* analysis to state a legally sufficient claim under our state constitution. Regardless, however, the trial court concluded correctly that the plaintiff's state constitutional claims were inadequately briefed.

Moreover, we are not persuaded by the plaintiff's claim that his "state constitutional right of redress for injuries to his reputation guaranteed by article first, § 10, of the constitution of . . . Connecticut trumped the later developed judicially created common-law fair report privilege." We are guided in our analysis by the *Geisler* factors, which, although not required to construe this claim, are "useful in analyzing the scope of a right guaranteed by the state constitution that has no federal analog." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 272 n.26, 990 A.2d 206 (2010).

Article first, § 10, of our state constitution provides: "All courts shall be open, and every person, for an injury

[7] See, e.g., *State* v. *Allan*, 131 Conn. App. 433, 435 n.2, 27 A.3d 19 (2011) (claim of violation of rights under article first, § 8, of state constitution not reviewed due to failure to provide analysis required by *Geisler*), aff'd, 311 Conn. 1, 83 A.3d 326 (2014); *State* v. *Knight*, 125 Conn. App. 189, 193 and n.6, 7 A.3d 425 (2010) (failure to provide independent analysis under *Geisler* of rights provided by article first, §§ 8 and 9, of constitution of Connecticut resulted in court declining to consider claim), cert. denied, 300 Conn. 927, 16 A.3d 704 (2011).

done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." The plaintiff claims that "[t]he Connecticut constitution does not provide that only 'some' injuries to reputation are subject to redress in our courts. It does not provide an exception [that] allows defamers to publish libelous reports without consequence so long as they cloak their deeds with an assertion that their source is a government document or official." Although it is true that the fair report privilege is not written into the Connecticut constitution, the text of article first, § 10, does not support the plaintiff's argument. The crux of this issue is that the 2015 articles were a substantially fair and accurate rendition of the suspension decision, which was a matter of public record. The 2015 articles may well have caused the plaintiff injury to his reputation in the lay sense, but they did so by accurately and fairly reporting on a matter of public record. Therefore, there was no legally cognizable injury to the plaintiff's reputation that would implicate the text of article first, § 10, of our state constitution. "The existence of a *false* and defamatory statement is a prerequisite to a party's prevailing in a case for libel." (Emphasis added.) *Burton* v. *American Lawyer Media, Inc.*, supra, 83 Conn. App. 137.

With respect to Connecticut history, we are not persuaded that the plaintiff's references to commentators on the Connecticut constitution provide any relevant historical insight into the intent of our constitutional forebears regarding application of the fair report privilege under these circumstances. Additionally, with respect to Connecticut precedent, the plaintiff acknowledges that the fair report privilege is a common-law privilege, but, as the trial court noted, he "did not bring to the court's attention any appellate decision that addresses the meaning and breadth of the article first, § 10 remedy by due course of law for injury to reputation." Likewise, the plaintiff cites no Connecticut case

law that supports his claim that the protection of article first, § 10, "trumps" the fair report privilege. The plaintiff similarly cites no persuasive federal or sister state authority that would call the validity of the privilege into question.

Finally, with respect to public policy, it is well established that the basis of the fair report privilege is "the public's interest . . . in having information made available to it as to what occurs in official proceedings and public meetings." (Internal quotation marks omitted.) *Burton* v. *American Lawyer Media, Inc.*, supra, 83 Conn. App. 138; see also 3 Restatement (Second), supra, § 611, comment (a), p. 297. The plaintiff counters that "the general public's need for the public media (e.g., newspapers, television news, radio reports) to be its source of information as to government activities as the foundational justification for the fair report privilege clearly has eroded substantially since the privilege was initially promoted. There are now literally millions of news sources available to individuals via the Internet. . . . The public no longer depends upon [public media], nor can it claim its public service role as being the eyes and ears of citizens absent from public proceedings." The plaintiff provides no citation to any authority substantiating those claims, nor does he provide analysis with respect to why the widespread availability of news sources would support his suggested application of article first, § 10, of the state constitution to defeat the fair report privilege. There is simply nothing that supports the plaintiff's assertion that the fair report privilege is inconsistent with article first, § 10, of our state constitution. The trial court properly rendered summary judgment in favor of the defendants.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

[8] Additionally, summary judgment does not violate a party's constitutional right to a jury trial where no facts are in dispute. See *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 330, 898 A.2d 197 ("[T]he plaintiff . . .

FIRST NIAGARA BANK, N.A. *v.* RAYMOND C. POUNCEY ET AL.
(AC 43459)

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

Syllabus

F Co. sought to foreclose a mortgage on certain real property owned by the defendants. The substitute plaintiff, K Co., filed a motion for a judgment of strict foreclosure and the defendants filed an amended answer with seven special defenses. Thereafter, K Co. filed a motion for summary judgment as to liability, which the court granted. The defendants then filed a motion to reargue and reconsider the granting of the motion for summary judgment, which the court granted but denied the requested relief. The defendants also filed a motion to open the summary judgment, which the court denied. The defendants then filed a motion to reargue and reconsider the court's denial of their motion to open the summary judgment on the ground that the court had failed to consider our Supreme Court's holding in *U.S. Bank National Assn.* v. *Blowers* (332 Conn. 656), which the court denied. Subsequently, the court rendered a judgment of strict foreclosure, from which the defendants appealed to this court. *Held* that the trial court did not abuse its discretion in denying the defendants' motion to reargue and reconsider the court's denial of their motion to open the summary judgment as to liability; the record showed that the trial court based its orders on a review of the parties' evidentiary submissions, not on a conclusion that the special defenses as pleaded were legally insufficient and, thus, contrary to the defendants' contention, our Supreme Court's decision in *Blowers* was inapplicable to the circumstances of the present case, as *Blowers* involved the trial court's ruling on a motion to strike that the defendant's special defenses and counterclaims, as pleaded, were legally deficient and whether the special defenses related to the enforcement of the note and mortgage, whereas in the present case, the court made no reference whatsoever to the relationship of the defendants' special defenses to the making, validity or enforcement of the note or mortgage when it denied the defendants' motion to reargue and reconsider.

Argued February 16—officially released May 4, 2021

met the heavy burden and strict standard of demonstrating its entitlement to summary judgment and therefore eliminated the delay and expense of a trial where there was no real issue to be tried. . . . As such, the defendants' right to a jury trial . . . was not implicated." (Citation omitted; internal quotation marks omitted.)), cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006).

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Middlesex, where KeyBank, N.A., was substituted as the plaintiff; thereafter, the court, *Domnarski*, *J.*, granted the substitute plaintiff's motion for summary judgment as to liability; subsequently, the court denied the motion to open filed by the named defendant et al.; thereafter, the court denied the motion to reargue and reconsider filed by the named defendant et al.; subsequently, the court, *Domnarski*, *J.*, rendered a judgment of strict foreclosure, from which the named defendant et al. appealed to this court. *Affirmed.*

John R. Williams, for the appellants (named defendant et al.).

Christopher J. Picard, for the appellee (substitute plaintiff).

Opinion

BRIGHT, C. J. The defendants Raymond C. Pouncey, also known as Raymond C. Pouncey, Sr., and Melissa Pouncey,[1] appeal from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff, KeyBank, N.A. On appeal, the defendants claim that, in light of our Supreme Court's holding in *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 226 (2019), the court erred in denying the defendants' motion to reargue and reconsider the court's

[1] The following entities were also named as defendants: First Niagara Bank, National Association, formerly known as NewAlliance Bank; State of Connecticut, Department of Revenue Services; and Midland Funding, LLC. First Niagara Bank, National Association, formerly known as NewAlliance Bank, and Midland Funding, LLC, were defaulted for failing to appear. State of Connecticut, Department of Revenue Services was defaulted for failing to plead. Accordingly, references to the defendants are to Raymond C. Pouncey, also known as Raymond C. Pouncey, Sr., and Melissa Pouncey.

order denying the defendants' motion to open summary judgment.[2] We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. On July 10, 2007, the defendant Raymond C. Pouncey executed an adjustable rate note in the original principal amount of $455,000 to NewAlliance Bank. The note is secured by a mortgage on real property located at 11 Sherwood Forest Lane, Lot 5, in Killingworth. In 2011, NewAlliance Bank merged with and into First Niagara Bank, N.A. (First Niagara). On May 1, 2013, the note and mortgage were modified by a loan modification agreement entered into between the defendants and First Niagara.

In a letter dated March 24, 2015, First Niagara notified the defendants in accordance with the terms of the note and the mortgage that they were in default and that the failure to cure the default could result in the acceleration of the debt. The defendants failed to cure the default following the issuance of the March 24, 2015 letter. Thereafter, First Niagara accelerated the debt and commenced the present action. In 2016, First Niagara merged into KeyBank, N.A. Thereafter, KeyBank, N.A., was substituted as the plaintiff in this action.

[2] The defendants also claim that the court erred in striking their counterclaim. The record reflects that the plaintiff moved to strike the counterclaim as untimely because it was filed after the court had granted summary judgment as to liability on the plaintiff's complaint, and that the court granted the motion to strike for that reason. The defendants' counsel conceded at oral argument before this court that the counterclaim was untimely. Furthermore, the defendants do not even mention, let alone address, in their briefs the plaintiff's motion to strike, the court's ruling or the basis for the ruling. Accordingly, the defendants' claim regarding the motion to strike their counterclaim is deemed abandoned. See *Sturman* v. *Socha*, 191 Conn. 1, 3 n.2, 463 A.2d 527 (1983) (issue raised in preliminary statement of issues but not pursued in brief deemed abandoned); see also *Wells Fargo Bank, N.A.* v. *Tarzia*, 186 Conn. App. 800, 813–14, 201 A.3d 511 (2019) (claim deemed abandoned due to inadequate briefing); *Araujo* v. *Araujo*, 158 Conn. App. 429, 430–31, 119 A.3d 22 (2015) (declined to review claims that were inadequately briefed).

On March 16, 2017, the plaintiff filed a motion for a judgment of strict foreclosure. On March 29, 2017, the defendants filed an amended answer and special defenses. The defendants pleaded seven special defenses alleging estoppel, promissory estoppel, equitable estoppel, unclean hands, violation of the covenant of good faith and fair dealing, unconscionability, and gross negligence.

On July 5, 2018, the plaintiff filed a motion for summary judgment as to liability on the allegations of the complaint. In support of the motion for summary judgment, the plaintiff attached an affidavit attested to by Irena Karovski, a banking officer for the plaintiff, averring that the defendants were in default under the loan documents for failure to make payments as required by the terms of the note and the mortgage and confirming the plaintiff's possession of the note at issue. The plaintiff attached a copy of the note and the mortgage, the loan modification agreement, the March 24, 2015 demand letter, and an emergency mortgage assistance payment letter. The defendants did not file any opposition to the plaintiff's motion for summary judgment. On October 15, 2018, the trial court granted the plaintiff's motion for summary judgment as to liability.

On October 16, 2018, the defendants filed a motion for permission to file a late affidavit in opposition to the plaintiff's motion for summary judgment. Attached to that motion were affidavits of both defendants. On October 22, 2018, the defendants filed a motion to reargue and reconsider the court's granting of the plaintiff's motion for summary judgment on the ground that their special defenses established genuine issues of material facts. The defendants submitted no affidavits or other documents in support of their motion.[3] On October 29,

[3] On October 25, 2018, the defendants submitted an exhibit in support of their October 22, 2018 motion to reargue. The exhibit is a copy of *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 137 A.3d 1 (2016) (reversing judgment of trial court due to plaintiff failing to meet burden of

2018, the trial court deferred action on the defendants' motion for permission to file a late affidavit in opposition to the plaintiff's motion for summary judgment pending the outcome of the October 22, 2018 motion to reargue. On November 16, 2018, the court granted the defendants' motion to reargue and reconsider, but denied the requested relief. In its November 16, 2018 order, the court first noted that "[the defendants acknowledge] that there was no objection to the motion for summary judgment before the court when the motion was decided; however, [the defendants maintain] that, on its face, the plaintiff's motion was insufficient to establish the absence of a genuine issue of fact as to the plaintiff's right to foreclose the subject mortgage." The court then stated: "The court has reviewed the allegations of the complaint, the affidavit in support of summary judgment, and [the defendants'] special defenses. The plaintiff's memorandum and supporting documents establish that there is no genuine issue of material fact regarding the plaintiff's right to foreclose the subject mortgage. The allegations of the [special defenses] are not legally sufficient. [The defendants allege] that there was a mortgage modification agreement entered into in February and April of 2013, however, the plaintiff's affidavit states that payments have not been made on the mortgage since June 1, 2014. [The defendants have] failed to sufficiently allege deceitful or unfair practices on the plaintiff that led to the filing of a foreclosure action that could have been avoided. See *U.S. Bank, N.A.* v. *Eichten*, 184 Conn. App. 727, 196 A.3d 328 (2018)."

Subsequent to the defendants' filing of their October 22, 2018 motion to reargue and reconsider, but prior to the court's ruling on the October 22, 2018 motion, the defendants, on November 5, 2018, filed a motion to open the summary judgment as to liability. On November 6,

establishing absence of genuine issue of material fact as to factual basis for claim of ownership of defendant's alleged debt).

2018, the defendants filed a revised motion to open the summary judgment and an affidavit in support of their motion.[4] On November 14, 2018, the defendants filed a second revised motion to open the summary judgment as to liability (motion to open). In their memorandum in support of the motion to open, the defendants argued that their amended answer and special defenses, request for admission, and a discovery dispute with the plaintiff raised genuine issues of material facts. In particular, the defendants claimed that there was evidence that the plaintiff misapplied their payments after the 2013 modification, that they had not defaulted on the note, and that they did not receive the notice of default. After conducting a hearing on the defendants' revised motion on July 8, 2019, the court issued an order on July 16, 2019, requesting further arguments and/or submissions regarding the defendants' motion to open and informed the parties that the matter would be scheduled for the August 12, 2019 foreclosure short calendar. After receiving additional evidentiary submissions from the parties, the court denied the defendants' motion to open on August 20, 2019. In its ruling, the court stated that it had considered the submissions of the parties, the procedural history of the case, the determinations made when summary judgment as to liability was rendered as well as those made in the ruling on the defendants' October 22, 2018 motion to reargue. The court concluded that the defendants did not show reasonable cause to open the summary judgment as to liability. Furthermore, the court noted that the plaintiff's supplemental affidavit in support of its motion for summary judgment satisfactorily explained the purported issues that were the basis for the defendants' motion to open.[5]

[4] On November 6, 2018, the defendants filed identical evidentiary submissions, which the defendants identified separately as "additional affidavit in opposition to motion for summary judgment" and "affidavit in support of motion to open summary judgment."

[5] In particular, on August 7, 2019, the plaintiff filed a supplemental memorandum and an affidavit with attached exhibits providing clarification on the

On September 9, 2019, the defendants filed a motion to reargue and reconsider the court's denial of their motion to open the summary judgment on the ground that the court had failed to consider our Supreme Court's holding in *Blowers*. The defendants argued that *Blowers* reversed the doctrine that the trial court had applied in "ignoring" the defendants' special defenses and granting the plaintiff's motion for summary judgment as to liability. The defendants contended that the court should have considered the defendants' allegations of, "[postorigination] of the loan, actions by the plaintiff in their special defenses as sufficient facts to deny summary judgment and at the very least to open after the [*Blowers* opinion]."[6] On September 10, 2019, the court denied the defendants' motion to reargue and reconsider. On September 16, 2019, the court rendered a judgment of strict foreclosure. This appeal followed.

On appeal, the defendants claim that the court erred in denying their September 9, 2019 motion to reargue and reconsider because our Supreme Court's holding in *Blowers* "dramatically reshaped the law" regarding the legal sufficiency of special defenses in a foreclosure action. According to the defendants, the court's conclusion that the defendants' allegations in their special defenses were not legally sufficient is no longer correct in light of *Blowers*. The defendants argue that there is no meaningful difference between the present case and *Blowers*. The defendants contend that their special defenses, like those in *Blowers*, are legally sufficient

purported misapplication of funds. The plaintiff submitted a supplemental affidavit wherein Irena Karovski attested that the defendants did have an escrow overage totaling $4413.41 on April 30, 2015. On April 30, 2015, the loan was due for May 1, 2014. The overage was applied to the loan on April 30, 2015, bringing the loan due date to June 1, 2014. The loan was never brought current after the issuance of the March 24, 2015 demand letters.

[6] The defendants also argued that "the court ignored the actions of the clerk of not entering a write-on on the computer system until after [9 p.m.] for a hearing that had already [passed] in the morning." The defendants have not pursued this issue on appeal.

because the special defenses were directed to the enforcement of the note or mortgage.

We first address our standard of review. The defendants argue that our review of the court's denial of their motion to reargue and reconsider the court's denial of their motion to open is de novo because they are challenging on appeal the court's erroneous application of our Supreme Court's decision in *Blowers* to the legal sufficiency of their special defenses. The plaintiff argues that our review is limited to determining whether the court abused its discretion. We agree with the plaintiff.

"[I]n reviewing a court's ruling on a motion to open, reargue, vacate or reconsider, we ask only whether the court acted unreasonably or in clear abuse of its discretion. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did. . . . [T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." (Internal quotation marks omitted.) *Wachovia Mortgage, FSB* v. *Toczek*, 196 Conn. App. 1, 12, 229 A.3d 730, cert. denied, 335 Conn. 964, 240 A.3d 282 (2020). Because we conclude that *Blowers* is inapplicable to the circumstances of the present case, and because the record does not support the defendants' claim that the court ignored the rationale of *Blowers*, we see no reason to depart from the abuse of discretion standard of review.

Relying on *Blowers*, the defendants contend that because their special defenses allege that the plaintiff engaged "in a pattern of misrepresentation and delay in postdefault loan modification negotiations before and after initiating the foreclosure action—thereby adding to the [defendants'] debt and frustrating the [defendants'] ability to avoid foreclosure," the defendants' special defenses are legally sufficient.

Because the defendants rely exclusively on what they claim was the court's failure to apply correctly the Supreme Court's holding in *Blowers*, we briefly discuss the facts, procedural history, and holding of that case. In *Blowers*, our Supreme Court addressed the question of whether this court erred in affirming the judgment of the trial court, which was based, in part, on the court's granting of a *motion to strike* the defendant's special defenses and counterclaims, in which the defendant alleged that the plaintiff "mortgagee engaged in a pattern of misrepresentation and delay in postdefault loan modification negotiations before and after initiating the foreclosure action—thereby adding to the mortgagor's debt and frustrating the mortgagor's ability to avoid foreclosure . . . ." *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 658. The mortgagor's principal claim was that this court and the trial court "incorrectly concluded that such allegations cannot establish legally sufficient special defenses or counterclaims because the misconduct alleged did not relate to the making, validity or enforcement of the note or mortgage." Id., 658.

Prior to addressing the merits of the defendant's claim, the Supreme Court noted that the trial court concluded that the allegations in support of at least two of the special defenses "were legally sufficient, but for the requisite direct connection to the making, validity or enforcement of the note or mortgage." Id., 669–70. Thus, the Supreme Court assumed, for purposes

of its opinion, that the special defenses otherwise would have been legally sufficient, and limited its review to the question of whether the allegations bore a sufficient connection to enforcement of the note or mortgage.[7] Id., 670.

The court did not abandon the "making, validity, or enforcement" test as an appropriate method for trial courts in foreclosure actions to determine whether special defenses and counterclaims bear a sufficient relationship to the allegations of the complaint to be legally sufficient. Instead, it interpreted the test "as nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions." Id., 667. The court then provided a definition of the enforcement element of the test and concluded that the trial court and this court applied a too narrow interpretation of the term to the defendants' allegations. Id., 670–76. In doing so, the court noted that it took a similar view of what equitable defenses relate to enforcement of the note or mortgage in *Thompson* v. *Orcutt*, 257 Conn. 301, 318, 777 A.2d 670 (2001). *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 671–72, 675. Thus, contrary to the defendants' claim that the Supreme Court in *Blowers* "dramatically reshaped the law," the court only clarified how the "making, validity, or enforcement" test should be applied, consistent with its earlier decision in *Thompson*.

Ultimately, the court concluded that "allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to

[7] Because the defendant's special defenses and counterclaims in the *Blowers* case were based on alleged misconduct by the plaintiff after the note and mortgage were executed, they could not relate to the making or validity of the note or mortgage.

enforcement of the note and mortgage." (Citation omitted; internal quotation marks omitted.) Id., 675. The court held that such allegations provide a legally sufficient basis for special defenses in a foreclosure action. Id., 676. Accordingly, that court reversed the judgment of this court with direction to reverse the judgment of strict foreclosure and to remand the case to the trial court for further proceedings.[8] Id., 678.

The defendants' reliance on *Blowers* and their perception that the court did not properly consider the Supreme Court's reasoning in that case are without merit for a number of reasons. First, *Blowers* involved the trial court's ruling, on a motion to strike, that the special defenses and counterclaims, *as pleaded*, were legally deficient. In the present case, the court rejected the defendants' special defenses when it ruled on the plaintiff's motion for summary judgment, which involved the question of whether the defendants had presented sufficient evidence to create a genuine issue of material fact as to the viability of their special defenses. The defendants argue that the procedural difference between this case and *Blowers* is unimportant because the court in the present case did not base its decision on facts but, instead, rejected the defendants' special defenses as legally insufficient. This simply is not true.

In the present case, before ruling on the defendants' November 14, 2018 motion to open, the court gave the parties "the opportunity to submit further affidavits [and/or] evidence on the issues related to the defendants' motion to open the judgment as to liability." After receiving and considering the parties' submissions, including affidavits of the defendants and multiple exhibits attached thereto, the court concluded that the

[8] Although the court concluded that the defendant's allegations "in toto" were legally sufficient, it "[expressed] no opinion as to whether all of the defendant's allegations necessarily have a sufficient nexus to enforcement of the note or mortgage." *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 676.

defendants had "not shown reasonable cause to open the judgment as to liability entered on October 15, 2018" and had "failed to persuade the court that it should exercise its equitable discretion to open or vacate that judgment as to liability."

Although when it denied the defendants' motion to reargue and reconsider the court's ruling granting summary judgment as to liability the court stated that "[t]he allegations of the [special defenses] are not legally sufficient," there is no question that in connection with the defendants' motion to open, the court requested evidentiary submissions from the parties, the defendants submitted evidence in response, and the court found that the submissions did not warrant the opening of the summary judgment as to liability. Significantly, on appeal, the defendants do not challenge the court's analysis of the parties' evidentiary submissions related to the motion to open. Consequently, the manner in which the court disposed of the defendants' special defenses and the record on appeal are completely different from the procedural posture and record in *Blowers*. The fact that the court rejected the defendants' argument in their September 9, 2019 motion for reargument that *Blowers* required that the motion to open be granted, therefore, is not surprising.

Second, to the extent it can be argued that the court, when ruling on the motion to open, relied on an earlier conclusion that the allegations of the special defenses as pleaded were legally insufficient, such a conclusion differs from the trial court's conclusion in *Blowers* that the allegations of the defendant's special defenses and counterclaims were legally deficient. Unlike in the present case, the trial court in *Blowers* concluded that at least two of the special defenses at issue were legally sufficient, but for the requisite direct connection to the making, validity or enforcement of the note or mortgage. Furthermore, the Supreme Court in *Blowers* assumed that the special defenses were legally suffi-

cient, but for the question of whether they were sufficiently related to enforcement of the note or mortgage. Thus, the sole issue in *Blowers* was whether the special defenses and counterclaims related to enforcement of the note or mortgage.

By contrast, in the present case, the court made no reference whatsoever to the relationship of the defendants' special defenses to the making, validity or enforcement of the note or mortgage, when it denied the defendants' motions to reargue and reconsider. When it denied the first motion to reargue and reconsider it merely stated that the defendants' allegations were not legally sufficient. As previously noted in this opinion, the court made this determination in the context of a motion for summary judgment, not a motion to strike. Furthermore, when the court denied the motion to open, which was the subject of the motion for reargument at issue in this appeal, it made no reference at all to the legal sufficiency of the defendants' special defenses. Instead, as previously noted in this opinion, it denied the motion based on the parties' evidentiary submissions.

In sum, the record does not show that the trial court concluded, in contrast with *Blowers*, that the defendants' special defenses were legally sufficient, but for the requisite direct connection to the making, validity or enforcement of the note or mortgage. Instead, the record shows that the trial court based its November 16, 2018 and August 20, 2019 orders on its review of the parties' evidentiary submissions and not on a conclusion that the special defenses as pleaded were legally insufficient. Consequently, on the basis of our review of the record and our Supreme Court's holding in *Blowers*, we conclude that the trial court did not abuse its discretion in denying the defendants' motion to reargue and reconsider the court's denial of their motion to open the summary judgment as to liability.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMAR BOYD (AC 43082)

Lavine, Prescott and Cradle, Js.*

Syllabus

The defendant, who had been previously convicted, on a plea of guilty, of assault in the first degree, appealed to this court from the judgment of the trial court denying in part and dismissing in part his motion to correct an illegal sentence. The defendant claimed that the trial court improperly denied that portion of his motion in which he alleged that the sentencing court had imposed his sentence in an illegal manner by relying on inaccurate information. *Held* that the defendant could not prevail on his claim asserted as a matter of law as the motion failed to advance a colorable claim that invoked the jurisdiction of the court; rather than truly attacking the legality of the sentencing proceedings or the sentence itself, the defendant instead challenged the continued validity of his choice to plead to reduced charges under the doctrine enunciated in *North Carolina* v. *Alford* (400 U.S. 25), and, in order for the court to have granted the defendant the relief he requested in his motion, it would have been required to open the judgment of conviction and vacate the plea agreement that was the actual basis of the challenged sentence, and, because the court lacked any authority to do so as part of the limited jurisdiction afforded under a motion to correct an illegal sentence, the motion, correctly construed, was nothing more than a collateral attack on the plea underlying the defendant's conviction; accordingly, this court concluded that the claim was properly rejected by the trial court but that the form of the judgment was improper with respect to this portion of the defendant's motion, and the case was remanded with direction to render judgment dismissing that portion of the defendant's motion.

Argued November 10, 2020—officially released May 4, 2021

Procedural History

Substitute information charging the defendant with two counts each of the crimes of assault in the first

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

degree and robbery in the first degree, and with one count each of the crimes of larceny in the second degree and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the defendant was presented to the court, *Damiani*, *J.*, on a plea of guilty to one count of assault in the first degree; judgment of guilty in accordance with the plea; thereafter, the court, *Clifford*, *J.*, denied in part and dismissed in part the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed in part*; *judgment directed.*

Robert T. Rimmer, assigned counsel, for the appellant (defendant).

Ana L. McMonigle, special deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Sean McGuinness*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Jamar Boyd, appeals from the judgment of the trial court denying in part and dismissing in part his amended motion to correct an illegal sentence. Specifically, the defendant claims on appeal that the court improperly denied that portion of his motion in which he alleged that the sentencing court had imposed his sentence in an illegal manner by relying on inaccurate information.[1] We conclude that only the form of the judgment was improper with respect to

[1] The defendant does not challenge on appeal the court's dismissal for lack of subject matter jurisdiction that portion of his motion arguing that the sentencing court had failed to account for his youth as a mitigating factor in light of our Supreme Court's decision in *State* v. *Williams-Bey*, 333 Conn. 468, 473–77, 215 A.3d 711 (2019). The defendant also does not challenge the court's denial of that portion of his motion arguing that the sentencing court violated his right to allocution, conceding that the transcript of the sentencing hearing demonstrates that the court both provided him with an opportunity to allocute and that he exercised his right of allocution by making a direct statement to the court on his own behalf.

this portion of the defendant's motion. Accordingly, we reverse the judgment in part and remand the case with direction to render a judgment dismissing this portion of the defendant's motion to correct an illegal sentence. We affirm the judgment of the court in all other respects.

The record reveals the following facts and procedural history. In 2005, following an armed robbery and shooting, the defendant was charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and (5), robbery in the first degree in violation of General Statutes § 53a-134 (a) (2) and (4), larceny in the second degree in violation of General Statutes (Rev. to 2005) § 53a-123, and carrying a pistol without a permit in violation of General Statutes § 29-35. The defendant initially entered pleas of not guilty to these charges. In two other files, the defendant faced additional charges of sexual assault in the second degree in violation of General Statutes (Rev. to 2005) § 53a-71 (a) (1) and a violation of probation. See General Statutes § 53a-32.

On February 24, 2006, three days prior to the start of jury selection in the armed robbery file, the defendant appeared before the court, *Damiani*, *J.*, in order to change his pleas and accept a long-standing plea agreement offered by the state that resolved all three of his pending files. At the start of the hearing, the defendant informed the court that he wanted it to appoint him new counsel. According to the defendant, he was not getting along with his public defender and was unhappy with how the public defender was handling the case. Among numerous complaints, he asserted that his attorney had failed to obtain a copy of a taped statement purportedly made by Thomas Lopes, a witness to the shooting. The court informed the defendant that no taped statement by Lopes existed. The prosecutor confirmed the court's observation on the record, indicating that the police had interviewed Lopes twice but that those interviews were not taped. After listening to the defendant's arguments, and ensuring there were no outstanding discovery issues, the court stated that the defendant

had given it no valid reason to remove his attorney and that the defendant could either accept the state's plea deal, which the state had held open for months, or proceed to trial the following week. The public defender indicated that, given the defendant's stated belief that his case had been mishandled and not adequately investigated, he would advise the defendant not to accept the plea agreement and to go to trial. The defendant rejected that advice.

Under the terms of the plea agreement, which were stated on the record by the court, the defendant agreed to plead guilty under the *Alford* doctrine[2] to one count of assault in the first degree in the armed robbery file and one count of risk of injury to a child under a separate docket number in exchange for a definite sentence of twenty years, five of which were mandatory, and no probation.[3] The state agreed that it would nolle the remaining charges. The agreement contained no provision giving the defendant the right to argue for less than the agreed upon twenty years of incarceration or otherwise giving the sentencing court discretion as to the sentence it imposed. After canvassing the defendant regarding both his understanding of the plea agreement and the voluntariness of his plea, the court accepted the defendant's plea and scheduled a sentencing hearing for April 28, 2006. At the sentencing hearing, the court, after hearing from the attorneys, a family member of the shooting victim, and the defendant, sentenced the defendant to the agreed upon effective sentence of twenty years of incarceration. Because the parties had agreed to a sentence with definite terms, the court effectively had no sentencing discretion other than to reject

[2] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[3] The sentence was comprised of a twenty year sentence of imprisonment for the assault charge, five years of which was a mandatory minimum, and a concurrent five year sentence on the risk of injury charge. With respect to the probation violation, the court agreed to resolve that file by vacating the remainder of the defendant's unserved period of probation at the sentencing hearing.

the entire plea agreement. The court did not discuss the factual basis for the defendant's plea when it imposed the sentence.

Sometime after sentencing, the defendant learned that Lopes, in fact, had given a taped statement, and the defendant obtained a transcript of that statement. The gravamen of Lopes' statement was that he saw the defendant take something from the victim, which led to an argument between the victim and the defendant. When the victim attempted to run away, the defendant chased after the victim, eventually shooting the victim in the chest. The taped statement sets forth facts that arguably differ in minor respects from the factual basis provided by the state during the court's plea canvass.

On December 13, 2017, the defendant filed a motion to correct an illegal sentence in which he argued that his sentence was illegal and/or imposed in an illegal manner. The defendant later amended his motion to claim in relevant part that his "sentence was imposed in an illegal manner because [he] was denied [his] right to be sentenced by a judge relying on accurate information and/or considerations solely within the record." Specifically, the defendant argued that portions of Lopes' taped statement reasonably could be construed as lessening his culpability, the court had accepted his plea with the erroneous belief that no taped statement existed, and, because the sentencing court presumably relied on this inaccurate information as stated on the record at the plea hearing, the defendant was denied "his right to be sentenced by a judge relying on accurate information."[4]

[4] The court initially appointed counsel for the defendant pursuant to *State* v. *Casiano*, 282 Conn. 614, 922 A.2d 1065 (2007). Prior to counsel making the requisite "sound basis" determination; see id., 627; the defendant elected to proceed as a self-represented party and the court granted counsel permission to withdraw. The defendant does not challenge the propriety of these procedures on appeal.

At the hearing on the motion to correct an illegal sentence, the defendant argued with respect to this claim that he believed portions of Lopes' statement tended to prove that he never had the intent to seriously injure the victim,[5] and that he would have pleaded guilty only to a lesser crime and received a lesser sentence. He also argued that the state's failure to disclose the taped statement amounted to a *Brady* violation.[6]

The state took the position that this aspect of the defendant's motion to correct an illegal sentence should be dismissed for lack of subject matter jurisdiction because the defendant was seeking to attack the judgment of conviction, claiming "he has reduced culpability based on this alleged new favorable information . . . ." The state further argued that, even if the court determined that it had jurisdiction over the motion, it failed on its merits because "there is no evidence that [the sentencing court] relied in any substantial way on the prosecutor's particular recitation of the facts" and, regardless, the sentence imposed "was an agreed upon disposition that the defendant himself agreed to enter into."

With respect to the jurisdictional question, the court, *Clifford*, *J.*, concluded that it had jurisdiction because the defendant's motion was predicated on a claim that the sentencing court had relied on inaccurate information at the sentencing hearing. Regarding the merits, the court first explained that, to prevail on a motion to correct an illegal sentence on the basis of a sentencing

[5] The defendant's position, as he explained at the hearing on the motion to correct, was that Lopes had indicated in his statement that the victim and the defendant had engaged in an argument, and that it was during this fight that the firearm went off. The defendant explained further: "It wasn't my intent to run up to the victim to just shoot him, which I'm standing right now convicted under and there's also evidence within [Lopes' statement] that said [a third party] had something to do with the actual crime."

[6] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

court's alleged reliance on inaccurate information, the defendant, in addition to showing that some information provided to the court by the state or defense counsel was, in fact, inaccurate, had to show that the sentencing court explicitly referred to the inaccurate information, gave specific attention to it, and relied on it in reaching the imposed sentence.

In ruling against the defendant, the court first noted that the sentence the defendant received was not the result of "a wide open sentencing" but, rather, reflected the definite sentence agreed to by the state and the defendant in the plea agreement. The court also disagreed with the defendant's characterization of the import of the Lopes statement or that its discovery after the fact helped the defendant to establish that he was sentenced on the basis of any inaccurate information. The court stated: "First of all, [the sentencing court] hardly said anything when [it] imposed the sentence. [It] didn't give any specific attention to the state's facts at all. . . . [It] didn't talk about . . . a witness's potential statement, what the victim might have said, nothing. . . . I know that you plead[ed] to this under the *Alford* doctrine; that you agreed to this particular sentence. So . . . I think you're attacking the whole fairness of the procedure. I really don't think you're attacking whether the sentence was imposed in an illegal manner or that it's inaccurate. I think you're trying to attack the underlying facts but they were not inaccurate facts that the [sentencing court] relied upon at all in the exhibits that you've shown me. So on that basis, I'm denying your motion." This appeal followed.

The sole claim raised by the defendant on appeal is that the court improperly denied that portion of his motion to correct an illegal sentence in which he asserted that the sentencing court had relied upon inaccurate information in imposing the agreed upon recommendation. In support of this claim, the defendant argues in his brief that "the newly discovered taped

statement of [Lopes] demonstrated reckless conduct rather than intentional conduct . . . [and], therefore, that [the defendant] should not have received a twenty year sentence . . . .'' (Citation omitted.) We conclude that the substance of the defendant's claim does not attack the manner in which the sentence was imposed but is, in fact, a collateral attack on his plea, which falls outside the postsentence jurisdiction of the court. Accordingly, we conclude that the claim was properly rejected by the court but that the form of the judgment rendered was incorrect.

''The Superior Court is a constitutional court of general jurisdiction. . . . In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . Under the common law, a trial court's jurisdiction over a criminal case terminates once the defendant has begun serving his or her sentence. . . . An exception to this general principle exists, however, that permits a trial court to retain jurisdiction to correct an illegal sentence. . . . This exception is recognized in Practice Book § 43-22, which provides that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner.

''[A]n illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way which violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right

that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law.

"Thus, to invoke the jurisdiction of a trial court to correct an illegal sentence, a defendant must allege that his or her sentence is illegal, or has been illegally imposed, for one of the reasons recognized under our common law. . . . Determining whether a defendant has satisfied this jurisdictional threshold presents a question of law over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Cruz*, 155 Conn. App. 644, 648–50, 110 A.3d 527 (2015).

In *State* v. *Casiano*, 122 Conn. App. 61, 68, 998 A.2d 792, cert. denied, 298 Conn. 931, 5 A.3d 491 (2010), this court held that the trial court did not have jurisdiction over a motion to correct an illegal sentence filed by the defendant because the defendant challenged the validity of his guilty plea on the ground that trial counsel had given erroneous advice prior to entry of the plea. This court explained: "In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the [proceedings] leading to the conviction, must be the subject of the attack. . . . The defendant's claim does not attack the validity of the sentence. Instead, it pertains to . . . alleged flaws in the court's acceptance of the plea. As such, it does not fit within any of the four categories of claims recognized under Practice Book § 43-22." (Citation omitted; internal quotation marks omitted.) Id.; see also *State* v. *Monge*, 165 Conn. App. 36, 43–44, 138 A.3d 450 (relying on *Casiano* in holding that motion seeking to vacate pleas and to open judgments of conviction fell outside court's limited postsentencing jurisdiction), cert. denied, 321 Conn. 924, 138 A.3d 284 (2016).

In the present case, the motion to correct an illegal sentence nominally challenges the sentencing proceedings by asserting that the sentencing court had relied on inaccurate information at the time of sentencing. The court denied the defendant's motion to correct an illegal sentence, concluding that although the motion invoked the jurisdiction of the court because it facially challenged the manner in which his sentence was imposed, he failed to meet his burden of demonstrating that the court had relied on any inaccurate information in sentencing the defendant in accordance with the definite terms agreed to pursuant to the plea agreement. See *State* v. *Martin M.*, 143 Conn. App. 140, 145, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013). Nevertheless, in ruling on the defendant's motion, the court also made the following observation, which appears to undermine its finding of jurisdiction: "I really don't think you're attacking whether the sentence was imposed in an illegal manner or that it's inaccurate."

"[F]or the trial court to have jurisdiction over a defendant's motion to correct a sentence that was imposed in an illegal manner, the defendant must put forth a colorable claim that his sentence, in fact, was imposed in an illegal manner. A colorable claim is [a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law). . . . For jurisdictional purposes, to establish a colorable claim, a party must demonstrate that there is a possibility, rather than a certainty, that a factual basis necessary to establish jurisdiction exists . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 244–45, 170 A.3d 139 (2017). "For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 784, 189 A.3d

1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

Having thoroughly reviewed the record in this case, we conclude that, under the circumstances, the defendant could not prevail on the claim asserted as a matter of law and, therefore, the motion failed to advance a colorable claim that invoked the jurisdiction of the court. Rather than truly attacking the legality of the sentencing proceedings or the sentence itself, the defendant instead challenges the continued validity of his choice to plead to reduced charges under the *Alford* doctrine. By electing to accept the proffered plea deal, the defendant received the benefit of a definite twenty year sentence with no probation and avoided the real risk posed by going to trial on all charges, including those nolled by the state, and thus potentially facing a far more substantial sentence if found guilty of all charges, including potentially having to register as a sex offender if the state prevailed on the sexual assault charge.

Here, in order for the court to have granted the defendant the relief he requested in his motion—a term of incarceration of less than twenty years—the court would have been required to do more than simply grant a new sentencing hearing. Rather, because the sentence imposed was the result of a plea agreement in which the defendant agreed to accept a definite sentence of twenty years and the state agreed to nolle a substantial number of other charges, the only way the court could have granted the defendant any practical relief on his motion to correct an illegal sentence was by opening the judgment of conviction and vacating the plea agreement that was the actual basis of the challenged sentence. Because the court lacked any authority to do so as part of the limited jurisdiction afforded under a motion to correct an illegal sentence, the motion, correctly construed, is nothing more than a collateral attack on the plea underlying the defendant's conviction rather than

a true challenge to the legality of the sentence imposed or to the sentencing proceedings. As such, despite any perceived superficial facial validity, the motion failed to state a colorable claim that his sentence was imposed in an illegal manner, and the court should have dismissed, rather than denied, the defendant's motion.

The form of the judgment is improper, the judgment is reversed only with respect to the trial court's denial of that portion of the motion to correct an illegal sentence claiming that the sentence was imposed in an illegal manner due to the sentencing court's alleged reliance on inaccurate information, and the case is remanded with direction to render judgment dismissing that portion of the defendant's motion to correct an illegal sentence; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

KIRSHAN NANDABALAN *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 43691)

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

Syllabus

The plaintiff, who had been charged with the crime of operating a motor vehicle while under the influence of intoxicating liquor, appealed to the trial court from the decision of the defendant Commissioner of Motor Vehicles suspending his motor vehicle operator's license for forty-five days and requiring the use of an ignition interlock device in his motor vehicle for one year, pursuant to statute (§ 14-227b), for his refusal to submit to a breath test to determine his blood alcohol content. The trial court rendered judgment dismissing the plaintiff's appeal, from which the plaintiff appealed to this court. *Held* that the judgment of the trial court dismissing the plaintiff's appeal was affirmed; the trial court did not err in concluding that the administrative record contained substantial evidence to support the hearing officer's finding that the plaintiff knowingly refused to submit to the breath test; the totality of the evidence, including a police report, a Form A-44, a breath test strip that read "test aborted refusal," and the testimony of the arresting officer and the plaintiff at the hearing, provided reliable, probative, and substantial

evidence that the plaintiff refused to submit to a breath test; moreover, although the officer did not provide a narrative to describe the plaintiff's words or actions that constituted a refusal, as required by Form A-44, the officer's testimony at the hearing about the plaintiff's express verbal refusal cured any defects in the Form A-44.

Argued January 11—officially released May 4, 2021

Procedural History

Appeal from the decision of the defendant suspending the plaintiff's motor vehicle operator's license, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Devin W. Janosov, with whom was *Donald A. Papcsy*, for the appellant (plaintiff).

Christine Jean-Louis, assistant attorney general, with whom were *Eileen Meskill*, assistant attorney general and, on the brief, *William Tong*, attorney general, for the appellee (defendant).

Opinion

SUAREZ, J. The plaintiff, Kirshan Nandabalan, appeals from the judgment of the trial court dismissing his appeal from the decision of the defendant, the Commissioner of Motor Vehicles, ordering a forty-five day suspension of his license to operate a motor vehicle and requiring him to employ an ignition interlock device, pursuant to General Statutes § 14-227b, for his refusal to submit to a chemical alcohol test. The plaintiff claims that the court erred in concluding that the administrative record contained substantial evidence to support the hearing officer's finding that he knowingly refused to submit to the chemical alcohol test.[1] We disagree and affirm the judgment of the trial court.

[1] In his principal brief to this court, the plaintiff raises three issues, all of which are related to his alleged refusal. These issues are the same in substance, and we have reframed them as the single issue set forth herein.

The following facts and procedural history are relevant to this appeal. We begin by restating the trial court's recitation of the facts surrounding the suspension of the plaintiff's license. "On May 7, 2019, Officer [Dimitar] Sadiev of the Guilford Police Department was dispatched in response to a 911 call indicating that a red Porsche with a specified license plate was operating erratically.[2] Officer Sadiev located the Porsche, noticed that it was driving about [fifteen miles per hour] in a [thirty mile per hour] zone and pulled it over. As he approached the operator, later identified as the plaintiff, the officer detected the odor of alcohol. Upon questioning, the plaintiff informed Officer Sadiev that he was coming from KC's Pub and that he had consumed a glass of wine.[3] Officer Sadiev noticed that the plaintiff spoke slowly and slurred his words. Sergeant [Martina] Jakober and Officer Potter then arrived to assist. The plaintiff had some difficulty in reciting portions of the alphabet and counting [backward] and was asked to exit his car.

"Officer Sadiev then administered standard field sobriety tests to the plaintiff. The plaintiff failed some of the standard field sobriety tests and was placed under arrest at approximately 10:20 p.m. The plaintiff was then transported to Guilford police headquarters. At approximately 10:54 p.m., the plaintiff was read his rights and signed a form indicating that he understood them. The plaintiff was read the Implied Consent Advisory and allowed to contact an attorney at 11:13 p.m. The plaintiff made a call. At 11:23 p.m. the plaintiff was read the Test Consent Form but refused to consent to

[2] "The 911 caller reported that the red Porsche was traveling on the wrong side of the road and nearly collided with the caller's car head-on. The caller further reported that she observed the Porsche repeatedly crossing the double yellow line and driving on the grassy shoulder of the road. Lastly, the caller noted that the Porsche was driving unusually slowly."

[3] "Later during processing, the plaintiff indicated that he had a glass of scotch."

a Breathalyzer test. The plaintiff was again read the Test Consent Form and again refused to consent to the test." (Footnotes in original.)

On May 22, 2019, the defendant sent a notice to the plaintiff to inform him of the suspension of his license pursuant to § 14-227b.[4] On June 7, 2019, pursuant to subsection (g) of § 14-227b, an administrative hearing was held before a hearing officer to determine if the

[4] General Statutes § 14-227b provides in relevant part: "(a) Any person who operates a motor vehicle in this state shall be deemed to have given such person's consent to a chemical analysis of such person's blood, breath or urine and, if such person is a minor, such person's parent or parents or guardian shall also be deemed to have given their consent.

"(b) If any such person, having been placed under arrest for a violation of section 14-227a or 14-227m or subdivision (1) or (2) of subsection (a) of section 14-227n, and thereafter, after being apprised of such person's constitutional rights, having been requested to submit to a blood, breath or urine test at the option of the police officer, having been afforded a reasonable opportunity to telephone an attorney prior to the performance of such test and having been informed that such person's license or nonresident operating privilege may be suspended in accordance with the provisions of this section if such person refuses to submit to such test . . . and that evidence of any such refusal shall be admissible in accordance with subsection (e) of section 14-227a and may be used against such person in any criminal prosecution, refuses to submit to the designated test, the test shall not be given . . . . The police officer shall make a notation upon the records of the police department that such officer informed the person that such person's license or nonresident operating privilege may be suspended if such person refused to submit to such test . . . .

"(c) If the person arrested refuses to submit to such test or analysis . . . the police officer, acting on behalf of the Commissioner of Motor Vehicles, shall immediately revoke and take possession of the motor vehicle operator's license . . . . The police officer shall prepare a report of the incident and shall mail or otherwise transmit in accordance with this subsection the report and a copy of the results of any chemical test or analysis to the Department of Motor Vehicles within three business days. . . . If the person arrested refused to submit to such test or analysis, the report shall be endorsed by a third person who witnessed such refusal. The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for a violation of section 14-227a or 14-227m or subdivision (1) or (2) of subsection (a) of section 14-227n and shall state that such person had refused to submit to such test or analysis when requested by such police officer to do so . . . ."

plaintiff's license should be suspended for refusal of a chemical alcohol test. At the hearing, Officer Sadiev and the plaintiff testified about the plaintiff's arrest and his alleged refusal to take the breath test. A copy of Form A-44[5] with its attachments was admitted into evidence. The plaintiff maintained that he did not refuse to take the breath test. In support thereof, he relied upon Officer Sadiev's failure to document on the A-44 form the exact language he used when he asked the plaintiff to submit to a chemical alcohol test, along with Officer Sadiev's hearing testimony that he "[did not] remember the specific words that [he] used" to make this request. Officer Sadiev testified at the hearing that, although he could not remember what he asked the plaintiff, the plaintiff "said no to [his] request for a . . . breath sample . . . ."

On June 13, 2019, the hearing officer issued a decision with the following findings of fact and conclusions of law: "(1) The police officer had probable cause to arrest the [plaintiff] for a violation specified in [§] 14-227b . . . . (2) The [plaintiff] was placed under arrest. (3) The [plaintiff] refused to submit to such test or analysis. (4) [The plaintiff] was operating the motor vehicle. (5) [The plaintiff] was not under [twenty-one] years of age." The hearing officer also made the following subordinate finding: "Based upon sworn, credible testimony of . . . Officer Sadiev and testimony of [the plaintiff], it is found that there was a refusal to participate in testing." On the basis of these facts, the hearing officer ordered that the plaintiff's license be suspended for forty-five days and that an ignition interlock device be installed and maintained in the plaintiff's vehicle for one year.

[5] This form is entitled: "Officer's OUI Arrest and Alcohol Test Refusal or Failure Report." "The A-44 form is used by the police to report an arrest related to operating a motor vehicle under the influence and the results of any sobriety tests administered or the refusal to submit to such tests." *Roy* v. *Commissioner of Motor Vehicles*, 67 Conn. App. 394, 396 n.3, 786 A.2d 1279 (2001).

On August 6, 2019, the plaintiff appealed from the hearing officer's decision to the Superior Court pursuant to General Statutes § 4-183.[6] In the complaint, the plaintiff alleged, among other things, that the decision was "clearly erroneous in light of the reliable, probative, and substantial evidence produced at the hearing" and that "the hearing officer abused his discretion in finding that . . . the state submitted 'substantial evidence' of [the plaintiff's] refusal to take a [chemical alcohol] test . . . ." This decision, the plaintiff alleged, was "arbitrary and capricious," "[constituted] an abuse of discretion," and "was clearly an unwarranted exercise of discretion." Both parties submitted briefs and a hearing was held before the trial court on December 2, 2019.

On December 3, 2019, the court rendered judgment dismissing the appeal and issued a memorandum of decision. After setting forth its findings, the court concluded that "the record contain[ed] substantial evidence to support the hearing officer's finding that the plaintiff knowingly refused the test," and that "the hearing officer's decision was not clearly erroneous, arbitrary and capricious, or an abuse of discretion in view of the reliable, probative and substantial evidence on the whole record." The court pointed to three pieces of evidence in the record that supported the hearing

[6] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) *clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record*; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings." (Emphasis added.) We interpret the plaintiff's claim to implicate subdivision (5) of this subsection.

officer's finding: "(1) the A-44 report and its attachments; (2) Officer Sadiev's hearing testimony; and (3) the plaintiff's hearing testimony." The court stated that, "given the reports, the testimony of Officer Sadiev and the testimony of the plaintiff himself, it is clear that (1) the plaintiff was requested by the officers to take the test; (2) the plaintiff understood that the officers were requesting that he take the test; and (3) that the plaintiff refused."[7]

Lastly, the court determined that "the plaintiff . . . failed to establish on appeal that the [defendant's] decision was (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) *clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record*; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." (Emphasis added.) This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the plaintiff claims that the court erred in concluding that the administrative record contained substantial evidence to support the hearing officer's finding that he knowingly refused to submit to the chemical alcohol test. We disagree.

We begin by setting forth the standard of review. "The determination of whether the plaintiff's actions constituted a refusal to submit to a Breathalyzer test is a question of fact for the hearing officer to resolve. . . .

"In an administrative appeal, the plaintiff bears the burden of proving that the commissioner's decision to suspend a motor vehicle operating privilege was clearly

[7] The trial court noted: "The plaintiff's own testimony establishes that he understood the officers wanted him to take the test and that he never communicated his consent to take the test."

erroneous in view of the reliable, probative and substantial evidence on the whole record. . . . Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The evidence must be substantial enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . [I]f the administrative record provides substantial evidence upon which the hearing officer could reasonably have based his finding . . . the decision must be upheld. . . . The obvious corollary to the substantial evidence rule is that a court may not affirm a decision if the evidence in the record does not support it." (Citation omitted; internal quotation marks omitted.) *Fernschild* v. *Commissioner of Motor Vehicles*, 177 Conn. App. 472, 476–77, 172 A.3d 864 (2017), cert. denied, 327 Conn. 997, 175 A.3d 564 (2018).

"Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Ives* v. *Commissioner of Motor Vehicles*, 192 Conn. App. 587, 595, 218 A.3d 72 (2019).

"[D]ifficulties [are] inherent in ascertaining when a person is 'refusing' to submit to the breath test. 'Refusal' is difficult to measure objectively because it is broadly defined as occurring whenever a person 'remains silent or does not otherwise communicate his assent after

being requested to take a blood, breath or urine test under circumstances where a response may reasonably be expected.' Regs., Conn. State Agencies § 14-227b-5. . . . Refusal to submit to a blood alcohol test may be established by one's actions or by verbally expressing one's unwillingness." (Citation omitted; internal quotation marks omitted.) *Fernschild* v. *Commissioner of Motor Vehicles*, supra, 177 Conn. App. 477.

In the present case, the hearing officer considered the following evidence relevant to the issue of refusal. First, a police report prepared by Officer Sadiev states: "[The plaintiff] refused to the two breath tests[8] which were requested at 2323 hours. Sergeant Jakober . . . asked if he would consent to the breath tests to which [he] declined once again." (Footnote added.) Second, section F[9] of the A-44 form completed by Officer Sadiev on May 8, 2019, indicates that Officer Sadiev twice asked to administer a breath test to the plaintiff, and that the plaintiff refused both requests. Section H[10] of the form indicates that the plaintiff's refusal was verbal. In this section, Officer Sadiev gave the following narrative description of the plaintiff's refusal: "The operator named above refused to submit to such test or analysis when requested to do so. The refusal occurred in my presence and my endorsement appears below." Sargent Jakober also signed the A-44 form as a witness to the

[8] In light of Officer Sadiev's testimony, it is reasonable to interpret this portion of his report to state that the plaintiff was asked and refused to submit to a breath test twice.

[9] Section F is entitled "Chemical Alcohol Test Data." In this section, there are boxes for an officer to indicate the type of test selected, the dates and times that the first and second tests were offered, and the result of each test. In the present case, Officer Saidev wrote "refused" for the result of each test.

[10] Section H is entitled "Chemical Alcohol Test Refusal" and must be completed when an operator refuses testing. An officer must indicate whether the test refusal was verbal or through conduct and "[u]se [a] narrative to describe the operator's words or actions that constituted a refusal." A second officer must provide his or her name and signature indicating that he or she witnessed the refusal.

refusal.[11] Third, a Breathalyzer test strip was imprinted with the phrase "test aborted refusal." Fourth, Officer Sadiev and the plaintiff testified under oath at the hearing and were cross-examined. Officer Sadiev testified that the plaintiff "said no to [his] request for a Breathalyzer, breath sample . . . ." Officer Sadiev then testified, however, that he "[did not] remember the specific words that [he] used" to ask the plaintiff to take the test. The plaintiff testified that he did not recall what he said when Officer Sadiev asked him to take the breath test. When asked whether, at any point, he communicated to Officer Sadiev that he would take the breath test, he responded: "I don't [think] so." The plaintiff's counsel interjected on multiple occasions during this colloquy.[12]

The plaintiff argues that this evidence was not sufficient to support the hearing officer's conclusion that he expressly refused to take the breath test. Specifically, he asserts that Officer Sadiev's narrative description in

[11] At the administrative hearing, the plaintiff's counsel asked Officer Sadiev: "And the refusal wasn't witnessed by a Sergeant Jakober; is that correct?" Officer Sadiev responded: "Yes, sir." Shortly after, the plaintiff's counsel asked: "[Y]our testimony . . . is that you in some way requested that [the plaintiff] do a test, the Breathalyzer or otherwise, and he said no; is that correct?" Officer Sadiev responded: "And someone asked him if he would do it. He said, no. And Sergeant Jakober also asked him." Additionally, the police report stated "Sergeant Jakober . . . asked if [the plaintiff] would consent to the breath tests to which [he] declined once again. The refusal was witnessed by Sergeant Jakober."

On the basis of this evidence, it is reasonable to interpret the evidence such that Sergeant Jakober signed the A-44 form as a witness to the refusal because she asked the plaintiff to take the breath test for a third time and, thus, witnessed this refusal.

[12] At one point during the administrative hearing, the defendant's counsel asked the plaintiff: "So isn't it true that when asked to take a breath test you said, no?" The plaintiff's counsel objected to this question and interjected when the defendant's counsel attempted to repeat the question. The plaintiff then answered: "I don't recall probably what I said. But I do recall, I do remember . . . ." Before the plaintiff could finish this response, his counsel interrupted, stating: "You don't have to answer more than that. I don't want you to speculate."

section H of the A-44 form contains only a conclusory statement that the plaintiff expressly refused the test, but does not contain facts to support this conclusion. He further argues that Officer Sadiev's testimony before the hearing officer "did not go far enough to correct the volume of errors" with the narrative description.

The plaintiff principally relies on *Fernschild* v. *Commissioner of Motor Vehicles*, supra, 177 Conn. App. 472, arguing that the present case is factually similar, and, thus, we should reverse the judgment for lack of evidence of refusal. In *Fernschild*, a police officer completed an A-44 form, on which the box "test refusal" was checked. Id., 478. A witnessing officer attested to a printed statement on the form stating: "[T]he operator named above refused to submit to [a breath] test . . . when requested to do so . . . . [T]he refusal occurred in my presence and my endorsement appears below . . . ." Id. The hearing officer found that the A-44 form, a Breathalyzer test strip with the words "test aborted refusal," and a case incident report in which the police officer stated that the plaintiff "refused to submit to the breath test," supported a finding of refusal. Id.

On appeal to this court, the plaintiff in *Fernschild* argued that "the record contained only mere conclusions of refusal without any underlying facts as to the plaintiff's verbal expressions or conduct supporting the conclusion of the hearing officer that the plaintiff had refused to submit to the Breathalyzer test." Id., 477–78. This court agreed, stating: "The evidence before the hearing officer . . . was . . . bereft of underlying factual information. It included only conclusions by [the police officers] that the plaintiff refused the breath test. The record contains no description, however brief, of the behavior, conduct or words of the plaintiff that led the officers to conclude that there had been a refusal, either expressly or by conduct. Without any underlying evidentiary basis to support the inference of a refusal,

we are constrained to conclude that there was not substantial evidence in the record to support the determination of the hearing officer that there had been a refusal." (Footnote omitted.) Id., 479.

In the present case, the plaintiff raised a similar argument before the trial court. The court rejected it, stating: "Given the actual hearing testimony of Officer Sadiev and the plaintiff himself, this matter is clearly distinguished from the plaintiff's interpretations of *Fernschild* v. *Commissioner of Motor Vehicles*, [supra, 177 Conn. App. 472] . . . . The refusal of the plaintiff here was confirmed as factually found by the hearing officer, by the live hearing testimony of the arresting officer and the plaintiff himself. As noted, the finding of a refusal is a finding of fact."[13] (Citation omitted.)

The defendant argues that the present case is distinguishable from *Fernschild* for reasons similar to those articulated by the trial court. In addition, the defendant points to *Adams* v. *Commissioner of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-16-6033742-S (March 7, 2017) (reprinted at 182 Conn. App. 169, 189 A.3d 633), aff'd, 182 Conn. App. 165, 189 A.3d 629, cert. denied, 330 Conn. 940, 195 A.3d 1134 (2018), which, the defendant contends, is factually similar to the present case because it involves an express refusal. The defendant further contends that *Adams* is distinguishable from *Fernschild* "because *Fernschild* concerned a refusal that left open for interpretation whether it occurred by behavior, conduct or words."

[13] The trial court stated: "In this regard, the hearing officer made a specific subsidiary finding, noting: 'Based upon sworn, credible testimony of . . . Officer Sadiev and testimony of [the plaintiff], it is found that there was a refusal to participate in testing.' As the finder of fact, the hearing officer was in the position to assess and weigh the evidence, determine credibility and make findings of fact which are supported by substantial evidence, as this finding was."

In *Adams*, the plaintiff, who was arrested for operating a vehicle under the influence of drugs or alcohol, claimed that there was insufficient evidence to support a finding that he refused to submit to a urine test. *Adams* v. *Commissioner of Motor Vehicles*, supra, Superior Court, Docket No. CV-16-6033742-S. In *Adams*, a police report indicated that after a police officer requested a urine sample from the plaintiff, "the plaintiff attempted unsuccessfully to reach an attorney and then 'spoke with a family member and elected to refuse a urine sample.' " Id. The trial court concluded that this evidence was sufficient to support a finding of express refusal. In reaching this conclusion, the trial court in *Adams* distinguished the case from *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 692 A.2d 834 (1997), which "stands for the proposition that when a person refuses a test by conduct . . . the police must document the conduct that constitutes the refusal." *Adams* v. *Commissioner of Motor Vehicles*, supra, Superior Court, Docket No. CV-16-6033742-S. The trial court held that where there is an express refusal, as opposed to a refusal by conduct, "no further description of the refusal is required." Id. This court adopted the opinion of the trial court. *Adams* v. *Commissioner of Motor Vehicles*, 182 Conn. App. 165, 168, 189 A.3d 629, cert. denied, 330 Conn. 940, 195 A.3d 1134 (2018).[14]

We agree with the trial court and the defendant that the present case is distinguishable from *Fernschild* and more like *Adams*. As the plaintiff notes, after *Fernschild*, the Department of Motor Vehicles revised section

[14] We note that the trial court in *Adams* issued its decision before this court issued its decision in *Fernschild*. Because this court adopted the trial court's decision in *Adams* as its own, it did not address *Fernschild*. This court's decision in *Fernschild*, however, was issued approximately three months before *Adams* was argued before this court, and approximately seven months before this court issued its decision in *Adams*. On the basis of the timeline of these decisions, we conclude that the court in *Adams* concluded that the express verbal refusal in that case distinguished it from the factual situations in *Fernschild*.

H of the A-44 form to include the following instructions: "Use narrative to describe the operator's words or actions that constituted a refusal." Officer Sadiev did not do so. Unlike in *Fernschild*, however, the hearing officer was presented with testimony about the plaintiff's express verbal refusal that cured any defects in the A-44 form, namely, the testimony from Officer Sadiev indicating that the plaintiff said "no" when he was asked to take a breath test.

The court stated in its memorandum of decision that the plaintiff's "initial testimony, along with his counsel's objections, concerning whether he refused to take the test can be characterized as evasive." Our review of the hearing transcripts leads us to the same conclusion. At the administrative hearing, the plaintiff testified that he "[did not] recall" what he said to Officer Sadiev. He further testified that he did not think he communicated to Officer Sadiev that he would not take the breath test. The plaintiff's responses to the defendant's counsel's questions were not definitive. His testimony indicated that he was uncertain about the events surrounding his alleged refusal. Officer Sadiev testified that, even though he could not remember the exact question he asked the plaintiff, the plaintiff expressly refused to submit to a chemical alcohol test. It was within the hearing officer's province as the finder of fact to find Officer Sadiev's testimony credible.

Furthermore, Officer Sadiev's indication on the A-44 form that the plaintiff's refusal was verbal, along with his testimony that the plaintiff responded "no" when asked to take a breath test, support the finding that the plaintiff's refusal was an express verbal one, rather than one expressed through ambiguous conduct. In *Adams*, the trial court relied solely on the description in the police report in concluding that there was sufficient evidence to find that the plaintiff expressly refused to take a urine test. *Adams* v. *Commissioner of Motor Vehicles*, supra, Superior Court, Docket No. CV-16-6033742-S. This description did not contain the words

that the police officer used to request the test, nor did it contain the words that the plaintiff used to respond. Id. Thus, in comparison to the hearing officer in *Adams*, the hearing officer in the present case had even more evidence about the plaintiff's express refusal upon which to rely. This evidence supported its ultimate decision.

The totality of the evidence, including the police report, the A-44 form, the Breathalyzer test strip, and the testimony of Officer Sadiev and the plaintiff, provides reliable, probative, and substantial evidence that the plaintiff refused to submit to a breath test. The plaintiff has not met his burden of proving that the hearing officer erred in concluding that there existed sufficient evidence of refusal.

The judgment is affirmed.

In this opinion the other judges concurred.

DOMINIC LEMMA *v.* YORK AND CHAPEL, CORP.
(AC 43786)

Alvord, Cradle and Eveleigh, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court denying its application to vacate an arbitration award that was rendered against it and granting the application filed by the plaintiff, its former employee, to confirm the award. The plaintiff had claimed that the defendant terminated his employment in violation of a written employment agreement between the parties. During the pendency of the arbitration proceeding, the trial court granted the plaintiff's application for an order pendente lite pursuant to statute (§ 52-422) and for a prejudgment remedy. On appeal, the defendant claimed, inter alia, that the trial court lacked subject matter jurisdiction because the case was commenced with the application for a prejudgment remedy, and the plaintiff thereafter failed to serve and return the summons and complaint to court as required by statute (§ 52-278j). *Held* that the judgment of the trial court was affirmed, as the statutory (§§ 52-417 and 52-418) requirements relevant to the parties' applications to vacate and to confirm the arbitration

award clearly were satisfied, the requirements of § 52-278j were inapplicable to proceedings pursuant to § 52-422, and, as the trial court thoroughly addressed the arguments raised in this appeal as to the claim that it erred in confirming the arbitration award, this court adopted the trial court's well reasoned decision as a correct statement of the facts and applicable law on the issues.

Argued March 10—officially released May 4, 2021

Procedural History

Application for a prejudgment remedy seeking the attachment or garnishment of certain of the defendant's property, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the plaintiff's application for a prejudgment remedy by agreement of the parties; thereafter, the defendant filed an application to vacate an arbitration award and the plaintiff filed an application to confirm the award; subsequently, the matter was tried to the court, *Pierson*, *J.*; judgment denying the application to vacate and granting the application to confirm, from which the defendant appealed to this court. *Affirmed.*

Bruce L. Elstein, for the appellant (defendant).

Stephen J. Curley, for the appellee (plaintiff).

Opinion

EVELEIGH, J. The defendant, York & Chapel, Corp., appeals from the judgment of the trial court confirming an arbitration award in favor of the plaintiff, Dominic Lemma. On appeal, the defendant claims that the court (1) lacked subject matter jurisdiction over the case and (2) erred in confirming the arbitration award. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. The plaintiff and the defendant entered into an "Executive Agreement" (agreement) on March 2, 2018. Pursuant to the agreement, the defendant employed the plaintiff

as "[d]irector of [m]arketing of the [defendant's] wholly-owned [marketing] division," with the plaintiff being responsible for "new business development, client relations, creative direction, and strategic consulting." The plaintiff was to be employed "on a part-time basis for two years . . . [working] [sixteen] hours to [thirty-two] hours . . . per week . . . [for] a salary of [$50,000] on an annualized basis . . . paid in semi-monthly installments." The defendant also agreed to reimburse the plaintiff for "all reasonable travel, dining and other ordinary, necessary and reasonable business expenses incurred . . . in the performance of his duties under [the agreement], subject to reasonable budget and/or other limitations or conditions agreed to with [the defendant]." The agreement further provided: "In the event that the [a]greement becomes terminated by [the plaintiff] for cause, [or] by [the defendant] without cause, then . . . [the defendant] shall pay to [the plaintiff] [an] additional severance payment . . . ."

In August, 2018, the defendant terminated the plaintiff's employment. On August 22, 2018, the plaintiff commenced the underlying arbitration action, claiming: "On or about August 15, 2018, [the defendant] terminated [the plaintiff's employment] without cause and without notice. As of that date, [the defendant] had failed to pay [the plaintiff $2083.34] in salary through August 15, 2018. [The defendant] had also failed to reimburse [$4200] in expenses through August 15, 2018. [The defendant] has materially breached the [a]greement. [The plaintiff] claims that he is entitled to damages for his unpaid salary and unreimbursed expenses . . . . In addition, [the plaintiff] is entitled to a [t]ermination [p]ayment as specified . . . [in] the [a]greement . . . [of] . . . at least $29,166.76. Moreover, [the defendant's] breach constitutes a violation of [General Statutes §] 31-72[1] entitling [the plaintiff] to double damages." (Footnote added.)

[1] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections

On September 6, 2018, the plaintiff filed an "application for [an] order pendente lite in aid of arbitration and for [a] prejudgment remedy," claiming "[t]hat there is probable cause that an arbitral award and judgment . . . will be rendered . . . in favor of [the plaintiff]" and "seek[ing] an order from [the court] directing that an attachment and/or garnishment be granted against sufficient property of [the defendant] in order to secure the sum of $35,450.10." On November 5, 2018, the court entered the following order: "The court by agreement of the parties enters a [prejudgment remedy] in the amount of $35,450.10. The defendant will provide disclosure of assets in this matter and will provide notice when compliance has been made."

The arbitration hearing occurred on May 23, 2019. On July 9, 2019, the arbitrator entered the following award: "The [plaintiff] is entitled to recover the following damages: (a) $1923.07 in salary for the time worked before he received notice of his termination; (b) $2907.73 for uncovered expenses; (c) $33,566.68 as the [t]ermina-t[ion] [p]ayment under the [a]greement when he was terminated without cause during the first year of the [a]greement; [and] (d) $1923.07 as the amount of unpaid wages doubled under the terms of [§ 31-72]. . . . Therefore the total damages awarded to [the plaintiff] against the [defendant] are $40,320.55. The administrative fees of the American Arbitration Association totaling $2950 and the compensation of the arbitrator totaling $13,350 shall be borne equally by the parties."

31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with section 31-76k or where an employee . . . institutes an action to enforce an arbitration award which requires an employer to make an employee whole . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between an employee and his or her

On August 2, 2019, the defendant filed an application to vacate the arbitration award, and on August 29, 2019, the plaintiff filed an application to confirm the arbitration award. On December 19, 2019, the court issued its memorandum of decision denying the defendant's application to vacate and granting the plaintiff's application to confirm the arbitration award. It is from that judgment that the defendant appeals. Additional facts and procedural history will be set forth as necessary.

I

We turn first to the defendant's claim—made for the first time on appeal—that the court lacked subject matter jurisdiction over the case. Specifically, the defendant claims that the court "lack[ed] subject matter jurisdiction over the case because it was commenced as a prejudgment remedy and no service and return were timely made after the order entered granting the prejudgment remedy sought in violation of General Statutes § 52-278j . . . ." The plaintiff counters that "[t]he docketed proceeding commenced with an application for an order pendente lite in aid of arbitration pursuant to [General Statutes] § 52-422 rather than an application for [a] prejudgment remedy. Arbitrations do not proceed based upon 'writ, summons and complaint.' As such, there was no signed writ, summons and complaint to serve on [the defendant] and return to court. There was no unsigned writ, summons and complaint for that matter. The requirements of [§ 52-278j] simply do not apply to the circumstances of this case." (Footnote omitted.) We conclude that the court had subject matter jurisdiction over the case.

"We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and

employer for payment of wages other than as specified in said sections shall be no defense to such action. . . ."

review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Citations omitted; internal quotation marks omitted.) *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005).

In the present case, the plaintiff filed in the Superior Court an application for an order pendente lite, pursuant to § 52-422, which "is a special statutory proceeding" made in support of an arbitration action. *Goodson* v. *State*, 232 Conn. 175, 180, 653 A.2d 177 (1995). Section 52-422 provides in relevant part that "[a]t any time before an award is rendered pursuant to an arbitration under this chapter, the superior court for the judicial district in which one of the parties resides . . . may make forthwith such order or decree, issue such process and direct such proceedings as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered and confirmed." Accordingly, pursuant to § 52-422, during the pendency of an arbitration proceeding and before an award is rendered, a party may file an application with the Superior Court for an order to protect the rights of the parties related to the pending arbitration matter.

The defendant relies on § 52-278j, which provides that, "[i]f an application for a prejudgment remedy is granted but the plaintiff, within thirty days thereof, does not serve and return to court the writ, summons and complaint for which the prejudgment remedy was allowed, the court shall dismiss the prejudgment remedy." We conclude that the requirements set forth in

§ 52-278j are inapplicable to proceedings pursuant to § 52-422. Accordingly, we reject the defendant's claim that the court lacked subject matter jurisdiction over the case on the basis of the plaintiff's failure to comply with the requirements set forth in § 52-278j.

General Statutes §§ 52-417 and 52-418 provide the jurisdictional requirements that are relevant to the parties' applications to vacate and confirm the arbitration award. Section 52-417 provides in relevant part: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides . . . for an order confirming the award. . . ." Section 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the [stated] defects . . . ." Because these jurisdictional requirements clearly have been satisfied, we conclude that the trial court had subject matter jurisdiction over the case.

II

We turn now to the defendant's claim that the trial court erred in confirming the arbitration award. Specifically, the defendant argues that the court erred in confirming the arbitration award (1) "in light of the defendant's request to continue the arbitration hearing for just cause," (2) "when the underlying award required the defendant to pay half of the arbitration fee and denied [the defendant's] request for attorney's fees in direct contravention of the underlying contract," (3) when the underlying award "granted double damages [to the plaintiff] pursuant to . . . § 31-72," and (4) "when the . . . award itself was in excess of the amount demanded by the [plaintiff] in [his] application . . . ."

After a careful examination of the record and the proceedings before the trial court, in addition to the parties' briefs and oral arguments, we conclude that the judgment of the trial court should be affirmed. Because the court thoroughly addressed the arguments that are now before this court on appeal, we adopt its well reasoned decision denying the defendant's application to vacate and granting the plaintiff's application to confirm the arbitration award as a correct statement of the facts and applicable law with respect to these issues. See *Lemma* v. *York & Chapel, Corp.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-18-5016228-S (December 19, 2019) (reprinted at 204 Conn. App. 478, A.3d). Any further discussion of these issues by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010).

The judgment is affirmed.

In this opinion the other judges concurred.

APPENDIX

DOMINIC LEMMA *v.* YORK AND CHAPEL, CORP.*

Superior Court, Judicial District of Ansonia-Milford
File No. CV-18-5016228-S

Memorandum filed December 19, 2019

Proceedings

Memorandum of decision on defendant's application to vacate and plaintiff's motion to confirm arbitration award. *Judgment denying the application to vacate and granting the application to confirm.*

Stephen J. Curley, for the plaintiff.

Bruce L. Elstein, for the defendant.

* Affirmed. *Lemma* v. *York & Chapel, Corp.*, 204 Conn. App. 471, A.3d (2021).

Opinion

PIERSON, J.

STATEMENT OF THE CASE

This action was commenced by an application for an order pendente lite in aid of arbitration and for a prejudgment remedy. According to a supporting affidavit filed by the applicant, Dominic Lemma, on March 2, 2018, he and the respondent, York & Chapel, Corp., entered into an executive agreement pursuant to which the applicant agreed to be employed by the respondent, part-time, from January 2, 2018 through December 31, 2018 (agreement). Further, according to the applicant, the respondent agreed to compensate the applicant at a rate of $50,000 per year on a semimonthly basis; permit the applicant to participate in group insurance and other health benefit plans; reimburse the applicant for business expenses; and provide paid holidays, vacation days, and sick leave.

The applicant alleges that, despite complying fully with his obligations under the agreement, the respondent terminated his employment on or about August 15, 2018, without cause or notice. The applicant further alleges that, as of the date of his termination, the respondent had failed to pay him wages and reimburse business expenses in accordance with the agreement. The applicant claims that a "Termination Payment" due under the agreement was not paid. He further claims that the failure to pay him wages may constitute a violation of General Statutes § 31-72, "which may entitle [him] to double damages." The applicant averred that probable cause exists to support an arbitration award in his favor "in at least the amount of $35,450.10 . . . ."

According to the applicant, on August 22, 2018, he demanded arbitration pursuant to the agreement "under the auspices of the American Arbitration Association."

Section 11 of the agreement provides, at subsection (f), in part as follows: "At either party's option, any dispute arising directly or indirectly from the performance or breach of a party's obligations under this Agreement shall be resolved by binding arbitration before the American Arbitration Association [AAA], using its then current Commercial Arbitration Rules. The panel shall consist of one arbitrator. The Arbitration Panel shall be authorized to resolve all questions of law and fact between the parties, but shall not be authorized to award special, consequential or punitive damages."

The AAA "Online Filing Acknowledgement" form filed by the applicant, which served as a "Demand for Arbitration," reflects, inter alia, several claims—namely, that the respondent (1) failed to pay the applicant $2083.34 in salary through August 15, 2018, (2) failed to reimburse expenses of $4200 through August 15, 2018, and (3) owed a termination payment of "at least" $29,166.76. The "Claim Amount" listed on the form is $34,450.10. The form also reflects that the respondent's alleged breach "constitutes a violation of [§] 31-72 entitling [the applicant] to double damages. Claimant also seeks interest, attorney's fees and arbitration costs."

The facts and circumstances surrounding the arbitration are largely undisputed. An arbitration hearing was scheduled to be held before James F. Stapleton, as arbitrator, on May 22 and 23, 2019. According to the respondent, on May 16, 2019, the respondent's attorney was informed "of the impending death of a close personal friend of over [forty] years. He . . . passed on May 16, 2019." On May 17, 2019, at 5:11 p.m., the applicant's attorney wrote to the arbitrator, stating that, "as of the close of business on May 17, 2019, Claimant has not received Respondent's Exhibits in conformance with Scheduling Order #1 as modified by the Arbitrator earlier this week. This situation compounds the prejudice suffered by Claimant, who timely complied with Scheduling Order #1."

In response, the respondent's attorney sent an e-mail to opposing counsel at 6:15 p.m. on May 17, 2019—on which the arbitrator was copied—which reads in part as follows: "I was informed Thursday morning of an impending death of a friend of over [forty] years. He passed yesterday afternoon. I knew he was in hospice. I was unable to work at all yesterday and very little today. The arrangements are still not firm but are anticipated to be Monday/Tuesday or Tuesday/Wednesday. It will be in [Foxborough] MA. I am giving the eulogy. I plan to work Monday [morning, as] I have a [long-standing] mediation in an important case and then will be out of town. Because I was unable to attend to this, I request a continuance of both the exhibits and the hearing."

The arbitrator continued the hearing by one day, from May 22, 2019, to May 23, 2019. An e-mail from the arbitrator dated May 18, 2019, reads, "[g]iven what has occurred [t]o date on this case and to be fair to all the following orders are hereby entered: the hearing is reduced to one day to be held on Thursday May 23, at 9 [a.m. . . .] and if [the respondent's counsel, Attorney Bruce L.] Elstein is unavailable [Attorney John J.] Ribas or another lawyer from that firm should handle the case on behalf of the [r]espondent."

The respondent's attorney did not return home from Massachusetts "until very late on May 22, 2019." On May 22, 2019, in the early afternoon, the respondent's attorney sent a second continuance request, which was denied.[1] Prior to the denial, counsel for the applicant sent two e-mails to the respondent's counsel (on which the arbitrator was copied) dated May 22, 2019, in which he stated in part as follows: "[M]y client is literally en route from points west to attend the hearing tomorrow.

[1] On both occasions, the respondent's attorney's continuance requests were sent to the applicant's counsel, with the arbitrator copied on the correspondence.

[The] [r]espondent has an entire firm (including Attorney Ribas, who participated in the preliminary conference call in the arbitration and has represented [the] [r]espondent in related litigation proceedings) available to handle this proceeding. [The] [c]laimant has paid all of the fees for this arbitration, the hearing of which was scheduled in November. [The] [r]espondent has ignored deadlines, failed to make payments and caused avoidable motion practice (motion to dismiss counterclaim). Enough is enough. As I wrote last week, I, as a solo attorney, do not have availability to handle a rescheduled hearing for several weeks. The prejudice to [the] [c]laimant is therefore even more palpable than it was several days ago. [The] [c]laimant insists that we proceed as ordered tomorrow." Sometime later, the applicant's attorney wrote: "One last point—at least one [third-party] witness has been subpoenaed to the hearing tomorrow as well. Disrupting the hearing therefore causes inconvenience to more than just the [p]anel, the parties and counsel."

The arbitration hearing was held on May 23, 2019, before the AAA arbitrator. According to the respondent's counsel, "[b]ecause the undersigned counsel was unavailable, Attorneys Matthew Woods and John Ribas were required, at the last second, to scramble to prepare for a hearing they never intended to attend, never mind actually conduct."

The arbitrator issued a written award in the matter on July 9, 2019. In the award, the arbitrator concluded that the respondent "did not have [c]ause under the [a]greement to terminate the [c]laimant and is therefore liable for damages under the terms in the [a]greement as provided under Connecticut law as set forth herein." The arbitrator further concluded that the applicant was entitled to recover the following items of damage: (1) $1923.07 in salary for time worked before he received notice of his termination; (2) $2907.73 for uncovered

expenses; (3) a $33,566.68 termination payment; and (4) $1923.07 in unpaid wages, doubled pursuant to § 31-72, on the grounds that the termination was unreasonable or arbitrary. Thus, the arbitrator awarded total damages of $40,320.55. The respondent was also directed to reimburse the applicant the sum of $8150, representing a one-half portion of administrative and arbitration fees, which were divided equally between the parties. Additional facts are recited below, as necessary.

On August 2, 2019, the respondent filed a motion to vacate and/or modify the arbitration award (No. 120.00). In the motion, the respondent asks the court to vacate or modify the arbitrator's award on four grounds: (1) by failing to continue the arbitration hearing held on May 23, 2019, the arbitrator was guilty of misconduct in violation of General Statutes § 52-418 (a) (3), for refusing to postpone a hearing for sufficient cause shown or other action by which the rights of any party have been prejudiced; (2) the arbitrator exceeded his authority in violation of § 52-418 (a) (4) by requiring the respondent to pay more than the sum demanded in the arbitration; (3) the arbitrator exceeded his power in violation of § 52-418 (a) (4) in ordering the respondent to pay one-half of the arbitration expenses and denying the respondent's request for attorney's fees; and (4) an award of double damages pursuant to § 31-72 is unavailable in arbitration.

Thereafter, on August 29, 2019, the applicant filed an application to confirm the arbitration award pursuant to General Statutes §§ 52-417 and 52-420 (No. 123.00). On September 4, 2019, the applicant filed an objection to the respondent's motion to vacate and/or modify the arbitration award (No. 124.00).

The motion to vacate and/or modify, and the application to confirm, were submitted to the court on September 9, 2019, following oral argument, on which date the

court took the matters under advisement. No evidentiary hearing was requested, and none is necessary for the court to resolve the motion and application presented. See *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 797–98, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019).

DISCUSSION

I

Our Supreme Court has held that, "for many years [it has] wholeheartedly endorsed arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation. . . . When arbitration is created by contract, we recognize that its autonomy can only be preserved by minimal judicial intervention. . . . Because the parties themselves, by virtue of the submission, frame the issues to be resolved and define the scope of the arbitrator's powers, the parties are generally bound by the resulting award. . . . Since the parties consent to arbitration, and have full control over the issues to be arbitrated, a court will make every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings. . . . The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it, and only upon a showing that it falls within the proscriptions of § 52-418 of the General Statutes, or procedurally violates the parties' agreement will the determination of an arbitrator be subject to judicial inquiry." (Citations omitted; internal quotation marks omitted.) *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, 203 Conn. 133, 145–46, 523 A.2d 1271 (1987).

"A party's choice to accept arbitration entails a tradeoff. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter. . . .

Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration." (Internal quotation marks omitted.) *DeRose* v. *Jason Robert's, Inc.*, supra, 191 Conn. App. 794, quoting *Bridgeport* v. *Kasper Group, Inc.*, 278 Conn. 466, 478–79, 899 A.2d 523 (2006). "The propriety of arbitration awards often turns on the unique standard of review and legal principles applied to decisions rendered in this forum. [Thus, judicial] review of arbitral decisions is narrowly confined. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 531, 205 A.3d 552 (2019).

"The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it . . . . [W]e have . . . recognized three grounds for vacating an [arbitrator's] award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Internal quotation marks omitted.) *Marulli* v. *Wood Frame Construction Co., LLC*, 124 Conn. App. 505, 509, 5 A.3d 957 (2010), cert. denied, 300 Conn. 912, 13 A.3d 1102 (2011), quoting *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 474. "If such party fails to carry [this] burden, then the court has no discretion but to confirm the award." *Between Rounds Franchise Corp.* v. *EDGR Real Estate, LLC*, 52 Conn. Supp. 295, 298, 40 A.3d 833 (2011), aff'd, 134 Conn. App. 857, 40 A.3d 342, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012), citing *Middlesex Mutual Assurance Co.* v. *Komondy*, 120 Conn. App. 117, 128, 991 A.2d 587 (2010).

Section 52-418 (a) reads in part as follows: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects . . . (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." Here, the respondent moves to vacate the arbitration award pursuant to § 52-418 (a) (3) and (4).

II

"The concept of arbitral 'misconduct' does not lend itself to a precise definition but is, instead, best illustrated by example. . . . Among the actions that have been found to constitute such misconduct on the part of an arbitrator as would warrant vacating an arbitration award are the following: participation in ex parte communications with a party or a witness, without the knowledge or consent of the other party . . . ex parte receipt of evidence as to a material fact, without notice to a party . . . holding hearings or conducting deliberations in the absence of a member of an arbitration panel, or rendering an award without consulting a panel member . . . undertaking an independent investigation into a material matter after the close of hearings and without notice to the parties . . . and accepting gifts or other hospitality from a party during the proceedings. . . . An award may likewise be set aside on the basis of procedural error by an arbitration panel if, for instance, the panel arbitrarily denies a reasonable request for postponement of a hearing . . . or commits an egregious evidentiary error, such as refusing to hear material evidence or precluding a party's efforts to

develop a full record. . . . Though not exhaustive, these examples of arbitral misconduct delineate the broad contours of conduct that is unacceptable and prohibited under § 52-418 (a) (3). The presumptive validity of consensual arbitration awards depends upon the underlying integrity of the arbitration process. When that integrity is tainted either by actual impropriety or the appearance of impropriety, the arbitration award cannot be permitted to stand." (Citations omitted.) *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, supra, 203 Conn. 146–48. In order "to vacate an arbitrator's award on the ground of misconduct under § 52-418 (a) (3), the moving party must establish that it was *substantially prejudiced* by the improper ruling." (Emphasis added.) *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 476.

The court's analysis is aided further by reference to federal case law. As noted by our Supreme Court, "[u]nder 9 U.S.C. § 10 (a) (3),[2] a District Court 'may make an order vacating the award upon the application of any party to the arbitration . . . [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.' This court previously has recognized that federal case law applying this statute is instructive because of the substantial similarity between the language of this statute and § 52-418 (a) (3)." (Footnote added.) Id., 475–76 n.7; see also *Windham* v. *Doctor's Associates, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-10-6004162 (January 3, 2012) (*Keegan, J.*) (53 Conn. L. Rptr. 264, 265) ("[o]ur Supreme Court regularly finds that federal cases pertaining to nearly identical provisions in the

[2] Section 10 of title 9 of the United States Code is part of the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

Federal Arbitration Act, 9 U.S.C. § 10, are instructive in analyzing § 52-418"), aff'd, 146 Conn. App. 768, 81 A.3d 230 (2013).[3]

As observed by the United States District Court for the District of Connecticut, "[t]he [United States Court of Appeals for the] Second Circuit has interpreted [§] 10 (a) (3) to mean that, except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review. . . . Arbitral misconduct typically arises where there is proof of either bad faith or gross error on the part of the arbitrator. . . . The party moving for vacatur must show not only that the arbitrator committed misconduct but also that the party was prejudiced as a result." (Citations omitted; internal quotation marks omitted.) *Vyas* v. *Doctor's Associates, Inc.*, United States District Court, Docket No. 3:17-cv-1774 (JCH) (D. Conn. March 21, 2018). "When determining whether to vacate an arbitral award on the ground that the arbitrator refused to continue a hearing, the court 'examines the facts and circumstances surrounding the arbitrator's refusal to grant an adjournment.' " Id.

A

"Parties to an arbitration are not entitled to a postponement merely by asking for one, nor is every decision of an arbitrator to deny a request for a postponement and proceed with the arbitration grounds for vacating the award. In passing on requests for postponements an arbitrator may balance the prejudice to the moving party resulting from the failure to postpone

[3] This court has considered at length the history of arbitration in our common-law tradition. *Silverstone* v. *Connecticut Eye Surgery Center South, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-18-6080472-S (October 23, 2018) (*Pierson, J.*). In so doing, the court noted the similarity between Connecticut public policy and the public policy of the United States, both of which favor the arbitration of private disputes between litigants. Id.

against the prejudice to the opposing party due to granting a postponement, the avoidability of such postponement, and other circumstances as warranted in each case." *Two Sisters, Inc.* v. *Gosch & Co.*, 171 Conn. 493, 499 n.4, 370 A.2d 1020 (1976); see also *Local Union No. 251* v. *Narragansett Improvement Co.*, 503 F.2d 309, 312 (1st Cir. 1974) ("Appellant's position in this case reduces to a claim that it is entitled to a postponement merely by asking for it. Such a view is obviously unacceptable.").

"The arbitrary denial of a reasonable request for a postponement may serve as grounds for vacating an arbitration award. . . . However, the expeditious resolution of a dispute remains one of the principal purposes for referring the matter to arbitration, and [9 U.S.C. § 10 (a) (3)] limits the [c]ourt's review to a determination as to whether the arbitrators were guilty of misconduct in refusing a postponement. As such, it follows that arbitrators are to be accorded a degree of discretion in exercising their judgment with respect to a requested postponement." (Citation omitted; emphasis omitted.) *Fairchild & Co.* v. *Richmond, Fredericksburg & Potomac Railroad Co.*, 516 F. Supp. 1305, 1313 (D.D.C. 1981). In fact, "[a]rbitrators are given broad latitude to grant or deny parties' adjournment requests at their discretion." *Rai* v. *Barclays Capital, Inc.*, 739 F. Supp. 2d 364, 371 (S.D.N.Y. 2010) (citing *Tempo Shain Corp.* v. *Bertek, Inc.*, 120 F.3d 16, 19 (2d Cir. 1997)), aff'd, 456 Fed. Appx. 8 (2d Cir. 2011), cert. denied, 566 U.S. 979, 132 S. Ct. 2113, 182 L. Ed. 2d 877 (2012). "The court will not interfere with an award on these grounds as long as there exists a reasonable basis for the arbitrators' refusal to grant a postponement." (Internal quotation marks omitted.) *Rai* v. *Barclays Capital, Inc.*, supra, 371.

The court concludes that the arbitrator did not engage in misconduct in violation of § 52-418 (a) (3) and acted

within his discretion when he denied the respondent's second request to continue the arbitration. This is because there were reasonable grounds for the refusal. To begin, the reason for the requested postponement—attendance at a close friend's funeral in a neighboring state—is insufficiently compelling to require an arbitrator to postpone, twice, a previously scheduled hearing. While the court takes seriously the attorney's loss of a close personal friend, that circumstance does not rise to the level of an event that would prescribe an adjournment in many circumstances, such as a medical emergency materially affecting the admission or presentation of evidence. See, e.g., *Bisnoff* v. *King*, 154 F. Supp. 2d 630, 638 (S.D.N.Y. 2001) ("absent a reasonable basis for its decision, a refusal to grant an adjournment of a hearing, due to a medical emergency, constitutes misconduct under the Federal Arbitration Act if it excludes the presentation of evidence material and pertinent to the controversy thus prejudicing the parties in the dispute"); *Allendale Nursing Home, Inc.* v. *Local 1115 Joint Board*, 377 F. Supp. 1208, 1214 (S.D.N.Y. 1974) (granting motion to vacate arbitration award where the plaintiff's administrative assistant became ill during arbitration proceeding and was taken to the hospital, and plaintiff had requested an adjournment on the ground that presence of administrative assistant was necessary to proper cross-examination of the defendant's witnesses). Here, the respondent has not demonstrated sufficient cause for the second requested postponement. See *Between Rounds Franchise Corp.* v. *EDGR Real Estate, LLC*, supra, 52 Conn. Supp. 301 (motion to vacate denied where the moving party submitted "no evidence establishing that it had demonstrated to the [arbitration] panel sufficient cause to obtain a postponement"); see also *Vyas* v. *Doctor's Associates, Inc.*, supra, United States District Court, Civil Action No.

3:17-cv-1774 (JCH) (denial of requests to postpone hearing not fundamentally unfair where sufficient cause not shown).

Moreover, according to the respondent, Attorney Elstein was back home from the funeral on May 22, 2019, albeit "very late." Thus, the respondent's attorney had returned by May 23, 2019, and the record does not reflect that Attorney Elstein was unable to attend the hearing. See *Vyas* v. *Doctor's Associates*, *Inc.*, supra, United States District Court, Civil Action No. 3:17-cv-1774 (JCH) (motion to vacate denied where there was no allegation that parties, attorneys, or witnesses were unable to attend the scheduled hearing). In addition, and while Attorney Elstein did not attend the hearing, the respondent was represented by counsel at the hearing, namely, by two of Attorney Elstein's colleagues, at least one of whom had been involved previously in the case.

Finally, in declining the respondent's request for a second continuance, the arbitrator was not limited to a consideration of the respondent's concerns. Rather, the arbitrator was required to balance "the prejudice to the moving party resulting from the failure to postpone *against the prejudice to the opposing party due to granting a postponement* . . . and other circumstances as warranted in each case." (Emphasis added.) *Two Sisters*, *Inc.* v. *Gosch & Co.*, supra, 171 Conn. 499 n.4. Here, in opposing the second requested continuance, the applicant's counsel cited as prejudicial, inter alia, the fact that (1) the applicant was "en route from [the West Coast] to attend the hearing," (2) at least one third-party witness had been subpoenaed to the hearing, and (3) the applicant's counsel, as a solo attorney, could not handle a rescheduled hearing for a period of time. In light of the fact that arbitration is designed to afford parties a more expeditious resolution of their disputes, and in balancing the prejudice to the parties and the

other circumstances existing, it was within the arbitrator's discretion to deny the second requested continuance of the hearing date. No proof of bad faith or gross error on the part of the arbitrator has been presented, and the arbitrator did not engage in misconduct under § 52-418 (a) (3).

B

Furthermore, even if the arbitrator's refusal to grant a second continuance constituted misconduct, the respondent has not demonstrated that it was prejudiced by the arbitrator's actions, let alone substantially prejudiced. The respondent was represented by counsel in the arbitration proceeding. No evidence was allegedly precluded at the hearing. See, e.g., *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 483–86 (affirming trial court order vacating arbitration award where party was prejudiced by arbitrator's failure to consider testimony that was highly probative and likely to have altered outcome if introduced).

The only specific ground of prejudice cited by the respondent is that Attorney Elstein had interviewed personally a third-party witness in advance of the hearing and that the witness testified at the hearing "in direct contravention to her prior statements." Even if accepted as true, this fails to demonstrate substantial prejudice to the respondent. The respondent fails to show, specifically and by sufficient evidence, that Attorney Elstein's presence at the hearing would have altered the impact of this testimony or the arbitrator's award. See, e.g., *Jenkins* v. *Jenkins*, 186 Conn. App. 641, 650, 200 A.3d 1193 (2018) (affirming trial court's denial of motion to vacate arbitration award and noting that plaintiff failed to show that particular witness' testimony "would have impacted the outcome of the proceedings"); see also *Hartford Municipal Employees Assn.* v. *Hartford*, 128 Conn. App. 646, 659, 19 A.3d 193

(testimonial evidence from individual witness was not so central to plaintiff's case that panel's failure to consider it constituted misconduct), cert. denied, 301 Conn. 934, 23 A.3d 730 (2011). Thus, the respondent has not demonstrated substantial prejudice resulting from the arbitrator's refusal to grant a second continuance of the arbitration hearing.

III

The respondent also argues that the arbitrator exceeded his powers because he awarded the applicant an amount in excess of the amount listed on the demand for arbitration form submitted by the applicant to the AAA. The argument is rejected.

In *Quinn Associates, Inc.* v. *Borkowski*, 41 Conn. Supp. 17, 20, 548 A.2d 480 (1988), the defendant sought to vacate an arbitration award on the ground that the arbitrator exceeded his authority in making an award. According to the defendant in that case, "the submission is restricted by the amount of $21,854.06 that the plaintiff claimed in the original demand for arbitration and . . . the arbitrator exceeded his power by awarding $29,283." Id., 21. In denying the motion to vacate on this ground, the court in *Quinn Associates, Inc.*, observed, "[t]he defendant cites no authority in Connecticut or elsewhere for this contention, and this court can find none. . . . In this court's view, it makes no sense for the amount of the claim or relief sought to constitute a restriction on the arbitrator. If the parties submitted to the arbitrator the question of whether a claimant should be compensated a specified sum, then, by awarding a different sum, the arbitrator exceeds his power. But when the submission is general, as here, and includes an agreement to decide by arbitration all disputes under the contract, the arbitrator is free to award more or less than the amount claimed. The essence of the submission is that the arbitrator resolve

all disputes. *A statement of the amount claimed is a guide to the arbitrator, but not a limitation on his power.*" (Citations omitted; emphasis added.) Id., 21–22. This court agrees and holds that the claim amount listed in the applicant's demand for arbitration did not limit the arbitrator's power to award a larger sum.

Moreover, the respondent misapprehends the nature of the submission in this case. The "submission" to which the arbitration award must conform is defined by § 11 (f) of the agreement, *not by the demand for arbitration form filed by the applicant.* "The arbitration clause in a contract constitutes the written submission to arbitration. . . . If the parties have agreed in the underlying contract that their disputes shall be resolved by arbitration, the arbitration clause in the contract is a written submission to arbitration." (Citations omitted; internal quotation marks omitted.) *Exley* v. *Connecticut Yankee Greyhound Racing, Inc.*, 59 Conn. App. 224, 229, 755 A.2d 990, cert. denied, 254 Conn. 939, 761 A.2d 760 (2000). Section 11 (f) of the agreement defined the parties' submission in broad terms to include "any dispute arising directly or indirectly from the performance or breach of a party's obligations under this [agreement]" and "all questions of law and fact between the parties . . . ."[4] Thus, and as noted by the court in *Quinn Associates, Inc.* v. *Borkowski*, supra, 41 Conn. Supp. 17, "[t]he agreement of submission in this case is the . . . contract between the parties, which provided: 'All claims, disputes and other matters in question . . . arising out of or relating to this [a]greement or the breach thereof, shall be decided by arbitration . . . . The demand for arbitration identified the nature of the dispute as the contract balance due the plaintiff. In deciding the defendant's claim that the arbitrator exceeded his powers, within the meaning of § 52-418 (a) (4), this court need only examine the

[4] The only express limitation imposed by the submission is a prohibition against an award of special, consequential, or punitive damages.

submission and the award to determine whether the award conforms to the submission. . . . Here the submission covered all claims in question under the contract, and the award was in full and final settlement of all such claims. Thus, the award conforms to the submission and is within the authority of the arbitrator." Id., 20–21; see also *Blatt* v. *Farley*, 226 Cal. App. 3d 621, 627, 276 Cal. Rptr. 612 (1990) (rejecting party's attempt to convert demand for arbitration into submission agreement). The arbitrator did not exceed his authority in awarding a sum in excess of the claim amount reflected in the demand for arbitration filed by the applicant, as the award was within the scope of the parties' prearbitration submission as set forth in § 11 (f) of the agreement.[5]

IV

The respondent also contends that the arbitrator exceeded his authority under § 52-418 (a) (4) by requiring the respondent to pay one-half of the arbitration fee and denying the respondent an award of attorney's fees. The respondent's argument is based on the claim that the agreement was unambiguous with respect to an award of fees, and that the arbitrator mistakenly interpreted and applied, and improperly reformed, the fee provisions of the arbitration clause of the agreement.

The respondent does not dispute that the submission was unrestricted, except as to an award of special, consequential, or punitive damages. "Even in the case of an unrestricted submission, however, a reviewing

[5] Although the "Claim Amount" reflected in the demand for arbitration was $35,450.10, the affidavit in support of the applicant's "Application for Order Pendente Lite in Aid of Arbitration and for Prejudgment Remedy," dated September 5, 2018, reads, in part, at paragraph 11, that "probable cause exists to support an award in my favor . . . and against [the] [r]espondent in *at least* the amount of $35,450.10, taking into account all of the [r]espondent's known defenses, counterclaims and setoffs." (Emphasis added.)

court will vacate an award when an arbitrator has exceeded the power granted to [him or] her by the parties' submission. . . . [A] claim that [an arbitrator has] exceeded [his or her] powers may be established under § 52-418 in either one of two ways: (1) the award fails to conform to the submission, or, in other words, falls outside the scope of the submission; or (2) the [arbitrator] manifestly disregarded the law." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 531–32. Thus, the court is faced with a two part inquiry.

As for conforming with the submission, "[w]hen the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission. . . . [Moreover] the factual findings of the arbitrator . . . are not subject to judicial review." (Citation omitted; internal quotation marks omitted.) *Norwalk Police Union, Local 1727, Council 15, AFSCME, AFL-CIO* v. *Norwalk*, 324 Conn. 618, 628, 153 A.3d 1280 (2017). "[U]nder an unrestricted submission, the [arbitrator's] decision is considered final and binding; thus the courts will not review the evidence considered by the [arbitrator] nor will they review the award for errors of law or fact. . . . A submission is deemed restricted only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 531. Given the unrestricted nature of the parties' submission with respect to all issues other than the award of special, consequential, or punitive damages, the court will not review the errors of law or fact alleged by the respondent with respect to the arbitrator's award of fees. See, e.g., *Quinn Associates, Inc.* v. *Borkowski*, supra, 41 Conn. Supp. 21 ("Here the submission covered all claims in question under the contract, and the award was in full

and final settlement of all such claims. Thus, the award conforms to the submission and is within the authority of the arbitrator.").

As for the claim that the arbitrator acted in manifest disregard of the law in awarding fees, our Supreme Court has "outlined the following burden of proof for claims that an arbitrator . . . issued a decision in manifest disregard of the law in violation of § 52-418 (a) (4) [as follows]: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is well defined, explicit, and clearly applicable." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 533.

"We have emphasized . . . that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotation marks omitted.) *Norwalk Police Union*, *Local 1727*, *Council 15*, *AFSCME*, *AFL-CIO* v. *Norwalk*, supra, 324 Conn. 629. "[Courts] are not at liberty to set aside an [arbitrator's] award because of an arguable difference regarding the meaning or applicability of laws urged upon it. . . . Even if an arbitrator misapplies the relevant law, such a misconstruction of the law [does] not demonstrate the [arbitrator's] egregious or patently irrational rejection of clearly controlling legal principles." (Citations omitted; internal quotation marks omitted.) *Lathuras* v. *Shoreline Dental Care*, *LLC*, 65 Conn. App. 509, 514, 783 A.2d 83, cert. denied, 258 Conn. 936, 785 A.2d 231 (2001). "[M]anifest disregard of the law may be found only where the arbitrators understood and correctly stated the law but proceeded to ignore it." (Internal

quotation marks omitted.) Id.; see also *Rai* v. *Barclays Capital, Inc.*, supra, 739 F. Supp. 2d 372 ("To constitute manifest disregard, the court must find that the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless [wilfully] flouted the governing law by refusing to apply it. Obtaining judicial relief on these grounds is rare." (Footnote omitted; internal quotation marks omitted.)).[6]

The respondent fails to meet its burden of proof here. The respondent argues that the fee award "is in direct contravention of the unambiguous language of the [a]greement . . . ." In doing so, the respondent demonstrates only its disagreement with the arbitrator's interpretation and application of legal principles. See *Lathuras* v. *Shoreline Dental Care, LLC*, supra, 65 Conn. App. 515 (affirming denial of motion to vacate where applicant had not demonstrated anything more than disagreement with arbitrator's interpretation and application of established legal principles). Such a disagreement is insufficient to satisfy the exacting standard required to demonstrate a manifest disregard of the law.

[6] In its brief, the respondent fails to cite a single case in which a court vacated an arbitration award based on manifest disregard of the law under § 52-418 (a) (4) or 9 U.S.C. § 10 (a) (4). With respect to § 52-418 (a) (4), it was recently noted in a decision considering a motion to vacate and a cross motion to confirm an arbitration award that "both parties conceded at oral argument that whether the arbitrator manifestly disregarded the law [is] a claim on which litigants have yet to prevail in our courts . . . ." (Citation omitted; internal quotation marks omitted.) *Monroe* v. *Directory Assistants, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-17-6084277-S (August 8, 2018) (*Gordon, J.*) (66 Conn. L. Rptr. 793, 794); see also *Trumbull* v. *UPSEU, Local 424, Unit 4*, Superior Court, judicial district of Fairfield, Docket No. CV-07-4021977 (January 10, 2008) (*Arnold, J.*) ("[t]he exceptionally high burden for proving a claim of manifest disregard of the law under § 52-418 (a) (4) is demonstrated by the fact that, since the test was first outlined in *Garrity* v. *McCaskey*, [223 Conn. 1, 612 A.2d 742 (1992)], our Supreme Court [has] yet to conclude that an arbitrator manifestly disregarded the law").

By way of example, in *JEM Builders, Inc.* v. *Zelvin*, Superior Court, judicial district of New London, Docket No. CV-04-4000119 (March 11, 2005) (*Hendel, J.*) (38 Conn. L. Rptr. 866), aff'd, 106 Conn. App. 401, 942 A.2d 455 (2008), the court considered a motion to vacate an arbitration award based in part on the argument that the arbitrators manifestly disregarded the law in interpreting a contract. In that case, the moving parties argued "that contract interpretation begins with the plain and ordinary meaning of the contract language. In effect, the defendants argue that the arbitrators ignored the normal rules of contract interpretation in arriving at the meaning of [a section of] the contract. The parties agreed that disputes would go to arbitration . . . unless there is manifest disregard of the law. The defendants do not argue that the arbitrators ignored the law but rather that they ignored rules of contract interpretation." Id., 871. In denying the motion to vacate, the court in *JEM Builders, Inc.*, held that, "even if this court were to find that the interpretation of the contract should be other than what the arbitrators decided, in such a voluntary arbitration with an unrestricted submission, the court is not entitled to substitute its judgment for that of the arbitrators. This is true even if the arbitrators are wrong as regarding questions of law." Id.; accord *Henry* v. *Imbruce*, 178 Conn. App. 820, 843, 177 A.3d 1168 (2017), quoting *Oxford Health Plans, LLC* v. *Sutter*, 569 U.S. 564, 569, 133 S. Ct. 2064 186 L. Ed. 2d 113 (2013) ("[O]nce bound to arbitration, '[a] party seeking relief under [9 U.S.C. § 10 (a) (4)] bears a heavy burden. It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error. . . . Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits. . . . Only if the arbitrator act[s] outside the

scope of his contractually delegated authority . . . may a court overturn his determination. . . . So the sole question . . . is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.' "); *Southeastern Connecticut Resources Recovery Authority* v. *American Ref-Fuel Co. of Southeastern Connecticut*, 44 Conn. Supp. 482, 488, 692 A.2d 874 (1996), aff'd, 44 Conn. App. 728, 692 A.2d 832 ("[i]f the arbitrator did, in fact, make a mistake, the plaintiffs assumed that risk by agreeing to submit the dispute to arbitration"), cert. denied, 241 Conn. 914, 696 A.2d 341 (1997); see also *Beumer Corp.* v. *ProEnergy Services, LLC*, 899 F.3d 564, 566 (8th Cir. 2018) (in case involving arbitrator's interpretation of attorney's fees provision, holding that "[t]he parties bargained for the arbitrator's decision; if the arbitrator got it wrong, then that was part of the bargain").

Moreover, "[t]o prevail on its application to vacate an arbitration award pursuant to § 52-418 (a) (4), a party must show that the arbitrator knew that [his] award was contrary to the law." *Lathuras* v. *Shoreline Dental Care, LLC*, supra, 65 Conn. App. 515. This has not been demonstrated by the respondent.

In addition, the respondent argues that there was "no evidence" introduced that would support reformation of the fee and cost provisions of the arbitration clause. As there is no record of the arbitration proceeding, the court is unable to conclude whether or not such evidence was presented. Thus, the evidentiary record here is insufficient to support the respondent's challenge.[7]

Importantly, and as reflected in his written decision, the arbitrator's award with respect to attorney's fees and costs was made pursuant to § 31-72. As held by the

[7] In any case, as an award of fees and costs was within the parties' submission, the court will not review the arbitrator's decision for alleged errors of fact upon which the arbitrator's legal conclusions were based.

arbitrator, "[§] 31-72, which is controlling, leaves the costs and attorney's fees to the discretion of the [a]rbitrator." Costs and reasonable attorney's fees may be awarded pursuant to § 31-72 (1). See, e.g., *Lathuras* v. *Shoreline Dental Care, LLC*, supra, 65 Conn. App. 514 ("[s]ection 31-72 authorizes the award of double damages and attorney's fees under circumstances where an employer has failed to pay an employee wages"). Section 31-72 is remedial and must be given a liberal construction in favor of those whom the legislature intended to benefit, namely, employees such as the applicant. See *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 98, 881 A.2d 139 (2005). Although the recovery of attorney's fees and double damages is appropriate "only when [it is] found that the defendant acted with bad faith, arbitrariness or unreasonableness"; (internal quotation marks omitted) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 269, 828 A.2d 64 (2003); in this case, the arbitrator made a specific finding that the respondent's termination of the applicant's employment was unreasonable or arbitrary. Thus, the award of attorney's fees and costs does not involve any obvious error of law or the arbitrator's decision to ignore the law. As the respondent has not demonstrated egregious or patently irrational rejection of clearly controlling legal principles by the arbitrator, its argument with respect to the award of fees and costs fails.

V

Finally, the respondent argues that it was beyond the arbitrator's authority to award double damages as to the applicant's proven lost wages, pursuant to § 31-72. The argument is *not* based on the restriction in § 11 (f) prohibiting the arbitrator from awarding special, consequential, or punitive damages. Rather, the claim is based on the contention that an arbitration is a not a "civil action," and § 31-72 provides that, "in a civil action," an employee may recover "twice the full amount of

such wages, with costs and such reasonable attorneys fee's as may be allowed by the court . . . ."

In *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 77–78, our Supreme Court considered a party's application to vacate an arbitration award under § 52-418 (a) (4), in part, on the ground that the arbitrator manifestly disregarded the law in awarding double damages, attorney's fees, and costs pursuant to § 31-72. In asserting this argument, the applicant pointed to the fact that the employment agreement containing the arbitration submission prohibited the arbitrators from awarding punitive, exemplary, or special damages—language similar to that contained in § 11 (f) of the agreement. Id., 78. In rejecting the argument, the court discussed the distinction between punitive and exemplary damages, on the one hand, and statutory multiple damages, on the other. Id., 93–99. Following this discussion, the court in *Harty* concluded that the employment contract was "ambiguous with respect to whether the contract provision was designed to exclude the double damages provided for under § 31-72"; id., 98; and held that "the award of double damages under § 31-72 did not exceed the scope of the submission." Id., 99; see also *Lathuras* v. *Shoreline Dental Care, LLC*, supra, 65 Conn. App. 514–15 (rejecting argument that arbitrator's award of double damages under § 31-72 was in manifest disregard of law and affirming trial court's denial of application to vacate). Thus, our appellate courts have sanctioned arbitral awards that include double damages under § 31-72.

The respondent attempts to distinguish the holdings in *Harty* and *Lathuras* on the grounds that, in those cases, the parties did not argue that an arbitrator is barred from awarding double damages under § 31-72 because an arbitration is not a "civil action." Although the respondent is correct that the foregoing argument was not specifically raised in those cases, the holdings in *Harty* and *Lathuras* fairly imply that an arbitration is a "civil action" under § 31-72.

More important to the respondent's motion to vacate is that, as characterized by the respondent's counsel at oral argument, the issue of whether an arbitration is a civil action for purposes of § 31-72 is one of first impression. This characterization is fatal to the respondent's argument that the award of double damages was "beyond the authority of the arbitrator." If the issue raised by the respondent presents an unsettled question of law, the respondent cannot demonstrate the elements necessary to prove a manifest disregard of the law under § 52-418 (a) (4). See, e.g., *Wulfe* v. *Valero Refining Co.-California*, 687 Fed. Appx. 646, 648 (9th Cir. 2017) ("[t]hat the arbitrator failed to correctly predict future judicial decisions does not mean that she acted in 'manifest disregard' of the law" (citation omitted)); *G&K Services LUG, LLC* v. *Talent Creation, Ltd.*, United States District Court, Case No. 3:16-cv-180 (S.D. Ohio February 23, 2017) ("[a]s the law . . . is unsettled, the arbitrator's decision . . . could not have violated clearly established precedent . . . and the [arbitrator's decision] was not in manifest disregard of [the] law" (citation omitted; internal quotation marks omitted)). If the question is unresolved, the alleged error could not be "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator . . . ." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 533. Furthermore, where a novel legal issue is involved, the arbitrator cannot be presented with a clearly governing legal principle that he decided to ignore. Finally, as the respondent claims that the issue is one of first impression, the governing law alleged to have been ignored by the arbitrator cannot be well defined, explicit, and clearly applicable. The respondent has not demonstrated that, in connection with the award of double damages under § 31-72, the arbitrator exceeded his powers or imperfectly executed them in violation of § 52-418 (a) (4).

CONCLUSION

For the foregoing reasons, the motion to vacate and/or modify the arbitration award (No. 120.00) is DENIED, and the objection thereto (No. 124.00) is SUSTAINED; the application to confirm the arbitration award (No. 123.00) is GRANTED.

DAVID EICHLER *v.* HEALTHY MOM, LLC
(AC 43793)

Moll, Alexander and Bishop, Js.

Syllabus

The plaintiff sought to recover damages for breach of contract, alleging that the defendant had failed to pay when a promissory note the parties had executed matured. The trial court rendered judgment for the defendant on its special defense of waiver. On the plaintiff's appeal to this court, *held* that the judgment of the trial court was affirmed, and, as the issues raised in this appeal properly were resolved in the trial court's thorough memorandum of decision, this court adopted the trial court's well reasoned decision as a proper statement of the facts, issues and applicable law.

Argued April 15—officially released May 4, 2021

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Anthony V. Avallone*, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Bruce L. Elstein, for the appellant (plaintiff).

Michael T. Cretella, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, David Eichler, appeals from the judgment of the trial court, rendered after a court trial in favor of the defendant, Healthy Mom, LLC.

On appeal, the plaintiff claims, in essence, that the court erred in (1) finding in favor of the defendant on its special defense of waiver, and (2) determining that the defendant had standing to assert rights under certain extension agreements. We affirm the judgment of the trial court.

In April, 2018, the plaintiff commenced the present action. In his one count complaint sounding in breach of contract, the plaintiff alleged that the defendant had (1) executed a promissory note, dated as of November 12, 2014, in favor of the plaintiff in the original principal amount of $50,000 (note), (2) failed to pay the note when it matured and owed the entire principal balance plus interest, costs, and reasonable attorney's fees, and (3) failed to pay such sum upon demand. On July 12, 2018, the defendant filed an answer and special defenses, which asserted waiver, the statute of frauds, and failure to state a cause of action. On December 17, 2018, the plaintiff filed his reply to the special defenses.

The matter was tried to the court on the basis of a joint stipulation of facts dated July 19, 2019, appended exhibits, and the submission of briefs. On November 18, 2019, the court issued a memorandum of decision rendering judgment in favor of the defendant, finding that it prevailed on its special defense of waiver. This appeal followed.

Our examination of the pleadings, the stipulation of facts, and accompanying exhibits, as well as our consideration of the briefs and arguments of the parties, persuade us that the judgment should be affirmed. The issues raised in this appeal properly were resolved in the court's thorough and well reasoned memorandum of decision, and we adopt it as a proper statement of the relevant facts, issues, and applicable law. See *Eichler* v. *Healthy Mom, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-18-6080162-S (November

18, 2019) (reprinted at 204 Conn. App. 506, A.3d). It would serve no useful purpose to repeat the discussion contained therein.

The judgment is affirmed.

APPENDIX

DAVID EICHLER *v.* HEALTHY MOM, LLC*

Superior Court, Judicial District of New Haven
File No. CV-18-6080162-S

Memorandum filed November 18, 2019

Proceedings

Memorandum of decision in plaintiff's action for breach of contract. *Judgment for the defendant.*

Bruce L. Elstein, for the plaintiff.

Michael T. Cretella, for the defendant.

Opinion

HONORABLE ANTHONY V. AVALLONE, JUDGE TRIAL REFEREE. This action arises from an alleged breach of contract on the part of the defendant, Healthy Mom, LLC. On April 25, 2018, the plaintiff, David Eichler, filed a complaint against Healthy Mom, LLC, alleging breach of contract on the ground that the defendant failed to pay a promissory note for $50,000 when it matured. The defendant responded to the plaintiff's complaint denying all allegations and asserting three special defenses: (1) the plaintiff's claim is barred by waiver, (2) the plaintiff's claim is barred by the statute of frauds, and (3) the plaintiff has failed to state a cause of action.[1]

* Affirmed. *Eichler* v. *Healthy Mom, LLC*, 204 Conn. App. 504, A.3d (2021).

[1] The parties' briefs only address the first special defense—waiver.

FACTS

The parties have stipulated to the following facts. On November 12, 2014, the plaintiff made a loan of $50,000 to the defendant, secured by a promissory note. The plaintiff is the holder of the note entitled "Series B Convertible Promissory Note." Although the note remains unsigned, the parties both agree to its validity. The plaintiff's note is one of a series of convertible promissory notes, totaling $258,000 in the aggregate.

On December 31, 2015, the plaintiff made a written demand for payment on the defendant, though the defendant did not reply. The plaintiff sent two additional written demand letters on January 26, 2016, and February 29, 2016. The plaintiff sent one final demand letter to the defendant on September 22, 2016. After the plaintiff's series of demand letters were sent to the defendant, "requisite noteholders" executed a series of extension agreements that extended the maturity date of the note to September 30, 2019.

CONTENTIONS OF PARTIES

The plaintiff contends that the defendant is in default for the sum of $50,000 plus interest, as the defendant did not pay the plaintiff on demand. The plaintiff argues that this scenario was accounted for in the note, which allows the holder of the note to demand payment on the maturity date of the loan or on demand and default—whichever is earlier. Therefore, the plaintiff contends that the extension agreements have no impact on the maturity date of its note. The plaintiff further asserts that the defendant does not have standing to raise the rights of the requisite noteholders and argues that only the plaintiff and the defendant are bound to the note at issue in this action.

The defendant argues that the maturity date of the note has been correctly extended to September 30, 2019,

the plaintiff has waived any "event of default" per the note, and the court should interpret the terms of the note via its express language. Accordingly, the plaintiff's argument that demand and default occurred prior to the extension agreements fails, as the waiver of an occurrence of an event extinguishes contract rights therewith.

DISCUSSION

The court first addresses the plaintiff's argument that the defendant lacks standing to raise rights dependent upon the acts of the requisite holders. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [When] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *Property Asset Management, Inc.* v. *Lazarte*, 163 Conn. App. 737, 745, 138 A.3d 290 (2016). Parties to a contract, generally, have standing to enforce it. See *Cottman Transmission Systems, Inc.* v. *Hocap Corp.*, 71 Conn. App. 632, 639, 803 A.2d 402 (2002) ("an action upon a contract or for breach of a contract can be brought and maintained by one who is a party to the contract sued upon" (internal quotation marks omitted)).

The plaintiff cites to *Elliott* v. *Bradley*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6006695-S (June 11, 2012) (*Hon. Alfred J. Jennings*, judge trial referee), for the proposition that "one party has no standing to raise another's rights." In *Elliott*, the plaintiff sought to enforce a promissory note on the defendant in the amount of $100,000. Id. The promissory note listed "Theodore H. Elliott, Jr., P/S Plan U/A dated 12/09/1983 U/A 12/09/83 FBO Theodore

H. Elliott, Jr.,'' as the holder of the note. Id. In that case, the court held that there were genuine issues of material fact ''as to whether the plaintiff [was] a proper party, in his individual capacity, to bring suit to enforce the subject promissory note.'' Id. Specifically, the Superior Court noted that the parties never addressed the legal significance of the words after the plaintiff's name and found it unclear whether the plaintiff had standing as the holder of the note in his individual capacity. Id.

In the present case, the plaintiff entered into a written agreement with the defendant that expressly provides for amendment, waiver, or modification. The note provides that ''[a]ny provision of this Note may be amended, waived or modified (a) upon the written consent of the Company and the Holder, or (b) upon the written consent of the Company and the Requisite Holders.'' The note defines requisite holders as ''the holders of Series B Notes evidencing at least a majority of the aggregate principal amount of all Series B Notes then outstanding.'' The parties agree that the aggregate principal of the requisite holders is $138,000, more than 50 percent of the $258,000 balance. The ambiguity present in *Elliott* is not present in the current action. It is clear from the note and the extension agreements that the defendant is a party to the contracts. Accordingly, the defendant has standing to raise the rights contained in the extension agreements.

Next, the court addresses the substance of the parties' arguments in light of the stipulated facts. The present inquiry is akin to a motion for summary judgment in the sense that no material facts are in dispute. ''[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred.'' (Internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual*

Ins. Co., 259 Conn. 527, 556, 791 A.2d 489 (2002). The parties have stipulated to the facts in this proceeding and, accordingly, the following inquiry is simply a matter of law for the court to decide. Although the parties agree to undisputed facts, the burdens are such that the plaintiff has the burden to prove demand and default, and the defendant has the burden as to the special defense of waiver. *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 745, 196 A.3d 328 (2018) ("[t]he party raising a special defense has the burden of proving the facts alleged therein" (internal quotation marks omitted)).

"[A] promissory note is nothing more than a written contract for the payment of money. . . . [T]he fundamental rules governing contract law are applicable." (Citation omitted.) *Appliances, Inc.* v. *Yost*, 181 Conn. 207, 210–11, 435 A.2d 1 (1980). "It is well established that [p]arties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated." (Internal quotation marks omitted.) *Ullman, Perlmutter & Sklaver* v. *Byers*, 96 Conn. App. 501, 505–506, 900 A.2d 602 (2006). "[C]ontracts voluntarily and fairly made should be held valid and enforced in the courts." (Internal quotation marks omitted.) *Schwartz* v. *Family Dental Group, P.C.*, 106 Conn. App. 765, 773, 943 A.2d 1122, cert. denied, 288 Conn. 911, 954 A.2d 184 (2008).

"[W]hen interpreting a contract, [courts] must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 322, 12 A.3d 995 (2011). "[W]e accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . [If] the language is unambiguous, we must give the contract effect

according to its terms. . . . [If] the language is ambiguous, however, we must construe those ambiguities against the drafter." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 358, 166 A.3d 800 (2017). "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Rund* v. *Melillo*, 63 Conn. App. 216, 220, 772 A.2d 774 (2001). Nevertheless, "[w]aiver is a question of fact." *Frantz* v. *Romaine*, 93 Conn. App. 385, 400, 889 A.2d 865, cert. denied, 277 Conn. 932, 896 A.2d 100 (2006).

The note at issue provides: "All unpaid principal, together with the balance of unpaid and accrued interest and other amounts payable hereunder, if not converted pursuant to the provisions of Section 4 or 5 below, shall be due and payable on demand at any time after the earlier of (i) December 31, 2015 (the 'Maturity Date'), or (ii) when such amounts are declared due and payable by the Holder upon or after the occurrence of an Event of Default . . . ." An event of default under the note includes the company's failure to pay "(i) when due any principal payment on the due date hereunder, or (ii) any interest or other payment required under the terms of this Note on the date due and such payment shall not have been made within fifteen (15) days of the Company's receipt of Holder's written notice to the Company of such failure to pay . . . ."

The parties stipulated to the fact that the plaintiff made demand for payment on December 31, 2015, January 26, 2016, February 29, 2016, and September 22, 2016. The parties also agree that the defendant and requisite holders executed a series of extension agreements which extended the maturity date of the note. The first

extension agreement, dated December 30, 2015, extended the maturity date from December 31, 2015, to September 30, 2016. The second extension agreement, dated September 1, 2016, extended the maturity date from September 30, 2016, to September 30, 2017. The last extension agreement, dated August 1, 2018, extended the maturity date from September 30, 2017, to September 30, 2019.

The third extension agreement provides that "[t]his amendment shall constitute a waiver of any Event of Default under Section 2.1 of the Series B Notes occurring prior to September 30, 2018 and a waiver of any rights of any Holder under Section 3 of the Series B Notes with respect to same." The parties agreed in the original iteration of the contract that any provision of the contract could be waived, amended, or modified upon the consent of the company and requisite holders. See supra.

"Courts must always be mindful that parties are entitled to the benefit of their bargain, and the mere fact [that] it turns out to have been a bad bargain for one of the parties does not justify, through artful interpretation, changing the clear meaning of the parties' words." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, supra, 174 Conn. App. 360. The plain language and ordinary meaning of the promissory note clearly shows that the parties agreed to allow amendment, modification, and waiver, by the consent of only the company and the requisite noteholders. Although the plaintiff may not have fully appreciated the impact of this provision at the time the contract was entered into, this does not change its present application. The information contained in the stipulation, along with the parties' attached exhibits, clearly shows that the facts in the present action are undisputed. The stipulated facts show that the defendant has established its special defense of waiver. Although the plaintiff, too, met its

burden of proof by showing demand and default, the plaintiff's valid assent to waiver supplants that inquiry per the terms of the last extension agreement.

CONCLUSION

Taking the contract as a whole and determining all provisions together, the maturity date was properly extended to September 30, 2019, and demand and default were properly waived under the terms of the note.