IN RE SKYLAR B.*
(AC 43916)

Lavine, Elgo and Palmer, Js.**

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights as to his minor child, S. On appeal, the father claimed that the court deprived him of his right to substantive due process because transfer of guardianship to S's relative foster parents would have been a less restrictive means than termination of his parental rights to achieve permanency. *Held* that this court declined to review the respondent father's unpreserved constitutional claim because the record was inadequate for review under the first prong of *State* v. *Golding* (213 Conn. 233): the father failed to file a motion to modify disposition and/or transfer guardianship to the relative foster parents, and neither the trial court, the petitioner, the Commissioner of Children and Families, nor S and the proposed guardians, whose lives would have been most affected by whether the father's parental rights remained intact, were on notice at the outset of the trial on the termination of parental rights petition that the father would be arguing for an alternative disposition; only a proper motion filed by a respondent serves to provide the requisite notice to all interested parties and the court of such an

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

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

alternative disposition and the evidence that is particularly relevant to a disposition of a transfer of guardianship, as opposed to a termination of parental rights and adoption.

Argued October 6, 2020—officially released May 17, 2021***

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Marcus*, *J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

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

Rosemarie T. Weber, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon* and *Evan O'Roark*, assistant attorneys general, for the appellee (petitioner).

David B. Rozwaski, counsel for the minor child.

Opinion

ELGO, J. The respondent father, Jeffrey B., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his minor child, Skylar B.,[1] on the ground that the respondent failed to rehabilitate in accordance with General Statutes § 17a-112 (j) (3) (B) (i).[2] On appeal,

*** May 17, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The attorney for the minor child has filed a statement, pursuant to Practice Book §§ 67-13 and 79a-6 (c), adopting the brief of the Commissioner of Children and Families.

[2] The court also terminated the parental rights of Skylar's mother, Easter M., in the same proceeding on the same grounds. Skylar's mother did not appeal from this judgment, and, therefore, we refer to Jeffrey B. as the respondent in this opinion.

the respondent claims that the court deprived him of his right to substantive due process as guaranteed by the fourteenth amendment to the United States constitution because transfer of guardianship is a less restrictive means than termination of his parental rights to achieve permanency. We conclude that the record is inadequate to review the respondent's claim and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. Skylar was born in November, 2017, and is the child of Easter M. (mother) and the respondent. The Department of Children and Families (department) had a long history of involvement with both parents due to the mother's mental health issues and extensive use of illicit substances, as well as the respondent's extensive involvement in the criminal justice system and history of intimate partner violence with the mother.[3] At the time of Skylar's birth, a referral was made by a hospital social worker to the department because both Skylar and her mother tested positive for opiates.[4] In the referral, the social worker also reported that the mother had been hospitalized in June, 2017, after being assaulted by the respondent while she was pregnant with Skylar.

On November 20, 2017, the department executed a ninety-six hour hold on Skylar and eventually placed her with the relative foster home of her maternal aunt and uncle. In the course of their investigation, the department eventually located the respondent, who at that time was incarcerated at the New Haven Correctional Center (facility). On November 22, 2017, the department filed an ex parte motion for an order of temporary custody, which the court granted. The order was sustained

[3] As the court noted in its memorandum of decision, in 2011, the Probate Court transferred guardianship of another child of the mother and the respondent to a maternal great-aunt.

[4] Skylar's mother tested positive for opiates on November 7, 2017, and later in November, 2017, on the date of Skylar's birth.

by agreement on December 1, 2017. On January 16, 2018, the court adjudicated Skylar neglected and committed her to the care and custody of the petitioner. The respondent was present and represented by counsel at the above hearings and was provided specific steps to facilitate reunification, which were duly approved and ordered by the court.

The respondent was released from the facility in June, 2018, but he failed to keep in contact with the department. In July, 2018, the respondent informed the department that he was serving parole in New York and he indicated his intention to have his parole transferred to Connecticut to be closer to Skylar and her mother. Although the department found service providers for the respondent in New York, the respondent declined to use them. The respondent also refused monthly visitation with Skylar, claiming that he did not want his daughter to see him while he was living in a hotel. In September, 2018, the respondent successfully transferred his parole from New York to Connecticut. The department referred the respondent to services for visitation, as well as substance abuse, intimate partner violence treatment, and parenting services.

Unbeknownst to the department, a no contact order was in place in connection with the respondent's parole, which prohibited him from contacting the mother. Despite that order, the respondent asked the department to arrange a joint visit with himself, the mother, and Skylar. A visit occurred in September, 2018, which led to the respondent's arrest for violating the conditions of his parole. The petitioner subsequently remained incarcerated until November, 2018. As a result, the services that the respondent was required to complete were placed on hold until his release.

On November 19, 2018, the petitioner filed a petition for termination of the respondent's parental rights, alleging that the respondent failed to achieve a suffi-

cient degree of rehabilitation in accordance with § 17a-112 (j) (3) (B) (i)[5] and that he had no ongoing parent-child relationship with Skylar. See General Statutes § 17a-112 (j) (3) (D).[6] While that termination proceeding was pending, the respondent was arrested on federal charges stemming from gang related activities in New Haven.

A two day trial was held on the petition for termination of the respondent's parental rights, at which the respondent, who remained in federal custody, participated via video conference. On December 30, 2019, the court issued a memorandum of decision, in which it terminated the parental rights of the respondent.[7] In its findings of fact, the court relied heavily on an evaluation of the respondent conducted on March 28, 2019, by a court-appointed psychologist, Jessica Biren Caverly.[8] In her report, Caverly noted: "There are a number of concerns about the negative aspects of [the respondent's] history, including his significant legal history, arrests for substances that he denied using, and his min-

[5] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused, or uncared for in a prior proceeding . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[6] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (D) there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ."

[7] The court also terminated the parental rights of Skylar's mother.

[8] Caverly's parenting/psychological evaluation report was admitted into evidence as state's exhibit D.

imization of intimate partner violence. These factors can be indicative of a personality disorder such as [a]ntisocial [p]ersonality [d]isorder or [n]arcissistic [p]ersonality [d]isorder. . . . In regard to substances, [the respondent's] recent urine tests [were] clean of all substances, but it is highly likely he is abstaining from substances solely so he can complete his parole." (Internal quotation marks omitted.) Caverly was particularly troubled by his blatant violation of parole orders requiring no contact with the mother, reporting that the respondent telephoned the mother during her own evaluation with Caverly. The court noted in its memorandum of decision that "[t]his is indicative of [the respondent's] failure to change his behavior even on a minimal basis." The court also found that "[i]t is apparent from the description . . . of the father-child [interaction] that the [respondent] presently is unable to meet Skylar's needs." In light of the foregoing, the court found by clear and convincing evidence that the respondent failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i).[9]

Having found an adjudicatory ground for termination, the court turned to the dispositional phase of its ruling. The court determined by clear and convincing evidence that termination of the respondent's parental rights was in Skylar's best interest, and expressly considered the factors outlined in § 17a-112 (k).[10] In so doing, the court

[9] In light of that determination, the court declined to address the department's alternative statutory ground for termination pursuant to § 17a-112 (j) (3) (D).

[10] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled

emphasized the respondent's failure to benefit from services that were timely offered to him and the fact that there was insufficient time for Skylar to develop a relationship with the respondent due to his incarceration following parole. The court, pursuant to § 17a-112 (k), also considered Skylar's emotional ties with her maternal aunt and uncle, in whose physical care and custody she has remained since birth. To that end, the court credited Caverly's testimony that Skylar was "well bonded to her foster parents . . . and . . . looked to them for support," observing that they were her psychological parents and that their home was the only home she has ever known. Finally, the court found that the foster family had committed to being an adoptive resource for Skylar. The court thus found, by clear and convincing evidence, that it was in Skylar's best interest to have the respondent's parental rights terminated, and appointed the petitioner as Skylar's statutory parent. This appeal followed.

On appeal, the respondent generally does not challenge the trial court's factual findings and conclusions of law with respect to its determination that he failed to achieve a sufficient degree of personal rehabilitation

their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

pursuant to § 17a-112 (j) (3) (B) (i).[11] Rather, he claims that the court deprived him of his right to substantive due process, as guaranteed by the fourteenth amendment to the United States constitution, because the petitioner "was without a compelling reason to terminate his parental rights" given that Skylar was placed with relative foster parents "within the meaning of [General Statutes] § 17a-111a (b) (1)."[12] The respondent contends that, in light of Skylar's placement with relative

[11] The respondent does allege, in a footnote in his principal appellate brief, that one of the trial court's factual findings in the dispositional phase was clearly erroneous—namely, that there was insufficient time for Skylar to develop a relationship with him under § 17a-112 (k) (4). That claim is without merit. "A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . [G]reat weight is given to the judgment of the trial court because of [the trial court's] opportunity to observe the parties and the evidence. . . . [An appellate court does] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Keyashia C.*, 120 Conn. App. 452, 455, 991 A.2d 1113, cert. denied, 297 Conn. 909, 995 A.2d 637 (2010).

In the present case, the court concluded that the time that the respondent spent with Skylar was insufficient because the respondent "only began visitation with Skylar in November, 2018, and was incarcerated in July, 2019, on his federal charges." The respondent argues that this conclusion was clearly erroneous because, between his return from parole in New York in September, 2018, and his subsequent incarceration on federal charges in July, 2019, he consistently visited with Skylar for weekly one hour visits for more than ten months. However, during this visitation period, the respondent was arrested in September, 2018, and incarcerated until November, 2018, for violating a no contact order with Skylar's mother. Although the court acknowledged that there were visits subsequent to his November, 2018 incarceration, it found at the time of trial that "he is now incarcerated again for a lengthy period of time and is no longer available to her." Moreover, the court's finding that there was insufficient time for Skylar to bond with the respondent is supported by the expert testimony of Caverly. According to Caverly, at the time of her evaluation, the respondent "ha[d] only recently begun visitation and therefore their relationship [was] new and likely [did] not have any positive memories." In light of that evidence, the court's finding was not clearly erroneous.

[12] General Statutes § 17a-111a provides: "(a) The Commissioner of Children and Families shall file a petition to terminate parental rights pursuant

foster parents, the petitioner "improperly allowed the relatives to select a permanency plan for the child calling for a termination of the respondent's parental rights, instead of using [her] authority under the statute to effectuate a transfer of guardianship to the relatives as a less restrictive means of permanency . . . ."

The respondent's counsel conceded at oral argument before this court that §§ 17a-111a and 17a-112 do not contain such "least restrictive means" language. Instead, the respondent relies primarily on footnote 11 of *In re Unique R.*, 170 Conn. App, 833, 845 n.11, 156 A.3d 1 (2017), and on *In re Azareon Y.*, 309 Conn. 626, 634–37, 72 A.3d 1074 (2013), to support his claim that § 17a-111a "must be interpreted to preclude the petitioner from filing [petitions] to terminate parental rights under § 17a-112 if the child's health and safety can be protected by transferring guardianship of the child to a relative as a less restrictive means of permanency." This, the respondent claims, is the only way "to save [§§ 17a-111a and 17a-112] from constitutional infirmity

to section 17a-112 if (1) the child has been in the custody of the commissioner for at least fifteen consecutive months, or at least fifteen months during the twenty-two months, immediately preceding the filing of such petition; (2) the child has been abandoned as defined in subsection (j) of section 17a-112; or (3) a court of competent jurisdiction has found that (A) the parent has killed, through deliberate, nonaccidental act, a sibling of the child or has requested, commanded, importuned, attempted, conspired or solicited to commit the killing of the child or a sibling of the child; or (B) the parent has assaulted the child or a sibling of a child, through deliberate, nonaccidental act, and such assault resulted in serious bodily injury to such child.

"(b) Notwithstanding the provisions of subsection (a) of this section, the commissioner is not required to file a petition to terminate parental rights in such cases if the commissioner determines that: (1) The child has been placed under the care of a relative of such child; (2) there is a compelling reason to believe that filing such petition is not in the best interests of the child; or (3) the parent has not been offered the services contained in the permanency plan to reunify the parent with the child or such services were not available, unless a court has determined that efforts to reunify the parent with the child are not required."

. . . .”[13] The respondent acknowledges that he did not raise this issue before the trial court and, thus, seeks review of this unpreserved constitutional claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

In *Golding*, our Supreme Court held that “a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3)

[13] Neither *In re Unique R.*, supra, 170 Conn. App. 833, nor *In re Azareon Y.*, supra, 309 Conn. 626, supports the respondent’s claim that § 17a-111a precludes the filing of a termination petition if there is a less restrictive means of permanency. Indeed, far from supporting the respondent’s contentions, a careful review of *In re Unique R.* suggests a contrary conclusion. In that case, this court concluded that the trial court did not improperly terminate the respondent’s parental rights due to the petitioner’s alleged failure to conduct an adequate investigation of his relatives as placement resources. See *In re Unique R.*, supra, 835–36. Specifically, we held that reasonable efforts to reunify the respondent with his child pursuant to § 17a-112 (j) (1) did not require investigation and placement with relative resources. Id., 844–45. Notably, in footnote 14 of that opinion, we compared § 17a-111a (a), which *requires* the petitioner to file a termination of parental rights petition when a child has been in the custody of the petitioner for a substantial period of time, with § 17a-111a (b), which, when a child is placed with relatives, does *not require* the filing of a termination petition. Id., 853–54 n.14. Observing that “[t]he use of the word shall in conjunction with the word may confirms that the legislature acted with complete awareness of their different meanings,” we concluded that the phrase “not required” is discretionary language and, therefore, even when a child has been placed with relatives, § 17a-111a (b) does not prevent the petitioner from filing a termination petition. (Internal quotation marks omitted). Id. In contrast, footnote 11 references the respondent’s substantive due process claim relative to the reasonable efforts requirement of § 17a-112 (j) (1), which is not the provision implicated in the present case. Id., 845 n.11.

Although the respondent does not direct us to authority for his specific claim that the petitioner must have “a compelling reason to terminate his parental rights” when a child is placed with relatives, we note that the plain language of § 17a-111a (b) (2) requires the petitioner to provide a compelling reason when she does not file a termination of parental rights petition within the statutory guidelines.

the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781. "[T]he inability to meet any one prong requires a determination that the [respondent's] claim must fail. . . . The appellate tribunal is free, therefore, to respond to the [respondent's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Soto*, 175 Conn. App. 739, 755, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017).

"In assessing whether the first prong of *Golding* has been satisfied, it is well recognized that [t]he [respondent] bears the responsibility for providing a record that is adequate for review of [his] claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the [respondent's] claim. . . . The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred." (Citations omitted; internal quotation marks omitted.) *In re Anthony L.*, 194 Conn. App. 111, 114–15, 219 A.3d 979 (2019), cert. denied, 334 Conn. 914, 221 A.3d 447 (2020).

In *In re Azareon Y.*, supra, 309 Conn. 632, the respondent sought *Golding* review of her unpreserved claim that substantive due process required the court to determine that the permanency plan of termination of the respondent's parental rights was the least restrictive

means to ensure the state's compelling interest in protecting the child's best interests. In determining that the record was inadequate for review under *Golding*'s first prong, our Supreme Court observed that the respondent did not request that the trial court consider any alternatives to the petitioner's permanency plan, the court's memorandum of decision did not indicate whether it had considered a permanency plan other than the one advocated by the petitioner, and the respondent did not ask the court to articulate whether it had considered other options. Id., 632–33. Because "the petitioner was never put on notice of the respondent's proposed constitutional gloss to § 17a-112," the court concluded that "it [would have been] manifestly unfair to the petitioner . . . to reach the merits of the respondent's claim . . . ." (Internal quotation marks omitted.) Id., 638; see also *In re Madison C.*, 201 Conn. App. 184, 193, 241 A.3d 756, cert. denied, 335 Conn. 985, 242 A.3d 480 (2020); *In re Anthony L.*, supra, 194 Conn. App. 112–13.

In the present case, the respondent claims that his right to substantive due process was violated by the termination of his parental rights because transfer of guardianship to the relative foster parents would have been a less restrictive means of achieving permanency for Skylar.[14] The respondent does not dispute the fact

[14] The genesis and application of the "less or least restrictive means of permanency" concept is unclear in our jurisprudence, such that our courts have noted confusion in how these claims have been presented on appeal. See, e.g., *In re Azareon Y.*, supra, 309 Conn. 637 (noting various ways in which claim was framed on appeal); *In re Adelina A.*, 169 Conn. App. 111, 120, 148 A.3d 621 (court compelled to clarify various usages of term), cert. denied, 323 Conn. 949, 169 A.3d 792 (2016). Nevertheless, the consistent and express purpose of the various iterations of the concept has been to challenge what we have previously acknowledged is the legislative preference for termination and adoption.

In *In re Adelina A.*, we observed that "[t]he Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997), and parallel state law, has established a clear preference for termination followed by adoption when reunification with a parent is not a viable permanency plan. . . . ASFA also requires the petitioner to file a petition for termination of parental rights if the child has been under the responsibility of the state for fifteen

that he did not file a motion before the court seeking a transfer of guardianship to the relative foster parents. He nevertheless contends that the record is adequate for review under the first prong of *Golding* because, at trial, his counsel argued during closing arguments that the court should transfer guardianship to the relative foster parents instead of terminating his parental rights. The respondent further asserts that "[i]t is certain from the record . . . that Skylar's relatives would have kept her in their care under any arrangement that did not result in Skylar being given back [to her parents] and taken away again" and suggests that the mere fact that they told the petitioner that they "preferred" an adoption does not mean that they opposed a transfer of guardianship. (Internal quotation marks omitted.) Because the respondent failed to file a motion to modify disposition and/or to transfer guardianship to the relative foster

of the last twenty-two months, subject to limited exceptions. 42 U.S.C. § 675 (5) (E) (2012); see 45 C.F.R. § 1356.21 (i); see also General Statutes § 17a-111a (a). Finally, state law requires a court to find by clear and convincing evidence that adoption is not possible or appropriate prior to issuing an order for permanent legal guardianship. General Statutes § 46b-129 (j) (6) (B)." (Citations omitted.) *In re Adelina A.*, supra, 121 n.14. Such efforts are consistent with federal law which, pursuant to 42 U.S.C. § 675 (1) (F) (v) (2018), requires that child protection agencies document that they have advised prospective guardians that adoption is the more permanent alternative to legal guardianship.

We further note that the concept of "least or less restrictive alternative to permanency" espoused by the respondent should be distinguished from the phrase "least restrictive placement," which is an established term of art governing placement of a child while in foster care, and which specifically emanates from the federal Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96–272, 94 Stat. 500, as amended by the Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115. See 42 U.S.C. § 671 et seq. (2018). Pursuant to federal funding requirements, state and local child protection agencies are required to develop a "case review system" for each child placed in foster care; 42 U.S.C. § 671 (A) (16) (2018); to assure, inter alia, that "each child has a case plan designed to achieve placement in a safe setting that is the *least restrictive* (*most family like*) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child . . . ." (Emphasis added.) 42 U.S.C. § 675 (5) (A) (2018).

parents pursuant to General Statutes § 46b-129 (j) and Practice Book § 35a-16 or § 35a-12A, we do not agree that there is an adequate record for review.

Our Supreme Court's decisions in *In re Azareon Y.*, supra, 309 Conn. 626, and *In re Brayden E.-H.*, 309 Conn. 642, 72 A.3d 1083 (2013), which were both released on July 30, 2013, are instructive. In *In re Azareon Y.*, the court concluded there was an inadequate record to review the respondent's substantive due process claim and specifically noted the absence of critical factual findings in the record to support the claim that viable alternatives to termination and adoption existed. *In re Azareon Y.*, supra, 637. By contrast, the court in *In re Brayden E.-H.* reached the merits of a similar substantive due process claim because the trial court had made specific findings regarding the dispositional alternatives to termination sought by the respondent parents. *In re Brayden E.-H.*, supra, 651, 655–56. In that case, the trial court, in determining whether to terminate the parental rights of both parents, was presented with the respondent father's motion to transfer permanent guardianship to the paternal great-aunt and her husband, as well as the respondent mother's motion to transfer guardianship. Id., 650. The trial court ultimately terminated the respondent mother's parental rights, but it denied the petition to terminate the respondent father's parental rights and granted the father's motion to transfer permanent guardianship to the paternal relatives. Id., 644, 653. On appeal, the respondent mother argued that the trial court violated her right to substantive due process because termination was not required given that the court had granted permanent guardianship to the paternal relatives. Id., 644–45. Our Supreme Court concluded that it was unnecessary to decide whether substantive due process requires that a court determine whether termination is the least restrictive means to protect a child's best interest and, instead, held that, even if

substantive due process required such a determination, the trial court's decision in that case satisfied that standard. Id., 645.

In so concluding, the court relied heavily on the findings of fact made by the trial court pursuant to the relevant statutory scheme, including the termination of parental rights provisions and the relevant transfer of guardianship provisions of § 46b-129 (j) (6) and Practice Book § 35a-20, as asserted by the father and the respondent mother relevant to their respective motions. Id., 648–51. Our Supreme Court emphasized the court's findings with respect to the respondent's relationship with the proposed guardian, including its conclusion that the it would be impossible for the proposed guardian to accommodate the respondent, that the respondent was "confrontational, unpredictable and aggressive," and that the respondent "would . . . [take] every possible opportunity to undermine and destabilize [the proposed guardian's] position as principal caretaker by filing motions for reinstatement of guardianship." (Internal quotation marks omitted.) Id., 659. The court also underscored the trial court's finding that "[t]he children could never confidently attach and would be tormented by divided loyalties." (Internal quotation marks omitted.) Id. It further emphasized the trial court's observation that "*giving* [*the respondent mother*] *any opportunity to further litigate would be disastrous to the children and to the guardians.* As it is now, the statute does not address specifically visitation and thus could provide her with an opportunity to litigate. *That possibility does not exist if her parental rights are terminated. The intention of the court was to prevent her from having any further control or influence over the children, including visitation, during which time she could undermine the authority of the guardians.*" (Emphasis in original.) Id., 661. Our Supreme Court noted the trial court's conclusion that "*any* avenue that

would permit the respondent to exert *any* further control or influence over the children would undermine the guardians' relationship with the children and would be contrary to the children's best interests." (Emphasis in original.) Id., 661–62. "Finally, the fact that the court declined to terminate [the father's parental] rights but determined that termination of the respondent's rights was necessary reflects the court's conclusion that nothing short of terminating the respondent's rights would adequately protect the children's best interests."[15] Id., 662.

Although the findings made by the trial court in *In re Brayden E.-H.* are specific to that case, the trial court's application of the established best interest standard to the relevant motions in that case resulted in a record that the Supreme Court could review for purposes of the respondent's substantive due process claim. That record, to the extent that permanent guardianship was sought, required factual findings and a determination that "[a]doption of the child or youth is not possible or appropriate" pursuant to what is now § 46b-129 (j) (6) (B). See id., 652. Moreover, because of the juxtaposition of both termination of parental rights petitions and the motions to transfer guardianship, the trial court in that case was required to evaluate a variety of considerations which, while not exclusive to motions for transfer of guardianship—such as the ability to attach, divided loyalties, undermining the authority of proposed guardian or caretaker, and the ability to use the legal system to exert control or influence over a child—have heightened importance when evaluating whether guardianship affords the child sufficient security and

[15] Our Supreme Court also emphasized the trial court's finding, made pursuant to what is now § 46b-129 (j) (6) (B), that, because the proposed guardians were in their sixties and had chronic health issues, they were not an appropriate adoptive placement, notwithstanding their willingness to adopt the child. Id., 652.

permanency when a parent, for whom adjudicatory grounds have been found, nevertheless, seeks to retain his parental rights.

In the present case, by contrast, neither the trial court, the petitioner, nor the minor child and the proposed guardians, whose lives would be most affected by whether the respondent's parental rights remain intact, were on notice at the outset of the trial that the respondent would be arguing for an alternative disposition. Only a proper motion filed by a respondent serves to provide the requisite notice to all interested parties and the court of such an alternative disposition and the evidence that is particularly relevant to a disposition of a transfer of guardianship, as opposed to a termination of parental rights and adoption. See, e.g., *In re Azareon Y.*, supra, 309 Conn. 641 (lack of evidence as to whether maternal aunt would have agreed to long-term foster care or conventional guardianship).

As this court repeatedly has observed, "[o]ur role is not to guess at possibilities, but to review claims based on a complete factual record developed by the trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the respondent's claims] would be entirely speculative." (Internal quotation marks omitted.) *In re Madison C.*, supra, 201 Conn. App. 196. Because the respondent has failed to provide this court with an adequate record for review, his claim fails *Golding*'s first prong. We, therefore, decline to review the merits of the respondent's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE ANGELA V. ET AL.*
(AC 44201)

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

Syllabus

The respondent mother appealed to this court from the judgments of the trial court adjudicating her minor children neglected. On appeal, the mother claimed that the court violated her rights to due process when it denied a motion for permission to call the two older children as witnesses that had been filed by the respondent father. Specifically, the mother claimed that the trial court employed an improper standard of proof when it denied the motion in part on the ground that it would not be in the "best interests" of the children. *Held* that the respondent mother's appeal was dismissed as moot, as the mother failed to challenge all of the bases for the trial court's denial of the motion for permission to call the children as witnesses: the record is clear that the court relied on two grounds in denying the motion, that it was not in the best interests of the children and that it was untimely and, as the mother failed to challenge this second independent basis for the court's decision denying the motion, this court could not afford her any practical relief; moreover, this court declined the mother's request to vacate that part of the trial court's judgment that found that it would not be in the best interests of the children to testify in order to clarify the correct legal standard that should be employed by the Superior Court in adjudicating motions for child testimony in a neglect proceeding, the mother having provided no authority that would permit this court to use the equitable remedy of vacatur to essentially render an advisory opinion in an appeal that was otherwise moot.

Argued March 23—officially released May 17, 2021**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondent parents' minor children neglected, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court,

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

** May 17, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Kavanewsky, J., denied the respondent father's motion for permission to call certain of the minor children as witnesses; thereafter, the court adjudicated the minor children neglected and committed the minor children to the custody of the petitioner, from which the respondent mother appealed to this court. *Appeal dismissed.*

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

John E. Tucker, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark* and *Mildred Bauza*, assistant attorneys general, for the appellee (petitioner).

Opinion

BRIGHT, C. J. The respondent mother, Elizabeth T.,[1] appeals from the judgments of the trial court adjudicating each of her three children, ages nine, seven, and three, neglected, and the two older of those children, abused, and vesting temporary custody of the children in the petitioner, the Commissioner of Children and Families.[2] On appeal, the respondent claims that the court violated her right to the due process of law when it denied the motion for permission to call the two older minor children as witnesses, which was filed by the respondent father and later joined by the respondent.[3] Following the parties' appellate oral argument, we requested supplemental briefs addressing whether the

[1] The respondent father also was named a party in the trial court proceeding. He has not participated, however, in this appeal.

[2] The attorney for the minor children has adopted the appellate brief and the position of the petitioner.

[3] In her appellate brief, the respondent also claimed that the court abused its discretion by granting the petitioner's motion for a psychological evaluation of the family. During oral argument before this court, however, she withdrew that claim, on the basis of this court's decision in *In re Marcquan C.*, 202 Conn. App. 520, 246 A.3d 41, cert. denied, 336 Conn. 924, 246 A.3d 492 (2021), without prejudice to raising it during further trial court proceedings.

respondent's claim was moot in light of her failure to challenge one of the independent grounds of the trial court's denial of the motion to have the two older children testify.[4] Having considered the supplemental briefs of the parties[5] and the record in this case, we conclude that the respondent's claim is moot. Accordingly, we dismiss the appeal.

The following facts, as found by the trial court and that are uncontested for purposes of this appeal, and procedural history are relevant. The respondent has a long history of substance abuse, and she previously had been convicted and incarcerated on a federal drug distribution offense. In April and May, 2019, she saw a mental health and substance abuse treatment provider, who, on May 17, 2019, made a mandated referral to the Department of Children and Families (department) on the basis of several events that had been reported to her by the respondent, which alleged violence in the home toward the children. The department thereafter attempted to investigate these allegations, but encountered great hostility from both of the children's parents, but especially from the respondent. On May 31, 2019, the department went to the school of the two older children, who then reported abuse and neglect to the department. The department then offered services to the family, but the respondent and the respondent father refused to cooperate.

On June 4, 2019, the petitioner filed ex parte motions for orders of temporary custody and neglect petitions

[4] Specifically, our order provided: "The parties are hereby ordered to file on or before April 9, 2021, supplemental briefs, not exceeding ten pages in length, addressing whether the respondent's first claim on appeal, that the court deprived her of due process of law when it denied her motion for permission to call her children to testify, is moot in light of the respondent's failure to challenge the second ground of the trial court's decision, namely, that the motion was untimely and the respondent failed to establish good cause for its late filing. See, e.g., *In re Jorden R.*, 293 Conn. 539, 554–57, 979 A.2d 469 (2009) (claim is moot if appellant has not challenged all bases for trial court's decision)."

[5] The attorney for the minor children also adopted the supplemental brief of the petitioner.

in the interest of the minor children alleging ongoing concerns of intimate partner violence, substance abuse, unresolved mental health concerns, and excessive physical discipline of the children. On June 4, 2019, the court granted the ex parte motions for orders of temporary custody, finding that the children were in danger of immediate physical harm. The court vested temporary custody of the minor children in the petitioner.

Between November, 2019, and February, 2020, the court conducted a consolidated trial on the issue of temporary custody in the neglect petitions. During the presentation of her case, the petitioner called a number of witnesses who testified about their interactions with the children, and about statements made by the children regarding the neglect and abuse they had endured at the hands of the respondent and the respondent father. The petitioner also introduced exhibits that similarly recounted statements made by the children regarding the respondent and the respondent father. On February 3, 2020, after the petitioner had rested her case and the time designated for the disclosure of witnesses had passed, the respondent father filed a motion for permission to have the two older minor children testify. The respondent joined in the motion at the time that it was heard, on February 6, 2020. The court found that the motion had been filed untimely, and it also found that having the children testify would be contrary to their best interests and detrimental to their welfare. Accordingly, the court denied the motion. The respondent presented her witnesses and her evidence on February 7, 2020.[6]

[6] The respondent listed seventeen potential witnesses in her November 1, 2019 trial management memorandum, including herself and the respondent father. None of the children were on the list. On February 7, 2020, the respondent called several witnesses to testify. The respondent father, who had failed to file a trial management memorandum, stated that he had no witnesses to present. The respondent and the respondent father each chose not to testify.

On February 14, 2020, the petitioner filed a motion for a psychological evaluation of the family. The respondent did not oppose the petitioner's motion, and, in fact, she consented to the motion, which the court granted after a hearing.

On February 28, 2020, the court adjudicated the minor children neglected, and it found that the two older minor children also had been abused. The court ordered that all three of the children be committed to the temporary custody of the petitioner.[7] This appeal followed. Additional facts and procedural history will be set forth as necessary.

The respondent claims that the court violated her right to due process of law when it denied, on the ground that it was not in the children's "best interests" to testify, the respondent father's motion for permission to call the two older minor children as witnesses, which motion she had supported. The respondent contends that the court employed an improper standard of proof when it "denied her the right to question her children at trial about [their] hearsay statements admitted into evidence based solely on a finding that it would not be in the children's 'best interests' to testify."[8] She contends that the court needed to find, by clear and convincing evidence, that it would be emotionally harmful to the children to testify and that the harm outweighed the probative value of their potential testimony. Recognizing that she did not preserve at trial this alleged constitutional issue, the respondent requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989).[9]

[7] In its memorandum of decision, the court specifically stated that, although the cases had been consolidated for trial, it "considered each case separately and independently of the others" and it "considered the allegations against each respondent separately and independently."

[8] The respondent does not claim on appeal that the court improperly admitted into evidence the statements made by the minor children, the vast majority of which were admitted without objection.

[9] Pursuant to *Golding*, a defendant may prevail on a claim of constitutional error not preserved at trial only if all four of the following conditions are

In her appellate brief, the petitioner sets forth several reasons for rejecting the respondent's claim.[10] She argues that this claim is not constitutional in nature but, rather, that it is an evidentiary matter, and that there can be no doubt that the court acted well within its discretion pursuant to Practice Book § 32a-4.[11] Additionally, the petitioner contended during oral argument before this court that the respondent failed to address the fact that the court also denied her motion on a second independent ground, namely, that it was untimely filed and without a showing of good cause. In the alternative, the petitioner also argues that, if we determine that the respondent's claim is reviewable and is of constitutional magnitude, the court did not violate the respondent's right to due process of law because it employed the proper standard when it found that permitting the children to testify would not be in their best interests and, in fact, would be detrimental to their interests.

As set forth in footnote 4 of this opinion, we requested supplemental briefs from the parties specifically addressing whether the respondent's claim was moot in light of her failure to challenge an independent ground for the trial court's denial of her motion to call the children to testify, namely, that the respondent father's motion

satisfied: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2019) (modifying third prong of *Golding* by eliminating word "clearly" before words "exists" and "deprived" (internal quotation marks omitted)).

[10] The respondent did not file a reply brief to respond to the petitioner's arguments.

[11] Pursuant to Practice Book § 32a-4 (b), "[a]ny party who intends to call a child or youth as a witness shall first file a motion seeking permission of the judicial authority."

for permission to call the two older minor children as witnesses was untimely. After considering the parties' supplemental briefs and the record in this case, we conclude that her claim is moot.

"Mootness raises the issue of a court's subject matter jurisdiction and is therefore appropriately considered even when not raised by one of the parties. . . . Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction. . . . We begin with the four part test for justiciability . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) *that the determination of the controversy will result in practical relief to the complainant*. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the [petitioner] or [the respondent] in any way." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555–56, 979 A.2d 469 (2009) (*Jorden R.*).

In *Jorden R.*, our Supreme Court, sua sponte, vacated the judgment of this court after concluding that this court had lacked jurisdiction to review the merits of the respondent's appellate claim that the trial court had erred in concluding that she was unable or unwilling to benefit from reunification efforts. Id., 554–55. Our Supreme Court determined that the respondent's claim

was moot because she had failed to challenge on appeal a second alternative basis of the trial court's decision. Id., 555. Specifically, our Supreme Court explained: "[General Statutes] § 17a-112 (j) (1) requires a trial court to find by clear and convincing evidence that the department made reasonable efforts to reunify a parent and child *unless* it finds instead that the parent is unable or unwilling to benefit from such efforts. In other words, *either finding*, standing alone, provides an independent basis for satisfying § 17a-112 (j) (1). In this case, however, the trial court found that *both alternatives* had been satisfied—the court found that the department had made reasonable efforts to reunify the respondent and Jorden *and* that the respondent was unwilling and unable to benefit from reunification services. . . . In light of the trial court's finding that the department had made reasonable efforts to reunify the respondent with Jorden and the respondent's failure to challenge that finding, the Appellate Court's decision, which disturbed only the trial court's finding that reunification efforts were not required, cannot benefit the respondent meaningfully." (Emphasis altered; footnote omitted.) Id., 556. Accordingly, our Supreme Court concluded that the respondent's claim was moot because the Appellate Court could not have afforded her practical relief. Id., 557.

In the present case, the respondent argues that the ruling of the trial court has to be reviewed in total and that the issue of timeliness is part and parcel of her due process claim and cannot be viewed as an independent basis for the denial of the respondent father's motion. The respondent further argues that "[t]he trial court's comments about the motion's untimeliness were . . . obiter dicta, lacking the force of an adjudication" in that the court did not deny the motion on the ground that it was untimely because the court, on January 10,

2020, "gave [her] permission to produce any dispositional evidence she wished on the last day of trial." Finally, she argues that, even if her claim is moot, we should exercise our equitable power of vacatur to correct the trial court's application of an incorrect legal standard to the respondent father's motion.

The petitioner responds that the respondent did not raise a due process claim at trial, and it is clear that the court voiced two alternative grounds for denying the respondent father's motion to call the older children to testify, namely, "(1) subjecting the children to interrogation by the respondent mother at trial would be detrimental to their welfare because of the trauma they endured in the . . . care [of the respondent and the respondent father]; and (2) the motion to call the minor children was untimely filed and there was no good cause for the late filing." The petitioner argues that "[e]ither of these grounds—that it was detrimental to these emotionally fragile children to testify *and* the extreme tardiness of the motion—provides an independent basis to affirm the trial court's decision on the motion to call children witnesses." (Emphasis in original.) We agree with the petitioner.

As required by the standing orders for the child protection docket of the Juvenile Matters session of our Superior Court, the petitioner and the respondent each filed their trial management memoranda on November 1, 2019.[12] The respondent father, however, did not file

[12] Standing Order 5 of the child protection docket for the Juvenile Matters session of our Superior Court provides in relevant part:

"5. Trial Management Procedures

"A. Four (4) weeks before any assigned trial date, all parties shall file trial memoranda intended to simplify and speed up a contested trial. The memoranda shall include the following:

"1. a summary of the petitioner's contentions and the respondent's defenses or oppositional grounds, together with a summary of settlement efforts;

"2. any pleadings or motions pending or to be filed;

"3. evaluations;

"4. admissions or stipulations;

a trial management memorandum. On November 13, 2019, the petitioner notified counsel for the parties that she intended to offer into evidence the exhibits containing the statements of the children. The trial in this matter commenced on November 15, 2019. During the petitioner's presentation of her case, she called a number of witnesses who testified about the children and their statements alerting the witnesses to the neglect and abuse they had suffered at the hands of the respondent and the respondent father. The petitioner also introduced exhibits that similarly recounted statements made by the children regarding the respondent and the respondent father. Much of this evidence was admitted without objection. On January 10, 2020, the petitioner rested her case, with the exception of one exhibit, which the parties were working to redact by agreement. The trial court file and the transcript from that date indicate that the respondent's behavior during that day's proceedings "was nearly contemptuous." Near the end of the hearing, the court asked the respondent and the respondent father whether they were going to call witnesses. Counsel for the respondent father stated that he did not know. Counsel for the respondent replied in the affirmative. Nevertheless, at no time before the petitioner rested, even after hearing and seeing the petitioner's evidence recounting statements attributed to the children, did the respondent give any indication that

"5. evidentiary disputes or judicial notice;

"6. (a) the name and address of each fact witness, (b) a summary of expected testimony and (c) the approximate length of time for direct testimony;

"7. (a) the name and address of each expert witness, (b) a resume or curriculum vitae, (c) a summary of the expected testimony and (d) the approximate length of time for direct testimony;

"8. a list of each pleading, motion, discovery matter, evaluation and evidence there is any dispute about or any outstanding matter, and a summary of the matter. . . ." Standing Orders for the Child Protection Docket for the Juvenile Matters session of the Superior Court (effective November 1, 2009), available at https://www.jud.ct.gov/external/super/StandOrders/Juvenile/juvenile childprot.pdf (last visited May 14, 2021).

she wished to call any of the children as witnesses; she also did not argue that the children's hearsay statements were admissible only if she was permitted to cross-examine them about those statements. The court continued the matter to February 7, 2020.

On February 3, 2020, nearly one month after the petitioner had rested her case and long after the date for disclosure of witnesses set forth in the trial management orders, the respondent father filed a motion for permission to have the two older minor children testify. See Practice Book § 32a-4. He represented that the children would testify that the allegations of neglect were not accurate. The petitioner objected to the motion on the grounds that it was late, that it would be prejudicial to the petitioner to grant the motion nearly one month after she had rested her case, and that it would be "detrimental and emotionally harmful to the [older] minor children," who were seven and nine years old at the time.[13] The respondent joined in the respondent father's motion on February 6, 2020, during oral argument. Neither the respondent nor the respondent father offered any reason for the late filing of the motion, despite the petitioner's objection, which included that specific ground.

During the February 6, 2020 hearing, the petitioner argued in part that the motion was untimely and that it would be prejudicial to the petitioner if it were granted. She explained that she already had presented all of her evidence, that the evidence concerning the children's statements was admitted, primarily without objection, through the business records exception to the hearsay rule applicable to the records of the department and the children's school. Specifically, the petitioner's counsel argued: "Then it's prejudicial in that we've already presented the evidence and had there been notice of this

[13] The guardian ad litem and the attorney for the children each filed a position letter objecting to the motion, as well.

and generally—well, let me start with, first, none of the evidence that was presented relied on the unavailability of the children. The exhibits that were and the information that was admitted was admitted through business record[s] of [the department], the business record[s] of the school as mandated reporters . . . . So, the admission of the statements by the children came in not through the residual that may trigger as in *In re Taylor F.*, [296 Conn. 524, 544–47, 995 A.2d 611 (2010)], a separate hearing on the availability of the witnesses, the psychological availability of the witnesses, but, had the court wished to address that, we've been foreclosed as our evidence has closed on that. And, generally, as I said, those are usually hearings that are held before trial commences or addressed during trial through the witnesses that are being called." See *In re Taylor F.*, supra, 544 ("a trial court properly may conclude [after an evidentiary hearing] that a child is unavailable if there is competent evidence that the child will suffer psychological harm from testifying . . . [but] [t]he court's determination must be based . . . on evidence specific to the child and the circumstances").

In its oral ruling during the February 6, 2020 hearing, the court stated that it did not think that it was in the children's best interests to testify, and it explained that it did not want its ruling "to hang all on the linchpin of timeliness so that's why [it] address[ed] the . . . best interest first . . . . The [petitioner] has rested and this is why we have trial management orders that review or require parties to set forth who their witnesses are. I understand *that may change for good cause from time to time* but I can't think of anything that would have suddenly [leapt] out from what has been presented and the material presented now that would not have been apparent before. So I am going to deny the [respondent] father's motion." (Emphasis added.) The court's written comments, contained in the trial court file for that date,

specifically provide: "Court determines it would not be in best interest of children to be called to testify in this case. Also, motion is untimely."

Despite this record, the respondent argues that we should disregard the trial court's statements that it was denying the respondent father's motion for permission to call the children as witnesses on the ground that the motion was untimely and without a showing of good cause excusing the lateness. She contends that (1) her appellate brief, although not specifically addressing the lateness of the motion and the failure to demonstrate good cause, was a complete attack on the court's decision, including this ground, (2) the court's statement about the lateness of the motion and the failure to argue good cause was not actually a basis for the court's denial of the motion, and (3) we should exercise our equitable powers to vacate the court's judgment. We consider each of these reasons in turn.

First, the respondent argues that her challenge to the trial court's order denying the motion was "a complete attack *in toto* on the validity of the trial court's order precluding her from questioning her children at the trial on the neglect petitions." She further argues that, consequently, "[t]he appropriate treatment of the trial court's comments about the motion's timeliness is not as an independent ground upon which to affirm the judgment. Rather, this court must 'closely examine' any and all procedural reasons advanced by the trial court in support of its ruling as part of the due process balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)." We are not persuaded.

The respondent's argument requires us to interpret the court's order. "As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The legal effect of an order must be declared in light of the literal meaning of the language used. The unambiguous terms of [an order],

like the terms in a written contract, are to be given their usual and ordinary meaning. . . . [An order] must be construed in light of the situation of the court, what was before it, and the accompanying circumstances." (Citation omitted; internal quotation marks omitted.) *In re Jacklyn H.*, 162 Conn. App. 811, 830, 131 A.3d 784 (2016).

Both in its oral ruling and in its written comments following the hearing on the respondent father's motion, the court provided two bases for denying the motion. The court first determined that it was not in the children's best interests to testify and explained its reasoning for reaching that conclusion. Second, the court stated that the motion was untimely and explained why it was denying the motion due to its late filing. It is clear to us from the language used by the court that it concluded that both of the stated reasons constituted independent bases to deny the respondent father's motion.

The respondent does not claim, nor could she, that she argued in her principal brief on appeal that the court deprived her of due process because it relied on the deadlines in its trial management orders to deny the respondent father's motion. Her principal brief attacked only the court's reliance on the best interests of the children as a ground for denying the motion. In fact, the respondent does not argue in her supplemental brief that the court's reliance on the deadlines in the trial management orders violated due process; nor could she, in good faith, because our law is to the contrary. See *Levine* v. *Hite*, 189 Conn. App. 281, 296, 207 A.3d 100 (2019) ("A trial court has the authority to manage cases before it as is necessary. . . . Deference is afforded to the trial court in making case management decisions . . . . The case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious

disposition of cases. . . . The ability of trial judges to manage cases is essential to judicial economy and justice." (Internal quotation marks omitted.)). Consequently, the respondent's suggestion that we should review a constitutional claim that she never raised and that finds no support in the law is without merit.

Second, the respondent argues that the court's comments regarding the timeliness of the respondent father's motion should be disregarded as "obiter dicta" because they were not material or necessary to the court's ruling. The respondent argues that the timeliness of the motion really was not an issue because "on January 10, 2020, the court gave the respondent permission to produce any dispositional evidence she wished on the last day of trial." We disagree.

The fact that the respondent may have had permission to present "any dispositional evidence" in her defense of the neglect petitions did not mean that she had a right to do so in contravention of the orders of the court or the rules of practice. The court at all times had the authority to limit the presentation of evidence based on its previous orders and the relevant rules. In any event, for the reasons previously discussed, the record is clear that the court relied on the untimeliness of the respondent father's motion as an independent ground for its denial on February 6, 2020. Thus, the court's reliance on the untimeliness of the motion was in no way "obiter dicta."

Finally, the respondent argues that we should exercise our power of "equitable vacatur" to prevent the trial court's ruling from becoming "misleading legal precedent." The respondent argues that, because the court improperly used the best interests of the children as a basis for denying the respondent father's motion, we should ignore the question of mootness and correct the court's purported error so that the appropriate test is applied in future cases should the question of whether

a parent has the right to compel their children to testify arise. We conclude that using the equitable remedy of vacatur in the manner suggested by the respondent is not appropriate. A review of our Supreme Court's prior application of this remedy is instructive.

In *In re Candace H.*, 259 Conn. 523, 525–26, 790 A.2d 1164 (2002), on which the respondent relies, the respondent mother had "appealed to the Appellate Court from the trial court's denial of her motion for visitation with the child. The Appellate Court reversed, in part, the judgment of the trial court, concluding that the trial court properly had denied the respondent's motion for visitation; *In re Candace H.*, 63 Conn. App. 493, 502, 776 A.2d 1180 (2001); but impermissibly had delegated to the department and to the child's foster parents 'its independent obligation to determine and further the child's best interest.' Id., 504." (Footnote omitted.) After our Supreme Court granted the department's petition for certification, the respondent voluntarily relinquished her parental rights, rendering the department's appeal to our Supreme Court moot. *In re Candace H.*, supra, 259 Conn. 526. The court concluded that the appeal should be dismissed as moot, but it, nevertheless, granted the department's request to vacate the Appellate Court's judgment to the extent that it reversed the trial court's decision empowering the department and the foster parents to determine the propriety of any future visitation. Id. The court provided no explanation for its decision to vacate the judgment of the Appellate Court other than to state that it was in the public interest to do so and noting that "[v]acatur is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." (Internal quotation marks omitted.) Id., 527 and n.5.

Similarly, in *In re Jessica M.*, 250 Conn. 747, 738 A.2d 1087 (1999), our Supreme Court, after a certified appeal in a termination of parental rights case became moot,

granted the petitioner's motion "to vacate the judgments of the Appellate Court and the trial court . . . on the grounds that the appeal is now moot and the issues decided by those courts have not been subject to review by the Supreme Court." Id., 749. In both *In re Candace H.*, and *In re Jessica M.*, our Supreme Court employed the equitable remedy of vacatur to leave for another day resolution of an issue that it did not reach because the appeal in which it would have reached the issue had been rendered moot.

In the present case, the respondent is not asking us to vacate that part of the trial court's judgment that relied on the best interests of the children so that the question of the appropriate standard to apply to a motion for permission to call children as witnesses in a neglect proceeding can be addressed another day in another case. Instead, the respondent is asking us to vacate the judgment of the trial court "in order to clarify the correct legal standard that should be employed by the Superior Court in adjudicating motions for child testimony under Practice Book § 32a-4." Essentially, the respondent is asking us to use the equitable remedy of vacatur to render an advisory opinion in an appeal that otherwise is moot. The respondent has cited no authority that permits us to do so, and we are aware of none. Furthermore, we conclude that vacatur is not appropriate in this case because the trial court's decision, unlike this court's decisions in *In re Candace H.* and *In re Jessica M.*, is not binding on the Superior Court. Thus, a parent defending against a neglect petition will be able to raise the same procedural arguments raised by the respondent in this case, and any decision regarding such arguments will be subject to review by this court and/or our Supreme Court. For these reasons, we reject the respondent's request that we employ the equitable remedy of vacatur in such an unprecedented manner.

Because the respondent challenges only one of the two separate and independent bases for the court's denial of the motion to call the two older minor children to testify, even if we were to agree that the court should not have considered the best interests of the children when considering the respondent father's motion, the fact that there is a second independent basis for upholding the court's determination, which she failed to challenge on appeal, renders us unable to provide her with any practical relief. On the basis of our plenary review of the record and the court's decision in this case, we conclude that the court utilized two independent grounds for denying the respondent's motion for permission to call the two older children to testify, one of which she has not challenged on appeal, rendering her challenge to the other independent ground moot.

The appeal is dismissed.

In this opinion the other judges concurred.

IN RE JACOB M.*
(AC 44233)

IN RE NATASHA T. ET AL.
(AC 44237)

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

Syllabus

The respondent parents filed separate appeals to this court from the judgments of the trial court terminating their parental rights with respect to the minor children, N and J. N and J are the biological children of the respondent mother and J is the biological child of the respondent father. The petitions were consolidated for trial. *Held*:

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

1. The respondents could not prevail on their claim that the trial court, relying on an executive order issued by the governor in response to the COVID-19 pandemic, improperly denied their joint motion for a mistrial on the basis of the court's failure to render its judgments within 120 days of the completion of the trial as required by statute (§ 51-183b), as the time limitation in § 51-183b properly had been suspended by the executive order at the time the judgments in the present case were rendered: the General Assembly set forth in statute (§ 28-9) a policy, which the governor followed, that, upon the governor's declaration of a public health emergency pursuant to statute (§ 19-131a), the governor may suspend any statute that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of the public health, and such standards and limitations set forth by the legislature in § 28-9 (b) (1) were followed in the executive order suspending the 120 day requirement set forth in § 51-183b, and a requirement of adherence to a strict time limitation on the rendering of judgments in civil cases at the outset of the COVID-19 pandemic, when there were critical shortages in sanitizer and personal protective equipment, reasonably could have interfered with the health and safety of the judges of the Superior Court and courthouse staff, who reasonably would have had to enter courthouses in order to review materials and to perform tasks necessary for the rendering of civil judgments; moreover, the time limitation set forth in § 51-183b, contrary to the mother's claim, was not jurisdictional, as § 51-183b related to the authority given to the Superior Court to render judgments in civil cases within a certain time frame, and did not pertain to the jurisdiction of the court to decide certain types of cases.
2. The trial court properly concluded that the Department of Children and Families made reasonable efforts to reunify the mother with the minor children, the evidence in the record having supported the court's determination; the department offered the mother many services over a number of years, including mental health treatment, parent mentoring services, visitation services, domestic violence counseling and transportation, as well as substance abuse treatment, and the mother attended a partial hospitalization program and an intensive outpatient program; moreover, although the department suspended visitation on the recommendation of a therapist, on the basis that the visits to the mother, who was at that time incarcerated, caused the children much emotional distress, the department continued its reunification efforts by regularly communicating with the children's therapist to inquire about the children's ability to resume visitation and provided updates to the mother on the children.
3. The trial court properly concluded that the department made reasonable efforts to reunify the father with J, the evidence in the record having supported the court's determination: the department referred the father for substance abuse services to address his admitted opioid dependence, but he did not complete those programs successfully, and the court properly determined that it was not unreasonable for the department

not to have referred the father for mental health services when he denied having any mental health concerns; moreover, the department's efforts regarding visitation were reasonable under the circumstances wherein J had negative reactions following visitation, and, although the court suspended visitation, the department communicated with the father regularly and the department continually contacted the therapist to assess whether resumption of visitation was advisable.

4. The trial court's determination that the termination of the father's parental rights was in the best interest of J was not clearly erroneous, as it was supported by the court's findings and conclusions with respect to the applicable statutory (§ 17a-112 (k)) factors, as well as the court's conclusion regarding J's need for permanency and stability: the father failed to demonstrate, in relying on the therapist's recommendation that the children establish positive memories of their biological parents, that it was not in J's best interest to have the father's parental rights terminated, as the therapist recommended open adoption and did not recommend reunification, the court reasonably found that the father was not prevented from having a meaningful relationship with J due to the unreasonable acts or conduct of another person, specifically, J's foster mother, with whom J had bonded, and J's therapist, but, rather, that it was his own actions that caused him not to have a meaningful relationship with J; moreover, although the father alleged that the department did not make reasonable efforts to reunite him with J, including offering him services to improve his parenting skills or referrals for mental health concerns, the record indicated that the father denied that he had any mental health concerns, the department offered the father timely and appropriate services from the start of the case, and the court determined that the father neither adjusted nor corrected his circumstances to make it in J's best interest to be returned to him.

5. This court declined to review the mother's claim that the trial court improperly denied her motion to intervene, filed after the trial court rendered judgments terminating her parental rights, in which she sought posttermination visitation with the minor children, as the record was inadequate to review this claim because the trial court did not file a memorandum of decision explaining its ruling and the mother did not file a notice pursuant to the applicable rule of practice (§ 64-1 (b)) or a motion for articulation of the court's factual and legal basis for its ruling.

Argued February 18—officially released May 20, 2021**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with

** May 20, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

respect to their minor children, brought to the Superior Court in the judicial district of Middlesex, Juvenile Matters at Middletown, and tried to the court, *Woods*, *J.*; judgments terminating the respondents' parental rights, from which the respondent father of Jacob M. and the respondent mother of Natasha T. et al. filed separate appeals to this court. *Affirmed.*

Karen Oliver Damboise, for the appellant in Docket No. AC 44233 (respondent father).

Albert J. Oneto IV, assigned counsel, for the appellant in Docket No. AC 44237 (respondent mother).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee in both cases (petitioner).

Chris Oakley, attorney for the minor children in both cases.

Opinion

DiPENTIMA, J. In these related appeals, the respondents, mother and father, appeal from the judgments of the trial court terminating their parental rights with respect to their minor children and child, respectively. The respondents both claim that the court improperly (1) denied their joint motion for a mistrial, (2) concluded that the Department of Children and Families (department) made reasonable efforts to reunify them with their children or child and (3) concluded that they were unwilling or unable to benefit from reunification efforts. In Docket No. AC 44233, the father additionally claims that the court improperly concluded that (1) the termination of his parental rights was in the best interest of his son, Jacob, and (2) it lacked the authority to grant posttermination contact. In Docket No. AC 44237, the

mother additionally claims that the court improperly denied her postjudgment motion to intervene. We affirm the judgments of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to the resolution of the respondents' claims on appeal. At the time of the court's July 21, 2020 judgments, Natasha, the biological daughter of the mother,[1] was seven years old, and Jacob, the biological son of both respondents, was four years old. In its memorandum of decision, the court found the following. "On November 22, 2016, [the department] received a report alleging physical and emotional neglect of Natasha . . . and Jacob . . . by [the respondents]. Pursuant to the report, [the father] was in a car accident at work and appeared to be under the influence. [The father's] boss then sent a friend to the family residence. . . . The children were found to be naked and soiled. They were brought to the maternal grandparents' home. Police went to the home where the parents admitted to opioid overdoses while caring for the children. At that time the department invoked a ninety-six hour hold on behalf of both children.

"On November 25, 2016, petitions of neglect and motions for orders of temporary custody were filed by [the petitioner, the Commissioner of Children and Families]. The [orders of temporary custody were] . . . granted on November 25, 2016, and sustained on December 2, 2016. The children were adjudicated neglected and committed to [the petitioner] on December 22, 2016. On February 8, 2017, they were sent to live with their mother at the Amethyst House women and children's program. On March 30, 2017, they returned to their apartment. . . . A motion to revoke commitment was

[1] In its memorandum of decision, the court also terminated the parental rights of Natasha's biological father, Charles L., who did not participate in this appeal.

filed on May 8, 2017, and commitment was revoked in a hearing on May 11, 2017 . . . . The children were then placed under an order of protective supervision for six months . . . which was extended until December 7, 2017.

"On December 1, 2017, [the mother] failed to attend her criminal court sentencing hearing. A silver alert was issued for Natasha and Jacob as [the respondents] fled with the children. On December 2, 2017, the family was found in a hotel . . . and the [respondents] were arrested. A ninety-six hour hold was invoked and Jacob and Natasha were placed in a nonrelative foster home. An [order of temporary custody] was granted on December 5, 2017, and the children were committed to the [petitioner] on December 13, 2017.

"On September 25, 2018, [the petitioner] filed a permanency plan of [termination of parental rights] and adoption and a termination of parental rights petition [for each child]. Said permanency plan was approved on November 15, 2018. A [termination of parental rights] trial was held in this matter on September 17, 18, 25, and 30, and October 2 and 28, 2019."

In a memorandum of decision filed on July 21, 2020, the court, *Woods*, *J.*, terminated the parental rights of the mother with respect to Natasha and Jacob, and terminated the parental rights of the father with respect to Jacob. On May 8, 2020, prior to the date of the filing of the memorandum of decision, the respondents filed a joint motion for a mistrial. In that motion, the respondents argued that a mistrial was warranted due to the court's failure to render its judgments within 120 days of the completion of trial in violation of General Statutes § 51-183b. The court, *Woods*, *J.*, denied the motion on July 30, 2020.

These appeals followed. Additional facts and procedural history will be set forth as necessary.

I

SEPARATION OF POWERS

Both respondents claim that the court, relying on an executive order issued by the governor, improperly denied their joint motion for a mistrial because the court had failed to render its judgments within 120 days of the completion of trial as required by § 51-183b. We are not persuaded.

To provide context for the respondents' claim, we discuss the relevant statutes and executive order. Section 51-183b provides in relevant part: "Any judge of the Superior Court . . . who has commenced the trial of any civil cause . . . shall render judgment not later than one hundred and twenty days from the completion date of the trial of such civil cause. The parties may waive the provisions of this section." The respondents did not waive the statutory provision, and it is undisputed that the court's July 21, 2020 judgments were rendered more than 120 days after the completion of trial.

On March 10, 2020, prior to the conclusion of the 120 day time limit, the governor issued a declaration of a "public health emergency and civil preparedness emergency throughout the [s]tate, pursuant to [Connecticut General Statutes §§] 19a-131a and 28-9" in order "to limit the spread of COVID-19" due to the "global pandemic" and the "resulting shortages of personal protective equipment and other supplies that could jeopardize public safety and civil preparedness."

Section 28-9 (b) (1) provides in relevant part : "Following the Governor's proclamation of a civil preparedness emergency pursuant to subsection (a) of this section or declaration of a public health emergency pursuant to section 19a-131a, the Governor may

modify or suspend in whole or in part, by order as hereinafter provided, any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. . . .''

On March 19, 2020, the governor issued Executive Order No. 7G, which referenced the declaration of a state of emergency and the confirmed spread of COVID-19 in the United States and in Connecticut and which suspended ''[n]on-[c]ritical [c]ourt [o]perations and [a]ssociated [r]equirements'' in paragraph 2. Specifically, paragraph 2 (c) of Executive Order No. 7G suspended ''[a]ll time limitations for rendering judgments in civil actions provided in [§] 51-183b . . . .''

The respondents claim that § 28-9, to the extent that it permits the governor, pursuant to paragraph 2 (c) of Executive Order No. 7G, to suspend the time limitation for rendering civil judgments set forth in § 51-183b, constitutes an unconstitutional delegation of the legislature's lawmaking function. In particular, they contend that the legislature's delegation to the governor of its exclusive lawmaking function to create statutes violates the separation of powers provision of the Connecticut constitution.

Generally, the decision of a trial court to deny a motion for a mistrial is reviewed under an abuse of discretion standard. *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 392, 3 A.3d 892 (2010). In the present case, however, the court's ruling on the motion for a mistrial implicates a constitutional question over which our review is plenary. *Persels & Associates, LLC* v. *Banking Commissioner*, 318 Conn. 652, 668, 122 A.3d 592 (2015). Article second of the constitution of Connecticut, as amended

by article eighteen of the amendments, provides in relevant part: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another . . . ."

"[T]he primary purpose of [the separation of powers] doctrine is to prevent commingling of different powers of government in the same hands. . . . The constitution achieves this purpose by prescribing limitations and duties for each branch that are essential to each branch's independence and performance of assigned powers. . . . It is axiomatic that no branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof. . . .

"The separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power. Nevertheless, it cannot be rigidly applied always to render mutually exclusive the roles of each branch of government. . . . [T]he great functions of government are not divided in any such way that all acts of the nature of the function of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government. Executive, legislative and judicial powers, of necessity overlap each other, and cover many acts which are in their nature common to more than one department." (Citations omitted; internal quotation marks omitted.) *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 551-52, 663 A.2d 317 (1995); see also *Casey* v. *Lamont* Conn. , , A.3d (2021).

Article third, § 1, of the Connecticut constitution provides in relevant part that: "The legislative power of

the state shall be vested in . . . the general assembly. . . .' "The [lawmaking] power is in the legislative branch of our government and cannot constitutionally be delegated . . . but the General Assembly may carry out its legislative policies within the police power of the state by delegating to an administrative agency the power to fill in the details." (Citation omitted; internal quotation marks omitted.) *New Milford* v. *SCA Services of Connecticut, Inc.*, 174 Conn. 146, 149, 384 A.2d 337 (1977).

"A Legislature, in creating a law complete in itself and designed to accomplish a particular purpose, may expressly authorize an administrative agency to fill up the details by prescribing rules and regulations for the operation and enforcement of the law. In order to render admissible such delegation of legislative power, however, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration. . . . If the Legislature fails to prescribe with reasonable clarity the limits of the power delegated or if those limits are too broad, its attempt to delegate is a nullity." (Citations omitted.) *State* v. *Stoddard*, 126 Conn. 623, 628, 13 A.2d 586 (1940). "[T]he *Stoddard* rule clearly is applicable to delegations of authority from the legislative to executive department." *Bottone* v. *Westport*, 209 Conn. 652, 660, 553 A.2d 576 (1989).

Pursuant to the authority given to the governor by the legislature in § 28-9, the governor's suspension in paragraph 2 (c) of Executive Order No. 7G of the time limitation in § 51-183b was not inconsistent with the

constitutional principle that the General Assembly cannot delegate its lawmaking power. The General Assembly exercised its legislative power when it decided that the governor could suspend statutes that conflict with civil preparedness or public health upon the governor's ascertaining and declaring of the existence of a particular contingency. See *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692–93, 12 S. Ct. 495, 36 L. Ed. 294 (1892); see also *Casey* v. *Lamont*, supra, Conn. .

In *Casey*, our Supreme Court held that the plaintiffs, who were the owners of a Connecticut pub that had closed in response to executive orders that were issued due to the COVID-19 pandemic, which pertained to on premise consumption of alcoholic liquor, could not satisfy their heavy burden of establishing that § 28-9 (b) (1) and (7) was an unconstitutional delegation by the General Assembly of its legislative powers to the governor in violation of the separation of powers provision of the Connecticut constitution. Id., . Our Supreme Court concluded that, "although the lawmaking power is in the legislative branch of our government and cannot constitutionally be delegated . . . the General Assembly may carry out its legislative policies within the police power of the state by delegating to an administrative agency the power to fill in the details . . . . [T]he General Assembly has the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet that threat . . . . Once the General Assembly has made that determination, it may carry out that policy by delegating to the executive branch the power to fill in the details in order to effectuate that policy." (Citations omitted; internal quotation marks omitted.) Id., .

As stated by our Supreme Court in *Casey*, the General Assembly set forth in § 28-9 the policy that the governor was to follow, namely, that upon the proclamation of

a civil preparedness emergency or upon the declaration of a public health emergency pursuant to § 19-131a, the governor may suspend statutes that conflict with the efficient and expeditious execution of civil preparedness functions or the protection of public health. Id., . The standards and limitations set forth by the legislature in § 28-9 (b) (1) were followed by the governor in paragraph 2 (c) of Executive Order No. 7G. As a precondition to the applicability of § 28-9 (b) (1), the governor must first make a proclamation of a civil preparedness emergency or a declaration of a public health emergency, both of which the governor did on March 10, 2020, prior to the conclusion of the 120 day time limit in the present case.

In paragraph 2 (c) of Executive Order No. 7G, the governor suspended the 120 day time limitation for rendering judgments in civil actions provided in § 51-183b. Executive Order No. 7G referenced the COVID-19 "outbreak in the United States and confirmed spread in Connecticut," stated that the virus "spreads easily from person to person and may result in serious illness or death" and noted the "critical shortage of hand sanitizer and personal protective equipment." A requirement of adherence to a strict time limitation on the rendering of judgments in civil cases at the outset of the COVID-19 pandemic, when there were critical shortages in sanitizer and personal protective equipment, reasonably could have interfered with the health and safety of the judges of the Superior Court and courthouse staff, who reasonably could have had to enter courthouses in order to review materials and to perform tasks necessary for the rendering of civil judgments.

The mother argues, citing *Waterman* v. *United Caribbean, Inc.*, 215 Conn. 688, 577 A.2d 1047 (1990), that the time limitation in § 51-183b is jurisdictional. She contends that article fifth, § 1, of the Connecticut constitution provides the General Assembly alone with the author-

ity to define the jurisdiction of the Superior Court.[2] She argues that § 28-9 cannot be applied so as to permit the governor to alter the jurisdiction of the Superior Court because it is the General Assembly, and not the executive branch, that "establishes the jurisdiction of the Superior Court." *Piquet* v. *Chester*, 306 Conn. 173, 188 n.14, 49 A.3d 977 (2012).

This argument is misplaced because § 51-183b does not relate to the jurisdiction of the Superior Court and *Waterman* does not stand for the proposition that § 51-183b is jurisdictional in nature. Section 51-183b does not pertain to the jurisdiction of the court to decide certain types of cases but, rather, it relates to the authority given to the Superior Court to render judgments in civil cases within a certain time frame. There is a "distinction between a trial court's jurisdiction and its authority to act under a particular statute. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 463, 239 A.3d 272 (2020).

For the foregoing reasons, we conclude that the court properly denied the respondents' joint motion for a mistrial. Although the court rendered its judgments outside the 120 day time limit in § 51-183b, that time limita-

[2] Article fifth, § 1, of the Connecticut constitution, as amended by article twenty, § 1, of the amendments, provides: "The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law."

tion properly had been suspended at the time when the judgments in the present case were rendered.

II

ADJUDICATORY PHASE

The respondents each challenge independently the court's conclusions regarding the adjudicatory phase of the termination proceeding made pursuant to General Statutes § 17a-112 (j) (1) that the department made reasonable efforts to reunify them with the children and that the respondents were unwilling or unable to benefit from such efforts. Before we address these claims, we note the following facts as found by the court regarding Natasha's and Jacob's visitation with the respondents during their periods of incarceration. Natasha had difficulty visiting the mother in prison and experienced high anxiety and difficulty returning to her routine following such visits. Natasha, who had witnessed the respondents' arrests, would indicate that the mother did not protect her or keep her safe and expressed that she did not want to visit the mother in prison. Jacob had episodes of crying and complained of stomach aches following visitation.[3] While playing, Natasha and Jacob would recreate the scene of the police arresting the respondents. As a result of their anxiety, dysregulation and concerning behavior, the children began therapy with DaJavon Davis, a licensed marriage and family therapist, in May, 2018. After working with the children, Davis informed the department that they should not visit the respondents until Natasha and Jacob were better able to regulate their emotions through therapy.

In June, 2018, the petitioner filed a motion for order, seeking to have visitation suspended between the children and the respondents, both of whom were incarcer-

[3] The court found that, in November, 2018, Jacob had surgery to remove his appendix and a section of diseased bowel. The court noted that his therapist, DaJavon Davis, worked with Jacob to address his negative reactions to visitation.

ated at that time. In the motion, the petitioner stated that Davis recommended that visitation be suspended at that time "due to the negative impact these visits are having on the children." On August 22, 2018, following an evidentiary hearing, the court, *Sanchez-Figuerora*, *J.*, granted the motion and determined that it was in the children's best interests to suspend the visits.

The department conferred regularly with Davis to assess the children's fitness to resume contact with the respondents. A phone call between the respondents and the children took place on July 19, 2019, during which time Natasha became upset and left the room. After further work with Davis, Natasha sent photographs of herself to the mother in August, 2019. The mother filed a motion for a psychological evaluation of the family in February, 2019. The court, *Sanchez-Figueroa*, *J.*, granted the motion. Mary Cheyne, a psychologist who conducted the psychological evaluation of the family, stated in her evaluation that it would benefit the children to form a positive relationship with the respondents. Nevertheless, she concluded that it was best for the children to achieve permanency through an open adoption.

The following principles guide our analysis. "A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under . . . § 17a-112 (j)] exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase." (Internal quotation marks omitted.) *In re Shaiesha O.*, 93 Conn. App. 42, 47, 887 A.2d 415 (2006).

"[T]he statutory requirement of § 17a-112 (j) (1) may be satisfied in any one of three ways: (1) by showing that the department made reasonable efforts to reunify;

(2) by showing that the parent was unable or unwilling to benefit from reunification efforts; or (3) by a previous judicial determination that such efforts were not appropriate. . . . The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible." (Citation omitted; internal quotation marks omitted.) *In re Jonathan C.*, 86 Conn. App. 169, 179, 860 A.2d 305 (2004).

"Our Supreme Court clarified the applicable standard of review of an appeal from a judgment of the trial court pursuant to § 17a-112 (j). . . . [T]he court clarified that [w]e review the trial court's subordinate factual findings for clear error. . . . We review the trial court's ultimate determination that a parent has failed to achieve sufficient rehabilitation [or that a parent is unable to benefit from reunification services] for evidentiary sufficiency. . . . [I]t is appropriate to apply the same standard of review of a trial court's decision with respect to whether the department made reasonable efforts at reunification." (Citations omitted; internal quotation marks omitted.) *In re Corey C.*, 198 Conn. App. 41, 59, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020).

A

In AC 44237, the mother claims that the court improperly concluded that the department made reasonable efforts to reunify her with Natasha and Jacob. We disagree.

The following additional facts, as found by the court, are relevant. The court found that the department referred the mother "to many services over a number

of years to assist her in an effort to reunify her with Natasha and Jacob. [The department] has offered her substance abuse treatment, mental health treatment, parent mentoring services, visitation services, domestic violence counseling, and transportation." The court noted that, in 2016, the mother had admitted to using heroin daily and to having overdosed on heroin on November 22, 2016. She accepted services at the Recovery Specialist Voluntary Program, where it was recommended that she attend a partial hospitalization program at the Rushford Center on December 5, 2016. In November, 2016, the department referred the mother to the Amethyst House, a residential substance abuse program, which she entered in January, 2017. The children were reunited with the mother at the Amethyst House on March 30, 2017, and returned to their apartment. She was discharged to the Rushford Center to attend a partial hospitalization program and an intensive outpatient program, both of which she completed successfully, and she was discharged from the Rushford Center in September, 2017. The court further found that "[s]ubsequent to [the] mother's incarceration on December 1, 2017, the department continued to make reasonable reunification efforts by maintaining monthly phone contact with [the mother] to address the status of the case."

The mother's argument on appeal focuses on the time frame following the court's August 22, 2018 order suspending visitation, and she contends that the department did not make any effort to reunify her with her children during that time frame. She argues that, "[i]n view of the dearth of evidence surrounding the petitioner's efforts to investigate whether family therapy of the kind recommended by . . . Cheyne would have ameliorated the children's fears about visiting the respondent within a prison setting, it was not clear from the record that there was nothing more the department

could have done [to reunite the family]." (Internal quotation marks omitted.)

The mother mischaracterizes the recommendations of Cheyne, who did not recommend that the children and the respondents engage in some type of family therapy while the mother was incarcerated.[4] Rather, Cheyne discussed an eventual progression toward in person contact "in a perceived safe place," but stressed that she did not recommend reunification in her evaluation "because, even while [the respondents] seem to have made some strides in terms of their personal growth and in their substance abuse, I also know that them being incarcerated is a very contained environment and I wouldn't be comfortable talking about any kind of reunification until I saw a good twelve to eighteen plus months of appropriate behavior outside of incarceration and that's too long for these children to wait for permanency." The goal of Cheyne's recommendations was not to reduce the children's negative reactions to visiting their mother in prison.[5] Rather, Cheyne testified at trial that her recommendations focused on how positive memories of their biological parents would assist in the children's emotional well-being. She testified that she recommended "what would take the form of a reunification therapy but not necessarily reunification" and suggested therapeutically arranged contacts, through Davis, to assist with forming positive

[4] In her evaluation, Cheyne stated that "[r]eunification would need to be conducted within a therapeutic framework of, or similar to, parent-child reunification therapy. Only if that is successful will [the] children feel comfortable visiting with their parents. And, this cannot begin until [the] parents are no longer incarcerated." In her evaluation, however, Cheyne recommended open adoption.

[5] If the mother wanted investigation into this type of therapy, she could have requested that the department make such an effort. See *In re Corey C.*, supra, 198 Conn. App. 64 (respondent's failure to request certain services undermines argument that services were part of what department should have provided as part of reasonable efforts to reunify).

memories. She specified that Davis would determine the extent to which the children were able to reach out and specified that the respondents' responses would be reviewed by Davis before the children received them.

There was evidence that the process described by Cheyne was underway. During the mother's incarceration, there initially were visits between the mother and the children, but Davis noted the adverse reactions of the children to such visits and recommended that the visits be suspended until the children were better able to regulate their emotions through therapy. A phone call between the respondents and the children took place in July, 2019, but Natasha became upset and left the room. Eventually in August, 2019, at Natasha's request, and with the assistance of a social worker, photographs of herself were sent to the mother. After visitation was suspended, a social worker requested monthly updates from Davis regarding the children's therapy, specifically as to whether the children were ready to resume visitation. In addition, a social worker called the mother monthly to provide updates on the children and to receive updates from the mother on her participation in programs while incarcerated.

These facts are much different than those in *In re Oreoluwa O.*, 321 Conn. 523, 139 A.3d 674 (2016) (*Oreoluwa*), on which the mother principally relies. In *Oreoluwa*, our Supreme Court reversed the judgment of the trial court terminating the parental rights of the father, who lived in Nigeria and who had difficulty traveling to the United States to visit his biological son who had a medically complex heart condition. Id., 526–43. The court determined that the trial court based its review of the efforts made by the department to reunify on a presumption that the father needed to be present in this country in order to engage in reunification efforts because Oreoluwa could not travel to Nigeria due to medical issues. Id., 542–43. The court noted that no

evidence was presented "regarding any additional steps taken to obtain more specific information about when Oreoluwa may be cleared to travel or at least when the medical authorities would have some clarity regarding his future ability to travel. Because the respondent [father] was having difficulty traveling to this country to be with Oreoluwa, the department's utter failure to determine when Oreoluwa would be able to travel to Nigeria can hardly be taken as evidence of an effort to reunify the two." Id., 543. The court further reasoned that no evidence was presented regarding the department's efforts to investigate the type of medical care that Oreoluwa would receive in Nigeria. Id., 542–43. The court stated that "[w]ithout updated medical information regarding Oreoluwa's ability to travel and medical needs, however, we conclude that the commissioner did not meet the burden of demonstrating that the department did everything reasonable under the circumstances to reunite the respondent with Oreoluwa." (Internal quotation marks omitted.) Id., 546.

The mother argues that her situation is similar to that of the respondent father in *Oreoluwa*, who was "confined" to the country of Nigeria and whose child had a complex medical condition because she "could not visit with the children due to their medical complexity without the assistance of the petitioner, as an agent of the state, to investigate services that would be logically calculated to overcome the physical and medical barriers preventing the visits with the children."

The present case and *Oreoluwa* are inapposite. In *Oreoluwa*, the department failed to make any effort to determine whether the child was medically able to travel to Nigeria. Unlike the minor child in *Oreoluwa*, who never visited his father in Nigeria, the children in the present case actually visited the mother in prison until visits were suspended. Further, the department made reasonable efforts by regularly communicating with Davis to inquire about the children's ability to

resume visitation. Additionally, in the present case, unlike in *Oreoluwa*, the reunification efforts made by the department following the court's suspension of visitation comprised only one segment in a series of reunification services provided to the mother. In *Oreoluwa*, the entirety of the reunification efforts took place under circumstances wherein the department never investigated whether the child could travel to Nigeria to visit the biological father. *In re Oreoluwa O.*, supra, 321 Conn. 545.

Although the mother's argument focuses on only one time frame, we note that throughout the entire process the department made reasonable efforts to reunify the mother with the children. The department offered the mother mental health treatment, parent mentoring services, visitation services, domestic violence counseling and transportation. The mother, who had admitted to having overdosed on heroin and to using heroin daily, was provided with substance abuse treatment by the department. The children were placed at the Amethyst House with the mother and she was provided with further substance abuse treatment, including a partial hospitalization program and an intensive outpatient program at the Rushford Center. We conclude, on the basis of this record, that the court's conclusion that the department made reasonable efforts to reunify the mother with the children was supported sufficiently by the evidence.

B

In AC 44233, the father claims that the court improperly concluded that the department made reasonable efforts to reunify him with Jacob. We disagree.

The following additional facts, as found by the trial court, are relevant. The court found that the department made "extensive efforts to find and engage [the father] in services for the purposes of reunification. [The

father] was referred to Fostering Family Services in December, 2016, for supervised visiting and parenting education. He attended only a few sessions and did not successfully complete the program. On December 7, 2016, [the father] submitted to a substance abuse evaluation and urine screen at Rushford Center. [The father] reported that he had a history of opioid dependence covering several years. Nevertheless, [the father] was recommended for detox but declined and reported that he had already undergone primary withdrawal. He also declined the partial hospitalization program . . . due to work concerns on December 9, 2016. In March of 2017, [the father] stopped working with Rushford Center and [Recovery Specialist Voluntary Program] case management services. He did not successfully complete these programs. In January, 2017, [the father] was referred to 24/7 Dads Program. He never followed through with the program. [The father] never engaged in any mental health treatment and denied he had any mental health issues. . . . The department continued to make reasonable efforts to reunify [the father] with Jacob . . . while incarcerated by maintaining monthly communication with him to inform him of Jacob's status and to receive updates on his participate in services while incarcerated."

The father does not contest any of these factual findings. Instead, he argues that the department offered only "minimal services" to him. He contends that the court identified his "presenting problems" as unaddressed mental health concerns, but that "there was no evidence that the department ever referred [him] to mental health services." We are not persuaded.

The court found that the father reported, at a December, 2016 substance abuse evaluation and urine screen at the Rushford Center, that he had a history of opioid dependence covering several years. The department provided the father with referrals for multiple services

relating to his substance abuse. The father, however, denied any mental health concerns. In a social study for the termination of parental rights, dated March 18, 2019, which was admitted as a full exhibit at trial, it was reported that "[the father] has not been engaged in any mental health treatment since the inception of this case. [The father] has denied any mental health issues." Under the circumstances of the present case, wherein the department referred the father for substance abuse services to address his admitted opioid dependence, but where the father did not complete those programs successfully, the court properly determined that it was not unreasonable for the department not to have referred him for mental health services when he had denied having any mental health concerns.

The father further argues that the department did not make reasonable efforts regarding visitation.[6] He contends that the "department's efforts to reunify are dictated by the particular deficiencies in the parent-child relationship. . . . The deficiencies in this particular parent-child relationship was that they were not visiting at all." He further contends that the department did not provide guidance, through changing the specific steps following the order suspending visitation, as to what he could have done to resume visitation. We are not persuaded.

The department referred the father for services relating to any "deficiencies in the parent-child relationship"

[6] He also contends that, prior to the suspension of visitation in August, 2018, he did not have visitation with Jacob in March, 2018, April, 2018, June, 2018, or July, 2018, in violation of General Statutes § 17a-10a (a). We note that the father's argument ignores that there is no statutory guarantee of visitation on any certain or definite timetable, but rather it is "based upon consideration of the best interests of the child." General Statutes § 17a-10a (b). The father did not raise this issue in his posttrial brief or at trial and, understandably, the court did not address this issue. Accordingly, we do not review it. *Guddo* v. *Guddo*, 185 Conn. App. 283, 286–87, 196 A.3d 1246 (2018) (because our review is limited to matters in record we do not address issues not decided by trial court).

caused by his opioid dependence. With respect to visitation, it was suspended due to the negative reaction of the children. Contrary to the father's contention that the social worker ceased contacting him in the six months following the order suspending visitation, the court found that the department communicated with the father monthly to provide updates on Jacob's status and to receive updates from him regarding his participation in services while incarcerated, and that the department conferred regularly with Davis to assess the children's fitness to resume contact with the respondents. These findings are not clearly erroneous. There was evidence that a social worker contacted the father monthly and sought monthly updates from Davis regarding the children's progress in therapy and regarding whether the children were ready to resume visitation. As we have noted previously, "[r]easonable efforts means doing everything reasonable, not everything possible." (Internal quotation marks omitted.) *In re Jonathan C.*, supra, 86 Conn. App. 179. The department's efforts regarding visitation were reasonable under the circumstances wherein Jacob had negative reactions following visitation, the court suspended visitation, the department checked in with the father regularly and the department continually contacted Davis to assess whether resumption of visitation was advisable. On the basis of this record, we conclude that the court's conclusion that the department made reasonable efforts to reunify the father with Jacob was supported by sufficient evidence.

C

In their respective appeals, both respondents claim that the court improperly determined that they were unwilling or unable to benefit from reunification efforts. We need not review these claims because we have determined that the court's conclusion that the department

made reasonable reunification efforts regarding both respondents was adequately supported by the evidence.

" 'Because the two clauses [of § 17a-112 (j) (1)] are separated by the word "unless," this statute plainly is written in the conjunctive. Accordingly, the department must prove *either* that it has made reasonable efforts to reunify *or*, *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. Section 17a-112 (j) clearly provides that the department is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element.' " (Emphasis in original.) *In re Paul O.*, 141 Conn. App. 477, 485, 62 A.3d 637, cert. denied, 308 Conn. 933, 64 A.3d 332 (2013). Because we have concluded that the court properly determined that the department made reasonable efforts to reunify the respondents with their respective child or children, we do not reach the respondents' additional claims regarding the court's conclusion that they were unable or unwilling to benefit from reunification. See id.

III

DISPOSITIONAL PHASE

In AC 44233, the father additionally claims that the court improperly concluded that the termination of his parental rights was in the best interest of Jacob. We disagree.

We first set forth the following applicable legal standards. "In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . In the dispositional phase of a termination of parental rights

hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [respondent's] parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnote omitted; internal quotation marks omitted.) *In re Joseph M.*, 158 Conn. App. 849, 868–69, 120 A.3d 1271 (2015); see *In re Kiara Liz V.*, 203 Conn. App. 613, 626, A.3d (2021) (determination that termination of parental rights is in best interest of child overturned only if trial court's findings are clearly erroneous); see also General Statutes § 17a-112 (k).[7]

[7] General Statutes § 17a-112 (k) provides in relevant part that, "in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

"[T]he fact that the legislature [had interpolated] objective guidelines into the open-ended fact-oriented statutes which govern [parental termination] disputes . . . should not be construed as a predetermined weighing of evidence . . . by the legislature. [If] . . . the record reveals that the trial court's ultimate conclusions [regarding termination of parental rights] are supported by clear and convincing evidence, we will not reach an opposite conclusion on the basis of any one segment of the many factors considered in a termination proceeding . . . . Indeed . . . [t]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . [A] trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Citations omitted; internal quotation marks omitted.) *In re Nevaeh W.*, 317 Conn. 723, 739–40, 120 A.3d 1177 (2015).

The court considered and made written findings as to all seven statutory factors. The father challenges the court's findings and conclusions with respect to four of those factors. For our analysis regarding some of these challenged factors, the court's findings regarding visitation, which are detailed in part II of this opinion, are relevant.

The father argues, with respect to the reasonable efforts factor, § 17a-112 (k) (2), that the department has not made reasonable efforts to reunite Jacob with him. He contends that the department did not make any referrals for mental health services or for services to improve his parenting skills. The father overlooks the court's finding that he had denied that he had any mental health concerns. The court determined that the department

offered him "appropriate and timely services from the beginning of the case" including "invitations to participate in Administrative Case Reviews, supervised visitations, Rushford Center Recovery Specialist Voluntary Program . . . 24/7 Dads Program, Considered Removal Team Meeting, ABH referrals, permanency team meetings, DCF Regional Resource Group and the Fostering Family Services Program." The court found that the "timeliness, nature, and extent of the services offered by [the department] to be fair and reasonable." These findings are not clearly erroneous.

The court determined that the father neither adjusted nor corrected his circumstances to make it in Jacob's best interest to be returned to him. See General Statutes § 17a-112 (k) (6). The father contends that he participated in various programs, including a drug and alcohol program as well as a fatherhood program while incarcerated in order to adjust his circumstances. Despite any progress the father made during incarceration, the court noted that Cheyne indicated that he would require another twelve to eighteen months of documented sobriety postincarceration, compliance with probation, gainful employment and stable housing before she would consider recommending reunification. "[W]e will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court." (Internal quotation marks omitted.) *In re Anaishaly C.*, 190 Conn. App. 667, 692, 213 A.3d 12 (2019).

Regarding the feelings and emotional ties factor, § 17a-112 (k) (4), the court noted the physical and emotional discomfort experienced by Jacob, who was four years old at the time of the court's decision, and his older sister, Natasha, as a result of having visited the respondents in prison. The court noted that "[t]he children have been in their current legal risk preadoptive placement since April, 2018. They have bonded with their foster parents who provide them with safety and

security. They have developed emotional ties with their foster parents who they call 'mom and dad.' "[8] The father argues that even though the children had not seen him for one year, they still had negative feelings toward him, which indicates that something else was at play. We will address the father's argument regarding alleged interference in his relationship with Jacob when reviewing his argument regarding the statutory factor in § 17a-112 (k) (7). For purposes of his emotional ties argument, we note that it is clear from the court's findings and the record that the court's order regarding the suspension of visitation was due to the children's negative reactions following visitation with the respondents. We further note that when addressing the emotional ties factor, it was proper for the court to consider the bond that Jacob had with the preadoptive parents. "In considering the minor child's emotional ties under § 17a-112 (k) (4), it is appropriate for the trial court to consider the [child's] emotional ties to the preadoptive foster family in considering whether termination of the respondent's parental rights [is] in the children's best interest[s].§ (Internal quotation marks omitted.) *In re Elijah G.-R.*, 167 Conn. App. 1, 30–31, 142 A.3d 482 (2016).

Regarding § 17a-112 (k) (7), the father argues that he was prevented from maintaining a meaningful relationship with Jacob due to the unreasonable conduct of the foster mother and Davis. With respect to Davis, the father highlights events leading up to Davis' recommendation to suspend visits including testimony during the evidentiary hearing on the motion to suspend visitation, such as Davis' statement on cross-examination that he had two sessions with Jacob prior to recommending that visitation be suspended. We do not agree with the father's argument that the circumstances under which Davis made his recommendation to suspend visitation

[8] The court discussed the respondents and the children together in some contexts. Our resolution of this claim focuses on the father and Jacob.

somehow indicate that Davis engaged in unreasonable conduct that prevented the father from maintaining a meaningful relationship with Jacob. The court found that visitation between the children and the respondents "caused so much physical and emotional distress to the children that their therapist [Davis] petitioned the court to suspend such contact. The court granted a suspension of visitation between the children and parents as a result of the children's physical and emotional distress before and after visits." The court found that the father was not prevented from having a meaningful relationship with Jacob due to the unreasonable acts or conduct of another person but rather that it was his own actions that caused him not to have a meaningful relationship with Jacob. This finding is supported by the record and, therefore, is not clearly erroneous.

Regarding the father's argument as to the foster mother, we note that the issue of whether her actions contributed to the children's negative feelings toward the respondents was a contested issue at trial. The father highlights the testimony of the guardian ad litem in support of his argument. There was ample testimony from the foster mother, Davis and Cheyne that the foster mother acted appropriately. The court found that the foster mother facilitated visitation between Jacob and the father. We cannot second-guess credibility determinations of the trial court on appeal. See *In re Jason M.*, 140 Conn. App. 708, 736, 59 A.3d 902, cert. denied, 308 Conn. 931, 64 A.3d 330, cert. denied sub nom. *Charline P.* v. *Connecticut Dept. of Children & Families*, 571 U.S. 1079, 134 S. Ct. 701, 187 L. Ed. 2d 564 (2013).

The father further argues that termination of his parental rights is not in Jacob's best interest because Jacob deserved the opportunity to form positive memories of him. The father contends that Cheyne recommended that the children establish positive memories of their biological parents. Termination of the father's

parental rights to Jacob does not necessarily nullify Cheyne's recommendation. Cheyne's focus was on the well-being of the children when she described a process by which the children could form positive memories of their biological parents for their own well-being. Cheyne testified that she was not recommending that the department or the court pursue reunification, and stated in her evaluation that an open adoption would be best.

Additionally, the court's determination that termination of the father's parental rights was in Jacob's best interest is also supported by the remaining statutory factors, as well as the court's conclusion regarding the need for permanency and stability. See, e.g., *In re Elijah G.-R.*, supra, 167 Conn. App. 34. The father has failed to demonstrate that the court's determination that the termination of his parental rights was in the best interest of Jacob was clearly erroneous.

IV

POSTTERMINATION CONTACT

In AC 44233, the father additionally claims that the court improperly concluded that it lacked authority to grant posttermination contact. The father directs our attention to a discussion during trial in which the court stated: "I don't believe, and of course counsel can inform the court in their posttrial briefs, that there's any authority that the court can require [posttermination] communication to continue." The court did not make a ruling regarding posttermination contact but, rather, invited counsel to include such authority in the posttrial briefs, if so inclined. Moreover, the father did not request during trial or in his joint posttrial brief that the court order posttermination contact, and, therefore, the claim is unreviewable. "Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [B]ecause our review is limited to matters in the record, we [also] will not address

issues not decided by the trial court. . . . The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties." (Internal quotation marks omitted.) *Guddo* v. *Guddo*, 185 Conn. App. 283, 286–87, 196 A.3d 1246 (2018).

V

MOTION TO INTERVENE

In AC 44237, the mother additionally challenges the court's denial of her posttermination motion to intervene in which she sought posttermination visitation with the children. In the unusual procedural posture of this case, the mother, who was a party to the termination proceedings, filed a motion to intervene in September, 2020, *after* the trial court had rendered its July, 2020 judgments terminating her parental rights to the children. In her motion, the mother argued that the court should grant her motion to intervene pursuant to General Statutes § 46b-121 and *In re Ava W.*, 336 Conn. 545, A.3d (2020). The court summarily denied the motion.

The mother argues that the court improperly denied her motion to intervene in which she sought posttermination visitation with the children.[9] Because the record is inadequate, we decline to review this claim. "[P]ursuant to Practice Book § 64-1 (a), the court [is] required to state, either orally or in writing, a decision that encompassed its conclusion as to each claim of law raised by the parties and the factual basis therefor. . . .

[9] The mother further argues that, as a biological parent, she has standing to seek a determination of her visitation rights pursuant to a writ of habeas corpus. Whether the mother would have standing to bring a writ of habeas corpus to seek visitation is not properly before us in this appeal because it was not raised in the trial court. The mother did not seek a writ of habeas corpus nor did she raise an issue in her motion to intervene that might cause a court to consider construing that motion as such. Because the issue has not been raised in the trial court, we do not address it on appeal. See *Guddo* v. *Guddo*, supra, 185 Conn. App. 286–87.

If an oral decision is rendered, a signed transcript of the oral decision should be created and filed for use in any appeal. If the court fails to file an oral or written decision, the appellant, who has the duty to provide an adequate record for appellate review; see Practice Book § 61-10; must file a notice to that effect with the appellate clerk in accordance with Practice Book § 64-1 (b)." (Internal quotation marks omitted.) *Gordon* v. *Gordon*, 148 Conn. App. 59, 66–67, 84 A.3d 923 (2014).

The court did not file a written memorandum of decision explaining its ruling. The mother did not file a notice pursuant to Practice Book § 64-1 (b) with the Office of the Appellate Clerk, nor did she file a motion asking the court to articulate the factual and legal basis for its ruling. See Practice Book § 66-5. On the record before us, we are left to speculate as to the court's reasons for denying the motion to intervene. The court could have, inter alia, concluded that a biological parent has no right to seek visitation after judgments terminating parental rights to her children have been rendered or it could have determined on the merits that posttermination visitation was not appropriate under the circumstances.[10] Because we do not know the trial court's

[10] The mother argues that an analysis of the prudential considerations mentioned in *In re Ava W.*, supra, 336 Conn. 545, indicates that she had a right to be heard on her motion to intervene. Our Supreme Court stated in *In re Ava W.*, that "a trial court has authority to issue a posttermination visitation order that is requested within the context of a termination proceeding, so long as it is necessary or appropriate to secure the welfare, protection, proper care and suitable support of the child. That authority derives from the court's broad common-law authority over juvenile matters and the legislature's enactment of § 46b-121 (b) (1) codifying that authority." Id., 548–49. The court explained that "[w]e do not opine upon whether a trial court has authority to consider a request for posttermination visitation made after parental rights have been terminated." (Emphasis omitted.) Id., 590 n.18. This statement by our Supreme Court indicates that it did not resolve in *In re Ava W.*, the issue of whether a trial court has the authority to consider a posttermination request for visitation. The mother has not cited any case law, nor are we aware of any, to suggest that she is entitled to a hearing on a postjudgment motion to intervene seeking visitation in a case in which she was a party.

factual or legal bases for denying the motion, the record is inadequate for us to review this claim.

The judgments are affirmed.

In this opinion the other judges concurred.

YOLANDA MCCREA ET AL. *v.* CUMBERLAND FARMS, INC., ET AL.
(AC 42985)

Elgo, Cradle and Alexander, Js.

Syllabus

The plaintiffs, M and P, sought to recover damages for the defendants' alleged negligence as a result of injuries they sustained when their vehicle was struck from behind by the defendants' vehicle. The defendants filed a special defense alleging that P was contributorily negligent. Interrogatories were not submitted to the jury, which returned a general verdict for the defendants, and the trial court rendered judgment in their favor. On appeal to this court, the plaintiffs claimed, inter alia, that the trial court improperly prevented them from testifying, for the purpose of rehabilitating their credibility after it had been challenged by the defendants, that the reason their attorney referred them to certain medical providers was because they lacked adequate medical insurance. *Held*:

1. The trial court did not abuse its discretion when it allowed the defendants' counsel to question the plaintiffs about their selection of medical providers from a list curated by their attorneys and about a lawsuit M previously had filed that pertained to injuries she sustained in a prior motor vehicle accident: the examination of the plaintiffs by the defendants' counsel as to those issues was relevant to the defendants' claims that the testimony of the plaintiffs' medical providers was biased and that M's assertion about her injuries being causally related to the motor vehicle collision at issue lacked credibility; moreover, that evidence was properly admitted to challenge the plaintiffs' credibility as to whether they were actually harmed or merely seeking treatment to establish and to augment their damages claim, as credibility was a particularly important issue at trial given the parties' differing versions of the events.
2. The trial court improperly precluded the plaintiffs from presenting evidence that they sought treatment from medical providers referred to them by their attorneys due to their lack of adequate medical insurance; the plaintiffs were entitled to present that evidence to rebut the defendants' claim that their treatment may have been motivated not by pain but for purposes of litigation and establishing damages, nothing in the

record revealed the authority on which the trial court relied in precluding the plaintiffs' evidence as to why certain medical providers were chosen, the defendants' assertion that the collateral source rule (§ 52-225a) precluded evidence of the absence of insurance was untenable, as that rule, which is premised on third-party payments toward damages sought by a plaintiff, was simply not implicated in this case, and, because the defendants repeatedly emphasized the role of the plaintiffs' attorneys in selecting medical providers, the court's preclusion of evidence the plaintiffs sought to present to rehabilitate their credibility likely affected the jury's verdict and thus constituted harmful error.

3. The defendants' contention that the general verdict rule precluded review of the plaintiffs' claims was unavailing; the defendants' challenge to the plaintiffs' credibility permeated all aspects of the trial, and, this court having determined that the trial court improperly precluded the plaintiffs from offering evidence to rehabilitate their credibility, the prejudicial effect of the trial court's ruling on their credibility could not be limited to the complaint or to the defendants' special defense of contributory negligence and, thus, necessarily tainted the entire case.

Argued October 19, 2020—officially released May 25, 2021

Procedural History

Action to recover damages for personal injuries sustained by the plaintiffs as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Fairfield, where the court, *Welch*, *J.*, denied the plaintiffs' motion to preclude certain evidence; thereafter, the matter was tried to the jury; verdict for the defendants; subsequently, the court, *Welch*, *J.*, denied the plaintiffs' motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiffs appealed to this court. *Reversed*; *new trial.*

Michael E. Skiber, for the appellants (plaintiffs).

Tara F. Racicot, with whom was *Matthew G. Conway*, for the appellees (defendants).

Opinion

ELGO, J. In this negligence action regarding injuries sustained by the plaintiffs, Yolanda McCrea and Derrick Pettway, in a motor vehicle accident, the jury returned

a general verdict in favor of the defendants, Cumberland Farms, Inc. (Cumberland Farms), and its employee, Trevor Johnie. The trial court thereafter denied the plaintiffs' motion to set aside that verdict and rendered judgment accordingly. On appeal, the plaintiffs contend that the court improperly (1) permitted the defendants' counsel to pursue certain lines of questioning that allegedly were irrelevant and prejudicial, and (2) prevented the plaintiffs from testifying that the reason they were referred to certain medical providers by their attorney was because of a lack of adequate medical insurance. The defendants respond by arguing that the general verdict rule precludes our consideration of the plaintiffs' evidentiary claims. We agree with the plaintiffs' second claim and, accordingly, reverse the judgment ofthe trial court.[1]

The following facts and procedural history are relevant to this appeal. On November 23, 2015, while Pettway was driving on Interstate 95 in Milford, Pettway's vehicle was struck from behind by a vehicle driven by Johnie that was owned by Cumberland Farms. On August 17, 2017, the plaintiffs served the defendants with a summons and a four count complaint. Counts one and three alleged that the plaintiffs were injured as a result of Johnie's negligence,[2] and counts two and four alleged that Cumberland Farms was vicariously liable for their injuries. In their answer to the complaint, the defendants admitted that Johnie was acting within

[1] The plaintiffs also claim that the court improperly denied their motion to set aside the verdict because it was against the weight of the evidence. In light of our conclusion that the court committed reversible error by precluding evidence of insurance, we do not address that claim.

[2] The plaintiffs alleged, inter alia, that Johnie was negligent in having failed (1) to operate his motor vehicle at a reasonable rate of speed, (2) to keep his vehicle under proper control, (3) to keep a proper lookout for other motor vehicles on the highway, (4) to apply the brakes in time to avoid a collision and (5) to turn his vehicle in such a manner as to avoid a collision.

the scope of his employment but denied that the plaintiffs had been injured as a result of any negligence. As to counts three and four of the complaint, the defendants alleged, as a special defense, contributory negligence on the part of Pettway.[3] See General Statutes § 52-572h. On November 13, 2017, the defendants filed an apportionment complaint against Pettway, in which they claimed that any damages awarded to McCrea must be proportionately reduced by the percentage of Pettway's negligence pursuant to § 52-572h (c) and General Statutes § 52-102b.[4]

[3] The defendants alleged, inter alia, that Pettway was negligent in having failed (1) to keep a proper lookout for other motor vehicles on the highway, (2) to keep a proper and reasonable control of his vehicle, (3) to apply his brakes or to steer his vehicle in a manner so as to avoid the collision and (4) to pass the vehicle driven by Johnie safely and in accordance with General Statutes § 14-233.

[4] General Statutes § 52-572h (c), which governs the apportionment of liability among multiple tortfeasors, provides in relevant part: "[I]f the damages are determined to be proximately caused by the negligence of more than one party, *each party against whom recovery is allowed* shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages . . . ." (Emphasis added.)

General Statutes § 52-102b provides in relevant part: "(a) A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person *not a party to the action* who is or may be liable . . . for a proportional share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability. . . ." (Emphasis added.)

Although the issue is not presently before us, we note that Superior Court authority is divided on the issue of whether a defendant may bring an apportionment claim against a plaintiff. "The majority of cases considering this issue . . . have refused to allow a defendant to bring an apportionment claim against a plaintiff." (Internal quotation marks omitted.) *Ulic* v. *Cacciopoli*, Superior Court, judicial district of New Haven, Docket No. CV-03-0473774-S (February 4, 2004) (36 Conn. L. Rptr. 474, 475). "Courts adopting the majority view have generally done so on the basis of the plain language and legislative history of § 52-102b as well as the fact that apportionment is already available to parties in negligence actions." (Internal quotation marks omitted.) *Harding* v. *Mrini*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-18-6027127-S (February 3, 2020) (70 Conn. L. Rptr. 31, 34).

A trial was held before a jury from March 6 to 8, 2019. When it concluded, the court instructed the jury on the applicable law, including negligence, proximate cause, and damages. Neither party objected to those instructions. Interrogatories were not submitted to the jury, which returned a general verdict in favor of the defendants.

The plaintiffs thereafter moved to set aside the jury's verdict. The defendants filed an opposition to that motion, claiming, inter alia, that the general verdict rule precluded disruption of the jury's verdict. After hearing argument from the parties, the court denied the plaintiffs' motion to set aside the verdict and rendered judgment in accordance with the jury's verdict. This appeal followed.

I

The plaintiffs first claim that the court improperly permitted the defendants' counsel to pursue certain lines of questioning at trial.[5] More specifically, they argue that the court abused its discretion in allowing the defendants to question (1) McCrea about the fact that she had brought a lawsuit related to a prior motor vehicle accident, (2) both plaintiffs on the fact that they had hired a previous attorney and the timing in which they contacted that attorney, and (3) both plaintiffs as to the fact that their medical providers were referred to them by their attorney. In response, the defendants contend that each line of questioning was relevant to the plaintiffs' credibility. We agree with the defendants.

The following additional facts and procedural history are relevant to those claims. On February 13, 2019, the plaintiffs filed a motion in limine to preclude evidence

[5] Although we reverse the judgment and remand the case for a new trial on other grounds, we address these evidentiary claims because they are likely to arise again in the new trial; see, e.g., *State* v. *Norman P.*, 169 Conn. App. 616, 618 n.2, 151 A.3d 877 (2016), aff'd, 329 Conn. 440, 186 A.3d 1143 (2018); and because a discussion of these claims underscores the centrality of the plaintiffs' credibility in this case.

of (1) when they hired their previous attorney, (2) McCrea's lawsuit that was related to a past motor vehicle accident, and (3) a referral made by the plaintiffs' prior attorney to a physical therapist. On March 1, 2019, the defendants filed an objection to the motion in limine, arguing that those facts were admissible "for purposes of aiding the jury in appraising the parties' credibility." The court thereafter denied the motion in limine.[6]

During the defendants' cross-examination of McCrea at trial, the following colloquy occurred:

"[The Defendants' Counsel]: At some point . . . after going to the emergency room the next day, you went to see a physical therapist, Core Physical Therapy?

"[McCrea]: It wasn't right after the emergency room. . . .

"[The Defendants' Counsel]: . . . You saw Dr. [Eric J.] Katz . . . because he was on a list given to you by your attorney?

"[McCrea]: That's correct.

"[The Defendants' Counsel]: And you were represented by a different attorney at the time?

"[McCrea]: That's correct.

"[The Defendants' Counsel]: So, it's fair to say that, as of December 17, 2015, you . . . had retained counsel in regard to this accident?

"[The Plaintiffs' Counsel]: Objection, Your Honor; relevance.

"The Court: Overruled. . . .

[6] Although the plaintiffs have not provided this court with a transcript of the trial court's ruling on their motion in limine, it is undisputed that the court denied that motion prior to trial.

"[McCrea]: So—

"[The Defendants' Counsel]: Well, the answer is either a yes or a no, ma'am. Is it true that, as of December 17, 2015, you had retained an attorney in regard to this accident, which we're here in court for today?

"[McCrea]: It's true that I retained an attorney after—

"[The Defendants' Counsel]: Thank you. You've answered the question."

After that exchange, the court took a lunch recess. The issue of attorney referrals came up again during the defendants' cross-examination of Pettway:

"[The Defendants' Counsel]: Let's turn to your medical treatment. You testified that you went to St. Vincent's [Medical Center in Bridgeport] day one, correct?

"[Pettway]: Yes. . . .

"[The Defendants' Counsel]: . . . You went to a doctor from an attorney who provided you a list? . . .

"[Pettway]: . . . I was calling doctors, and they told me I'll have to get a lawyer. So, the attorney gave me a list.

"[The Defendants' Counsel]: So, is it fair to say that the day after you went to the emergency room, you went to a lawyer to find a doctor.

"[Pettway]: No.

"[The Plaintiffs' Counsel]: Objection, Your Honor, relevance.

"The Court: Sustained."

The defendants' counsel then asked Pettway about McCrea's medical treatment:

"[The Defendants' Counsel]: . . . [L]et's talk about the medical documents that you've seen. You testified that you're aware of who . . . McCrea has seen as well, correct?

"[Pettway]: Only some—some of the ones we've seen together. Yeah.

"[The Defendants' Counsel]: Well, [your counsel], on direct examination asked you if she went to Dr. Katz as well, and she did.

"[Pettway]: Yes.

"[The Defendants' Counsel]: In fact, you went together to see Dr. Katz?

"[Pettway]: Yes.

"[The Defendants' Counsel]: And she has testified on direct examination that she went to Core Physical Therapy and you went to Core Physical Therapy.

"[Pettway]: Yes.

"[The Defendants' Counsel]: She's testified on direct examination that she went to [a] chiropractor. You went to . . . the [same] chiropractor . . . .

"[Pettway]: Yes.

"[The Defendants' Counsel]: She's testified in examination that she had a lawyer and then she had a different lawyer. . . . And you had that same lawyer and then you had [a different lawyer]?

"[Pettway]: Yes."

Finally, during McCrea's direct examination, she testified that she suffered neck and back pain from a previous motor vehicle accident in 2011. During recross-examination, the following colloquy took place between the defendants' counsel and McCrea:

"[The Defendants' Counsel]: So, [after your prior] motor vehicle accident in 2011, you filed a lawsuit for that accident. Correct?

"[McCrea]: Yes, I did.

"[The Defendants' Counsel]: Thank you.

"[McCrea]: And my car was totaled out, yes."[7]

On appeal, the plaintiffs challenge the propriety of that questioning. We begin by setting forth the relevant standard of review. "Upon review of a trial court's decision, we will set aside an evidentiary ruling only when there has been a clear abuse of discretion. . . . The trial court has wide discretion in determining the relevancy of evidence and the scope of cross-examination and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Edwards*, 202 Conn. App. 384, 407, 245 A.3d 866, cert. denied, 336 Conn. 920, 246 A.3d 3 (2021).

Section 4-1 of the Connecticut Code of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." "To determine whether a fact is 'material' or 'consequential,' it is necessary to examine the issues in the case, as defined by the underlying substantive law, the pleadings, applicable pretrial orders, and events that develop during the trial. Thus, the relevance of an offer of evidence must be assessed against the elements of the cause of action, crime, or defenses at issue in the trial. The connection to an element need not be direct, so long as it exists." (Internal quotation marks omitted.) *State* v. *Fasano*, 88 Conn. App. 17, 36–37, 868 A.2d 79, cert. denied, 274 Conn. 904, 876 A.2d 15 (2005), cert. denied, 546 U.S. 1101, 126 S. Ct. 1037, 163 L.

[7] The defendants do not contend that the evidentiary claims discussed in part I of this opinion were unpreserved. See Practice Book § 60-5; cf. *Cima* v. *Sciaretta*, 140 Conn. App. 167, 173 n.5, 58 A.3d 345 (evidentiary claim preserved for appellate review by filing of pretrial motion in limine), cert. denied, 308 Conn. 912, 61 A.3d 532 (2013).

Ed. 2d 873 (2006). Section 4-3 of the Connecticut Code of Evidence provides: "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." "In order to exclude evidence on the ground of prejudice, there must be undue prejudice great enough to threaten an injustice. . . . The burden of showing that the evidence may unduly arouse the jurors' emotions of hostility or sympathy rests with the party claiming prejudice." (Citations omitted; internal quotation marks omitted.) *Hayes* v. *Manchester Memorial Hospital*, 38 Conn. App. 471, 475, 661 A.2d 123, cert. denied, 235 Conn. 922, 666 A.2d 1185, and cert. denied, 235 Conn. 922, 666 A.2d 1185 (1995).

The plaintiffs argue that each of these issues raised by the defendants "created a side issue that unduly distracted the jury" from whether Johnie was negligent and whether that negligence was the proximate cause of the plaintiffs' injuries. In response, the defendants submit that "credibility is always relevant," and "the fact that the plaintiffs first consulted with an attorney and then treated with doctors the attorney referred them to tends to show that the plaintiffs' treatment may have been motivated, not by any purported pain, but instead for purposes of the litigation and establishing damages." (Emphasis omitted.) We conclude that the defendants' examination of the plaintiffs with respect to this evidence was relevant to the issue of credibility and was not unduly prejudicial.

"Once a witness has testified to certain facts . . . his credibility is a fact that is of consequence to [or material to] the determination of the action, and evidence relating to his credibility is therefore relevant . . . ." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Fasano*, supra, 88 Conn. App. 37.

It is well established that "[c]ross-examination is an indispensable means of eliciting facts that may raise questions about the credibility of witnesses and, as a substantial legal right, it may not be abrogated or abridged at the discretion of the court to the prejudice of the party conducting that cross-examination." (Internal quotation marks omitted.) *Tiplady* v. *Maryles*, 158 Conn. App. 680, 696–97, 120 A.3d 528, cert. denied, 319 Conn. 946, 125 A.3d 527 (2015).

Here, evidence that McCrea filed a lawsuit after she sustained injuries in the 2011 motor vehicle accident was relevant to the defendants' claim that McCrea's assertion that her injuries were causally related to her accident in this action lacked credibility. The fact that the plaintiffs selected medical providers from a list curated by their attorneys was also relevant to the defendants' claim that the testimony of the plaintiffs' medical providers was biased in favor of the plaintiffs. That evidence was also properly admitted to challenge the plaintiffs' credibility with respect to whether the plaintiffs were actually harmed or merely were seeking treatment from these providers to establish and to augment their damages claim for litigation purposes. Moreover, evidence that the plaintiffs' former attorney had referred the plaintiffs to Dr. Katz was similarly relevant to motive, bias, and credibility. Finally, as the defendants asserted in their objection to the plaintiffs' motion in limine, "the credibility of the plaintiffs is a particularly important issue at trial given the differing versions of events proffered by the plaintiffs as opposed to what the [defendants claim] occurred." For those reasons, we conclude that the court did not abuse its discretion when it allowed the defendants' counsel to explore these issues of credibility at trial.

II

The plaintiffs also claim the court improperly precluded them from testifying that their lack of adequate

medical insurance was the reason for seeking treatment from medical providers referred by their attorney. We agree.

The following additional facts are relevant to this claim. Following the denial of the plaintiffs' motion in limine, the trial commenced with opening statements by counsel. In his opening statement, the defendants' counsel suggested that the plaintiffs were exaggerating their injuries, stating that "[t]his case is entirely about credibility," that "the [plaintiffs'] attorneys sent [the plaintiffs] to certain doctors for the treatment," and that "it all adds up . . . ." After noting during his opening statement that the plaintiffs' counsel had "[allud]ed to the fact that the attorneys have sent them to the doctors to treat," the defendants' counsel stated that the plaintiffs' counsel had "sent" Pettway to Dr. Michael J. Giordano and had "sent [Pettway] to Dr. [Abraham] Mintz."

After opening statements concluded but before the presentation of evidence began, the plaintiffs requested permission from the court to offer testimony that the attorney referrals were necessary because the medical provider did not accept the plaintiffs' medical insurance. The court rejected the plaintiffs' request:

"The Court: We're not going there.

"[The Plaintiffs' Counsel]: But, Your Honor, he's—he's already—he's able to throw the—

"The Court: No, he—he said, how did you get referrals. We're talking about referrals.

"[The Plaintiffs' Counsel]: Right.

"The Court: Now you're bringing insurance into the case.

"[The Plaintiffs' Counsel]: But the reason we made referrals, Your Honor, and I think I should be able to

explain that, is because [the medical providers do not] accept [the plaintiffs' insurance]—

"The Court: Then you're—you're—it's testimony. That's where I thought we were moving.

"[The Plaintiffs' Counsel]: Right. But he's already thrown the—the gauntlet down by saying the [plaintiffs'] attorneys send clients to their own doctors . . . and I think I have the—I should have the ability to [explain why the plaintiffs were] sent to these particular doctors; well, because the other doctors didn't accept [their] insurance. . . .

"[The Defendants' Counsel]: No—no way. . . . [T]here's not a case in the state that we allow insurance issues to come in.

"The Court: Right. And insurance is not coming in. . . . [Y]ou have a list, if I gather correctly, that you refer doctors. That's how they got there. The money issue is not part of this."

Nothing in the transcripts or record before us reveals the authority on which the court relied in precluding evidence of the plaintiffs' lack of adequate medical insurance as the reason for seeking treatment from medical providers referred by their attorney. On appeal, the defendants cite to *Capozziello* v. *Robinson*, 102 Conn. App. 93, 95, 924 A.2d 876 (2007), for the precept that "it is a well established rule that the existence of collateral sources should not be revealed to the jury." (Emphasis omitted.) With no further analysis, the defendants suggest that the collateral source rule justifies the court's ruling.[8] In response, the plaintiffs argue that

[8] The collateral source rule, codified at General Statutes § 52-225a provides in relevant part: "(a) In any civil action, whether in tort or in contract, wherein the claimant seeks to recover damages resulting from (1) personal injury or wrongful death . . . and wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant, the court shall reduce the amount of such award which represents economic damages, as defined in subdivision (1) of subsection (a) of section 52-572h, by an amount equal to the total of amounts determined to have

evidence of insurance, or more precisely, their lack thereof, was necessary to properly explain why certain medical providers were chosen. They contend that such evidence was relevant and necessary to rehabilitate their credibility in light of the defendants' portrayal of them as "litigious malingerers who only chose to treat for their injuries at the suggestion of their attorneys."

In 1986, our legislature abolished the common-law collateral source rule in personal injury cases to prevent a plaintiff from receiving a double recovery for injuries. *Mack* v. *LaValley*, 55 Conn. App. 150, 167, 738 A.2d 718, cert. denied, 251 Conn. 928, 742 A.2d 363 (1999). General Statutes § 52-225a (a) provides in relevant part that, in a civil action sounding in tort in which the plaintiff seeks to recover damages resulting from personal injuries that occurred on or after October 1, 1987, and in which the jury determines liability and awards damages to compensate the plaintiff, "the court shall reduce the amount of such award which represents economic damages . . . by an amount equal to the total of amounts" paid by collateral sources. As this court has noted, "[t]he language and legislative history of § 52-225a clearly indicate that [it] was intended to prevent plaintiffs from obtaining double recoveries, i.e., collecting economic damages from a defendant and also receiving collateral source payments." (Internal quotation marks omitted.) *Corcoran* v. *Taylor*, 65 Conn. App. 340, 344–45, 782 A.2d

been paid under subsection (b) of this section less the total of amounts determined to have been paid, contributed or forfeited under subsection (c) of this section, except that there shall be no reduction for (A) a collateral source for which a right of subrogation exists, and (B) the amount of collateral sources equal to the reduction in the claimant's economic damages attributable to the claimant's percentage of negligence pursuant to section 52-572h.

"(b) Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment. . . ."

728, cert. denied, 258 Conn. 925, 783 A.2d 1027 (2001). In enacting § 52-225a, the legislature sought to strike an "equitable balance . . . between preventing defendants from benefiting from reduced judgments due to collateral source payments, on the one hand, and barring plaintiffs from recovering twice for the same loss, on the other." (Internal quotation marks omitted.) *Jones* v. *Kramer*, 267 Conn. 336, 346, 838 A.2d 170 (2004). The legislature plainly was concerned that evidence of third-party payments could accrue to the benefit of the defendant because a jury might be tempted to factor in and deduct paid medical bills from a plaintiff's claim for damages. At the same time, in the absence of a collateral source hearing pursuant to § 52-225a, a plaintiff inadvertently could be awarded a double recovery. With the mechanism embodied in § 52-225a in place, "[e]vidence of an injured person's income or recovery from loss-reducing sources is ordinarily barred by the collateral source rule." *Hammer* v. *Mount Sinai Hospital*, 25 Conn. App. 702, 721, 596 A.2d 1318, cert. denied, 220 Conn. 933, 599 A.2d 384 (1991).

Given the principles underlying the collateral source rule, which are premised on third-party *payments* toward the claim of damages sought by a plaintiff, the defendants' suggestion that it operates to preclude evidence of the *absence* of insurance is untenable. For that reason, the collateral source rule is simply not implicated in the present case. Even if third-party payments were at issue, however, the appellate courts of this state have long held that, when evidence of collateral source payments is relevant to credibility, the admission of such evidence is not improper. See *Acampora* v. *Ledewitz*, 159 Conn. 377, 384, 269 A.2d 288 (1970) (although evidence that third party paid plaintiff's bills ordinarily is irrelevant and inadmissible under collateral source rule, that evidence is admissible if relevant to credibility); cf. *Hammer* v. *Mount Sinai Hospital*, supra, 25 Conn. App. 722 (court did not abuse its

discretion in excluding evidence of plaintiff's income from disability insurance payments when such evidence would have been cumulative because it related to his credibility about his finances).

Our Supreme Court's analysis in *Acampora* v. *Ledewitz*, supra, 159 Conn. 377, is instructive. In that case, the plaintiff sought damages for injuries she suffered from a fall on the defendant's property. At trial, the plaintiff's physician testified that he treated the plaintiff for those injuries between the years 1965 through 1967. The plaintiff nevertheless had submitted into evidence a medical bill indicating that her last visit with the physician was on December 8, 1964. In an apparent attempt to explain the discrepancy between the bill and his testimony, the physician testified that he did not charge the plaintiff for her visits in the ensuing years because she was worried about her ability to pay and that he kept no record of her visits. On cross-examination, the defendant was precluded from attempting to show that the plaintiff's bills were paid under workers' compensation, which, he argued, was relevant to challenging the physician's credibility with respect to his testimony that he had not kept a record or billed the plaintiff because of her inability to pay. Because the issue of payment was deemed vital with respect to the physician's credibility, our Supreme Court held that, although the collateral source rule ordinarily would preclude evidence of payments by third parties, it was reversible error to preclude the defendants from pursuing the matter on cross-examination. Id., 383–84.

In the present case, the defendants' case was premised on the claim that the plaintiffs were not credible, in part because their medical providers were referred to them by their attorneys. As discussed in part I of this opinion, such testimony properly was admitted into evidence, as the defendants claim, "to show that the plaintiffs' treatment may have been motivated, not by

any purported pain, but instead for purposes of the litigation and establishing damages." It is for precisely this reason that the plaintiffs sought to rebut this characterization of their motives with evidence that strikes at the heart of their attorneys' role in the procurement of their treatment. Thus, the plaintiffs were entitled to present evidence that they sought treatment from medical providers referred to them by their attorneys due to their lack of adequate medical insurance. We, therefore, conclude that the court improperly precluded the plaintiffs from introducing such evidence.

Our inquiry does not end with the conclusion that the court's ruling was erroneous. We also must consider whether it constituted harmful error. "Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . It is the plaintiff's burden to show harmful error." (Internal quotation marks omitted.) *Suntech of Connecticut, Inc.* v. *Lawrence Brunoli, Inc.*, 173 Conn. App. 321, 347, 164 A.3d 36 (2017), appeal dismissed, 330 Conn. 342, 193 A.3d 1208 (2018).

The defendants argues that, even if the court erred in precluding this testimony from the plaintiffs, the error was harmless because the plaintiffs were able to explain that they chose certain providers for convenience,[9] that they provided their doctors with letters of

[9] More specifically, the defendants note that McCrea was permitted to explain that she chose Dr. Katz (a doctor to whom she was referred by her former attorney) because Dr. Katz' practice stayed open later than other practices. During Pettway's direct examination, he testified that he selected Dr. Katz because the practice was close to one of his properties and that he went at the same time as McCrea because the appointment times "work[ed] for both of" them. McCrea and Pettway also testified that Dr. Katz' practice was located in the same building as Core Physical Therapy, which both plaintiffs attended for treatment.

protection,[10] and that they received treatment from other doctors who were not referred to by the plaintiffs' attorneys.[11] We conclude that such ancillary evidence does not mitigate the taint on the plaintiffs' motives or their overall credibility.

In this regard, it bears emphasis that, in his opening statement to the jury, the defendants' counsel alleged that the case was "about [the plaintiffs] taking advantage of the system" and that the plaintiffs' attorneys "sent them to certain doctors for the treatment . . . ." In light of that narrative to the jury, the defendants' counsel proceeded to question both plaintiffs about the fact that their attorneys had referred them to some of their medical providers. Finally, during closing arguments, while discussing Pettway's claimed injuries, the defendants' counsel argued that the fact that the plaintiffs' attorneys were "sending people to doctors, by [the plaintiffs' counsel's] own words, it's not a good look . . . ." Because the defendants' theory at trial repeatedly emphasized the role of the plaintiffs' attorneys in selecting medical providers, we are not persuaded that other reasons given by the plaintiffs mitigate the prejudice to them. Unlike convenience and proximity, the

[10] On this issue the defendants specifically cite the fact that (1) during opening statements, the plaintiffs' counsel referred to "letters of protection," and (2) during McCrea's direct examination, she testified that there was a gap in her treatment because she was no longer represented by her first attorney and, as a result, Dr. Katz could no longer see the plaintiffs on "a letter of protection status." We note, however, that opening statements are not evidence and that "letter of protection" is a term of art. Thus, mere reference to a "letter of protection" without affording the plaintiffs the opportunity to explain its significance does not mitigate harm.

[11] The defendants note that Pettway testified that Dr. Katz referred him to Dr. Rahul S. Anand for lumbar epidermal injections. They further note that McCrea also testified that she was referred to the Orthopedic Specialty Group, P.C., in Fairfield by Dr. Joseph J. Firgeleski III for neck and back pain, was referred to a specialist at Gaylord Hospital by her oral surgeon, found another provider, Dr. Brijesh Chandwani, on her own after her pain worsened, did not recall who referred her to Dr. William C. DeAngelo,, and was referred to Dr. M. Joshua Hasbani, a neurologist, by Dr. DeAngelo.

plaintiffs' lack of insurance was offered not simply to explain their choice of providers but, more precisely, to explain the role their attorneys played in securing them. Such testimony bore directly on a central challenge to their credibility by the defendants at trial. By precluding that testimony, the court permitted the defendants to attack the plaintiffs' credibility while denying the plaintiffs the opportunity to rehabilitate their credibility. For that reason, we conclude that the court's ruling likely affected the jury's verdict and, thus, constitutes harmful error.

III

As a final matter, we address the defendants' contention that the general verdict rule precludes review of the plaintiffs' claims.[12] "Under the general verdict rule, if a jury renders a general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. . . . Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall. . . . The rule rests on the policy of the conservation of judicial resources, at both the appellate and trial levels." (Internal quotation marks omitted.) *Garcia* v. *Cohen*, 335 Conn. 3, 10–11, 225 A.3d 653 (2020).

"On the appellate level, the rule relieves an appellate court from the necessity of adjudicating claims of error that may not arise from the actual source of the jury verdict that is under appellate review. In a typical general verdict rule case, the record is silent regarding whether the jury verdict resulted from the issue that

[12] We note that the plaintiffs did not address the applicability of the general verdict rule in their appellate brief. Although the plaintiffs were provided an opportunity at oral argument before this court to explain why they believed the general verdict rule did not apply, they declined to provide any such argument.

the appellant seeks to have adjudicated. Declining in such a case to afford appellate scrutiny of the appellant's claims is consistent with the general principle of appellate jurisprudence that it is the appellant's responsibility to provide a record upon which reversible error may be predicated. . . . [T]he general verdict rule applies to the following five situations: (1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Citation omitted; internal quotation marks omitted.) Id., 11–12.

In the present case, we analyze the applicability of the general verdict rule under the fourth scenario because the pleadings here included a denial of the complaint and the assertion of a special defense.[13]

As this court has noted, the general verdict rule "operates . . . to insulate a verdict that may have been reached under a cloud of error, but which also could have been reached by an untainted route." (Internal quotation marks omitted.) *Klein* v. *Quinnipiac University*, 193 Conn. App. 469, 487, 219 A.3d 911 (2019), appeal dismissed, Conn. , A.3d (2020).

[13] The defendants contend that the present case may be analyzed pursuant to the first and second scenarios. We disagree. Scenario one applies when a complaint asserts several counts against a defendant, and a *prevailing plaintiff* seeks application of the rule because at least one count is not implicated by a defendant's claim of error. Because the plaintiffs are taking the appeal and there is only one count alleged against each defendant, scenario one clearly does not apply. See generally *Curry* v. *Burns*, 225 Conn. 782, 792–93, 626 A.2d 719 (1993). The second scenario similarly has no application to the present case, as there is only one special defense asserted by each defendant as to Pettway.

We further note that the defendants have failed to address the operation of the general verdict rule relative to the apportionment complaint filed with respect to Pettway. See footnote 4 of this opinion and accompanying text.

In the present case, the defendants argue that the general verdict rule applies because they filed special defenses of contributory negligence as to Pettway and because the plaintiffs failed to request interrogatories. As this court has noted, a defendant's "denial of negligence and . . . allegations of contributory negligence constitute two discrete defenses, either of which could [support a] jury's general verdict. . . . The verdict [could be] predicated on the [defendant's] freedom from negligence or on the plaintiff's comparatively greater negligence. . . . In light of [a] plaintiff's failure to request interrogatories to ascertain the basis of the jury's verdict, [the verdict] must [be upheld] . . . under the general verdict rule, if either defense is legally supportable." (Internal quotation marks omitted.) Id.

A review of cases in which this court has addressed the applicability of the general verdict rule to evidentiary claims is instructive. In *Bergmann* v. *Newton Buying Corp.*, 17 Conn. App. 268, 269, 551 A.2d 1277 (1989), the plaintiff sued the defendant in connection with injuries she sustained when she slipped and fell in the defendant's department store. In responding to the complaint, the defendant filed a special defense alleging contributory negligence on the part of the plaintiff. Id. At trial, no interrogatories were submitted to the jury, which returned a general verdict for the defendant. Id. On appeal, the plaintiff argued that the court improperly had granted a motion in limine that precluded her from offering evidence of the defendant's refusal to permit inspection of its premises until after the surface of the floor was changed. The purpose of the excluded evidence was to allow the jury to draw an inference adverse to the defendant, namely, that the defendant's initial refusal to let the plaintiff inspect the floor was an admission of liability by conduct. Id., 269–70. In considering the applicability of the general verdict rule, this court observed that the court's evidentiary ruling affected

only the plaintiff's claims regarding the defendant's negligence and not the defendant's special defense of contributory negligence. Id., 270. As such, we reasoned that, if the plaintiff's claim of error as to the defendant's special defense was without merit, the general verdict rule would preclude review of the plaintiff's other three claims of error relative to the defendant's negligence. Id., 270–71. The court then turned to the merits of the plaintiff's additional claim of instructional error as to the defendant's special defense. Having concluded that the trial court did not err in its jury instruction on contributory negligence, we held that the general verdict stood, irrespective of any other claim of error, including the plaintiff's assertion of evidentiary error. Id., 271–73.

In *Spears* v. *Elder*, 124 Conn. App. 280, 284, 5 A.3d 500, cert. denied, 299 Conn. 913, 10 A.3d 528 (2010), the plaintiff brought an action against the defendant alleging, inter alia, defamation by slander and fraud. At the conclusion of trial, neither party submitted interrogatories to the jury, which returned a general verdict in favor of the plaintiff. Id. On appeal, the defendant challenged the propriety of several evidentiary rulings. Id., 285. This court concluded that, to the extent that certain evidentiary claims pertained solely to the slander count, the general verdict rule precluded review of the fraud claim. However, to the extent that an evidentiary error implicated the credibility of the plaintiff, the general verdict rule did not preclude review because the plaintiff's credibility applied to both causes of action. Id., 292.

In part I of this opinion, we concluded that the court properly allowed the defendants to elicit evidence challenging the plaintiffs' motives in filing the lawsuit and their credibility in general. Although the defendants have argued that the evidence was proper because it tended "to show that the plaintiffs' treatment may have

been motivated, not by any purported pain," but instead for purposes of litigation and establishing damages, their challenge to the plaintiffs' credibility permeated all aspects of the trial. As the defendants' objection to the plaintiffs' motion in limine made clear, "the credibility of the plaintiffs [was] a particularly important issue at trial given the differing versions of events proffered by the plaintiffs as opposed to what the [defendants claim] occurred." Because we have concluded that the court improperly precluded the plaintiffs from offering evidence to rehabilitate their credibility, and given that the prejudicial effect on their credibility cannot be limited to the complaint or the defendants' special defense of comparative negligence, the preclusion of that evidence necessarily taints the entire case. Cf. *Spears* v. *Elder*, supra, 124 Conn. App. 292. Because no untainted route to the jury's verdict remains, we conclude that the general verdict rule does not apply.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

JOSEPH S. ELDER *v.* MATTHEW KAUFFMAN ET AL.
(AC 43513)

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

Syllabus

The plaintiff attorney sought damages from the defendant reporter, K, and the defendant publisher, C Co., for, inter alia, defamation in connection with articles written by K and published by C Co. The articles related to certain a disciplinary proceeding brought against the plaintiff in the Superior Court that resulted in his suspension from the practice of law for one year. Our Supreme Court reversed the order of the Superior Court on the ground that the proceeding was untimely commenced. The plaintiff alleged in this action that articles published by the defendants in 2015 after his suspension, and an article published in 2017 after our

Supreme Court reversed that decision, were defamatory because they stated that he had "impersonated" another attorney. The trial court granted the defendants' special motion to dismiss the complaint filed pursuant to statute (§ 52-196a), holding that the publications were about a matter of public concern and that the plaintiff's complaint was barred by the doctrines of res judicata and collateral estoppel because he had previously raised these claims and issues in prior litigation in federal court and in state court. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The plaintiff's claim that the trial court erred in dismissing his complaint on the ground that it was barred by the doctrine of res judicata, which was based on his claim that res judicata does not apply to a special motion to dismiss, was unavailing: the application of the doctrine of res judicata to the present case necessarily would meet or exceed the proof requirements of § 52-196a (e) (3) because it would establish, as a matter of law, that the plaintiff could not establish that there was probable cause that he would prevail on the merits of the complaint; moreover, if the plaintiff unsuccessfully litigated in his prior actions an issue necessary to his success in this action, he would be precluded from relitigating that issue and, therefore, could not establish probable cause that he would prevail in this action; consequently, collateral estoppel was an appropriate defense to consider in the context of a § 52-196a motion to dismiss.
2. The doctrine of collateral estoppel barred the plaintiff's claims: although this court generally agreed with the plaintiff that res judicata did not apply to the allegations of his complaint concerning the article published in 2017, because those allegations related to an article published two years after the articles at issue in previous litigation, collateral estoppel barred his claims because the issues presented in the complaint were substantially identical to issues previously litigated before the federal and state courts that decided his claims; in his complaint, the plaintiff alleged that the 2017 publication used the word "impersonation" to describe his conduct and that the use of this word evidenced malice, and, in his prior complaints in both federal and state courts, he had also alleged that the use of the word impersonation in the 2015 publications was defamatory, and both of those courts rejected that claim, holding that such a description of the plaintiff's conduct was fair and accurate.
3. The plaintiff could not prevail on his claim that § 52-196a was unconstitutional as applied in this case because its application infringed on his state constitutional rights to redress and a trial by jury; this court, having recently addressed substantially the same claim in *Elder* v. *21st Century Media Newspaper, LLC* (204 Conn. App. 414), adopted the reasoning contained therein.

Argued January 13—officially released May 25, 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, *Moukawsher, J.*, granted the defendants' special motion to dismiss 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 (defendants).

Opinion

BRIGHT, C. J. The plaintiff, Joseph S. Elder, appeals from the judgment of the trial court dismissing, on the grounds of res judicata and collateral estoppel, his complaint alleging defamation and invasion of privacy brought against the defendants, Matthew Kauffman and The Hartford Courant Company, LLC (Courant). On appeal, the plaintiff claims that the court improperly granted the defendants' special motion to dismiss because (1) res judicata is not applicable to the anti-SLAPP[1] statute, General Statutes § 52-196a,[2] (2) res judicata is

[1] "SLAPP is an acronym for 'strategic lawsuit against public participation,' the 'distinctive elements of [which] are (1) a civil complaint (2) filed against a nongovernment individual (3) because of their communications to government bodies (4) that involves a substantive issue of some public concern. . . . The purpose of a SLAPP suit is to punish and intimidate citizens who petition state agencies and have the ultimate effect of chilling any such action.' " *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , S. Ct. , L. Ed. 2d (2021).

[2] General Statutes § 52-196a provides in relevant part: "(b) In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim.

"(c) Any party filing a special motion to dismiss shall file such motion not later than thirty days after the date of return of the complaint, or the filing of a counterclaim or cross claim described in subsection (b) of this

not applicable to this case, and (3) § 52-196a is unconstitutional as applied in this case because its application infringed on his state constitutional rights to redress and to a trial by a jury. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's appeal. The plaintiff, who is an attorney licensed to practice law in Con-

section. The court, upon a showing of good cause by a party seeking to file a special motion to dismiss, may extend the time to file a special motion to dismiss.

"(d) The court shall stay all discovery upon the filing of a special motion to dismiss. The stay of discovery shall remain in effect until the court grants or denies the special motion to dismiss and any interlocutory appeal thereof. Notwithstanding the entry of an order to stay discovery, the court, upon motion of a party and a showing of good cause, or upon its own motion, may order specified and limited discovery relevant to the special motion to dismiss.

"(e) (1) The court shall conduct an expedited hearing on a special motion to dismiss. . . .

"(2) When ruling on a special motion to dismiss, the court shall consider pleadings and supporting and opposing affidavits of the parties attesting to the facts upon which liability or a defense, as the case may be, is based.

"(3) The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim.

"(4) The court shall rule on a special motion to dismiss as soon as practicable.

"(f) (1) If the court grants a special motion to dismiss under this section, the court shall award the moving party costs and reasonable attorney's fees, including such costs and fees incurred in connection with the filing of the special motion to dismiss.

"(2) If the court denies a special motion to dismiss under this section and finds that such special motion to dismiss is frivolous and solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to the party opposing such special motion to dismiss.

"(g) The findings or determinations made pursuant to subsections (e) and (f) of this section shall not be admitted into evidence at any later stage of the proceeding or in any subsequent action. . . ."

necticut, brought this action against the Courant and Kauffman, who is a reporter at the Courant. In his two count complaint, the plaintiff alleged against both defendants claims of defamation and "false light" invasion of privacy. The allegations in the complaint stem from the defendants' publication of articles related to disciplinary proceedings that had been brought in the Superior Court against the plaintiff on the basis of his giving a false name to the police (presentment). The presentment resulted in the Superior Court suspending the plaintiff from the practice of law for one year. The plaintiff, thereafter, appealed from the order of suspension, and our Supreme Court reversed the order of the Superior Court specifically on the ground that the presentment had been untimely commenced. See *Disciplinary Counsel* v. *Elder*, 325 Conn. 378, 382, 159 A.3d 220 (2017). In his complaint in the present case, the plaintiff alleged that articles published by the defendants in 2015, after the Superior Court rendered its decision suspending the plaintiff from the practice of law for one year, and an article published after our Supreme Court reversed that decision in 2017 (2017 publication), were defamatory and portrayed him in a false light by stating that he had " 'impersonated' " another attorney.

In response to the plaintiff's complaint, the defendants, pursuant to § 52-196a, filed a special motion to dismiss the complaint. On August 27, 2019, the court, *Moukawsher*, *J.*, granted the defendants' motion, concluding that the publications were about matters of public concern and that the plaintiff's complaint was barred by the doctrines of res judicata and collateral estoppel because the plaintiff had raised these claims and issues, or could have raised these claims and issues, previously in federal court; see *Elder* v. *Tronc*, *Inc.*, United States District Court, Docket No. 3:17-CV-01285

(WWE) (D. Conn. July 2, 2018) (claims of defamation and invasion of privacy dismissed on ground that fair and accurate publications discussing plaintiff's disciplinary suspension were protected by fair report privilege); and in state court. See *Elder* v. *21st Century Media Newspaper, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-17-6081368-S (February 14, 2019), which recently was affirmed by this court in *Elder* v. *21st Century Media Newspaper, LLC*, 204 Conn. App. 414, 425–26, A.3d (2021) (after comparing publications to suspension decision, this court determined, inter alia, that trial court correctly concluded that publications were protected by fair report privilege, that use of word " 'impersonated' " to describe plaintiff's conduct was based in fact, and that plaintiff failed to provide support for assertion that fair report privilege is inconsistent with article first, § 10, of Connecticut constitution). Following the plaintiff's motion to reargue, which was denied by the trial court, the plaintiff commenced the present appeal.

I

The plaintiff claims that the trial court erred in dismissing his complaint on the ground that it was barred by the doctrine of res judicata. He argues that res judicata is not applicable to a special motion to dismiss filed pursuant to § 52-196a, and that res judicata may be asserted only as a special defense. We disagree.

"Statutory construction . . . presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 670, 240 A.3d 1056, cert. granted, 335 Conn. 972, 240 A.3d 676 (2020). "Where a party files a complaint . . . against an opposing party that is based upon the opposing party's exercise of its right of free speech, right to petition the

government, or right of association under the federal or state constitution in connection with a matter of public concern, the opposing party may file a special motion to dismiss. A special motion to dismiss is to be filed no later than thirty days after the return date of the complaint or the filing of such counterclaim or [cross claim]." T. Merritt, 16A Connecticut Practice Series: Elements of an Action (2020) § 14:13, pp. 226–27; see also Practice Book § 10-30.

We agree with the plaintiff that res judicata properly is raised by means of a special defense and that it generally is not raised by a motion to dismiss. See *Larmel* v. *Metro North Commuter Railroad Co.*, supra, 200 Conn. App. 670 n.9 ("[t]he proper procedure by which to assert that a claim is barred by the doctrine of res judicata is to plead it as a special defense"). A special motion to dismiss filed pursuant to § 52-196a, however, is not a traditional motion to dismiss based on a jurisdictional ground. It is, instead, a truncated evidentiary procedure enacted by our legislature in order to achieve a legitimate policy objective, namely, to provide for a prompt remedy. See *Fishman* v. *Middlesex Mutual Assurance Co.*, 4 Conn. App. 339, 355–56, 494 A.2d 606, cert. denied, 197 Conn. 806, 499 A.2d 57 (1985), and cert. denied, 197 Conn. 807, 499 A.2d 57 (1985). It is, in this respect, similar to a motion for summary judgment.

Pursuant to § 52-196a, "[w]hen ruling on a special motion to dismiss, the court shall consider pleadings and supporting and opposing affidavits of the parties attesting to the facts upon which liability or a defense, as the case may be, is based." General Statutes § 52-196a (e) (2). A special motion to dismiss shall be granted "if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint . . . is based on the moving party's exercise of its right of free speech . . . in connection with a matter of public concern, unless the party that brought

the complaint . . . sets forth with particularity the circumstances giving rise to the complaint . . . and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint . . . .'' General Statutes § 52-196a (e) (3). ''The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it.'' (Emphasis omitted; internal quotation marks omitted.) *Three S. Development Co.* v. *Santore*, 193 Conn. 174, 175, 474 A.2d 795 (1984). Proof of probable cause is not as demanding as proof by preponderance of the evidence. See *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 137, 943 A.2d 406 (2008).

Whether res judicata properly may be raised as a ground for a § 52-196a motion to dismiss depends on whether the establishment of res judicata in the particular case could meet the proof requirements of § 52-196a (e) (3). In other words, the application of res judicata to the plaintiff's cause of action necessarily would have to establish, ''by a preponderance of the evidence, that the [plaintiff's] . . . complaint . . . is based on the moving party's exercise of its right of free speech . . . in connection with a matter of public concern'' and that the plaintiff failed to establish ''that there is probable cause, considering all valid defenses, that [he] will prevail on the merits of the complaint . . . .'' General Statutes § 52-196a (e) (3).

Although § 52-196a (e) (3) requires that the plaintiff only establish probable cause that he will prevail, we conclude that the application of the doctrine of res judicata, if properly applied to the present case, necessarily would meet or exceed the proof requirements of § 52-196a (e) (3) because it would establish, *as a matter of law*, that the plaintiff would be unable to establish

"that there is probable cause, considering all valid defenses, that [he] will prevail on the merits of the complaint . . . ." See General Statutes § 52-196a (e) (3). Put another way, if the plaintiff failed to establish his entitlement to relief in prior actions in which he asserted or could have asserted the same claims brought in this action, he has *no possibility* of succeeding in this action and, therefore, cannot establish probable cause that he will prevail on the merits of his complaint. Accordingly, we are not persuaded that res judicata cannot be argued in support of a special motion to dismiss filed pursuant to § 52-196a.

The same analysis applies to the doctrine of collateral estoppel, or issue preclusion, on which the court also relied in granting the defendants' special motion to dismiss. "[C]ollateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim. . . . An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . To assert successfully the doctrine of issue preclusion, therefore, a party must establish that the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case." (Internal quotation marks omitted.) *Doyle* v. *Universal Underwriters Ins. Co.*, 179 Conn. App. 9, 14, 178 A.3d 445 (2017). If the plaintiff unsuccessfully litigated in the prior actions an issue necessary to his success in this action, he is precluded from relitigating that issue and, therefore, cannot establish probable cause that he will prevail in this action. Consequently, collateral estoppel

is an appropriate defense to consider in the context of a special motion to dismiss filed pursuant to § 52-196a.

II

The plaintiff next claims that, even if we determine that res judicata could be applicable to § 52-196a, the court in the present case improperly granted the defendants' special motion to dismiss because res judicata is not applicable under the particular facts of this case. The defendants argue that both res judicata and collateral estoppel apply in this case. We conclude that collateral estoppel bars the plaintiff's claims.

The following background information, as recently set forth in *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 414, is relevant to our analysis. "On August 1, 2015, the Hartford Courant published an article titled, 'Attorney Suspended for a Year.' . . . 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.' . . .

"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*, [supra, 325 Conn. 393]. Kauffman wrote an additional article detailing the Supreme Court's decision. . . . In August, 2017, the plaintiff commenced [an] action by way of a nineteen count complaint dated July 27, 2017, against ten defendants claiming that they defamed him by publishing the 2015 articles. 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." (Citations omitted; footnotes omitted.) *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 417–18. The Superior Court rendered summary judgment on behalf of the defendants in that action, holding that the fair report privilege barred the plaintiff's claims. Id., 418. This court recently affirmed the judgment of the Superior Court. Id., 432.

In the present case, the plaintiff again alleged defamation and invasion of privacy in the defendants' reporting of the same incident, but he added allegations regarding the 2017 publication, an article written by Kauffman and published by the Courant concerning the May 2, 2017 Supreme Court decision that he had omitted from his previous cases. See id., 418 n.3 (noting that plaintiff did not allege that Kauffman's article regarding May 2, 2017 decision was defamatory).

The trial court in the present case reviewed the allegations in the plaintiff's complaint and compared them with the federal and state cases in which the plaintiff previously had alleged defamation and invasion of privacy on the basis of the 2015 publications, which discussed the disciplinary proceedings that had been

brought against him. See *Elder* v. *Tronc, Inc.*, supra, United States District Court, Docket No. 3:17-CV-01285 (WWE); *Elder* v. *21st Century Media Newspaper, LLC*, supra, Superior Court, Docket No. CV-17-6081368-S. The court recognized that the present complaint also contained an allegation that the defendants, in the 2017 publication, again, used the word " 'impersonat[ed]' " to describe the conduct of the plaintiff in identifying himself to the police as someone else, namely, Attorney Wesley Spears, in addition to setting forth allegations concerning the 2015 publications that had been the subject of the previous federal and state cases.

The court discussed the fact that both the federal and the state cases were commenced after the 2017 publication, but noted that the plaintiff had failed to include allegations concerning that publication in his previous complaints and that both decisions, although not citing directly to § 52-196a, held that the 2015 publications were a matter of public concern protected by the fair report privilege. See *Elder* v. *Tronc, Inc.*, supra, United States District Court, Docket No. 3:17-CV-01285 (WWE) (holding, in part, that "defendants' publications are protected by the fair report privilege"); *Elder* v. *21st Century Media Newspaper, LLC*, supra, Superior Court, Docket No. CV-17-6081368-S (same); see also *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 424–27 (same). The court then held that, as had been determined in the previous cases, this "is a matter of public concern covered by the statute," that the "issues are settled now," and that the plaintiff's "claims in this case are barred by the doctrine of res judicata or claim preclusion." Accordingly, the court granted the defendants' special motion to dismiss the plaintiff's complaint.

The plaintiff now alleges that the court improperly dismissed his complaint on res judicata grounds because the "current action arises out of a newspaper

article published [on] April 26, 2017, in the [Courant] . . . concerning a decision of the Connecticut Supreme Court which reversed the July 29, 2015 Superior Court decision,'' and that the complaint now includes allegations of malice.[3] The plaintiff does not argue that the court improperly ruled that the allegations involving the 2015 publication are barred by the doctrine of res judicata. Rather, he focuses only on the allegations regarding the 2017 publication. The defendants argue that the court correctly concluded that any claims regarding the 2017 publication are barred both by claim preclusion and issue preclusion because the claims could have been raised in the prior litigation and because the resolution of the issue of whether the publication of the 2015 articles was protected by the fair report privilege applies to the virtually identical 2017 publication.[4]

[3] The plaintiff also argues that the court made no findings that his complaint was based on the defendants' exercise of their right of free speech in connection with a matter of public concern. This argument requires little discussion. It was unnecessary for the court to explicitly find that a reporter and a newspaper's publication of a story reporting on a court proceeding constitutes the exercise of free speech. Such reporting is quintessential free speech. In addition, the court explicitly stated that the disciplinary proceeding on which the defendants reported "is a matter of public concern covered by the statute." It is indisputable that the public has an interest in being informed of the outcome of disciplinary proceedings involving attorneys licensed to practice law in this state.

[4] Although the trial court stated that the plaintiff's "claims in this case are barred by the doctrine of res judicata or claim preclusion," it also specifically stated that the "issues are settled now," and that the plaintiff could have brought these claims in his previous cases. We read the court's decision as holding that the complaint in this case is barred by both the doctrine of res judicata and the doctrine of collateral estoppel. "The construction of a judgment is a question of law for the court. . . . 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." (Emphasis in original; internal quotation marks omitted.) *Cimmino* v. *Marcoccia*, 332 Conn. 510, 522, 211 A.3d 1013 (2019).

"Under the doctrine of res judicata, a final judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the parties or those in privity with them, upon the same claim." (Internal quotation marks omitted.) *Smigelski* v. *Kosiorek*, 138 Conn. App. 728, 735, 54 A.3d 584 (2012), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013). "Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue. . . . Before collateral estoppel applies . . . there must be an identity of issues between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding." (Citation omitted; internal quotation marks omitted.) *Rockwell* v. *Rockwell*, 196 Conn. App. 763, 769, 230 A.3d 889 (2020). "[T]he applicability of res judicata or collateral estoppel presents a question of law over which we employ plenary review." (Internal quotation marks omitted.) Id.

We generally agree with the plaintiff that res judicata does not apply to the allegations concerning the 2017 publication, authored by Kauffman, because those allegations do not involve the same underlying claim set forth in the previous cases.[5] See id. (fourth element of res judicata requires that "the same underlying claim . . . be at issue" (internal quotation marks omitted)). Those allegations relate to an article published two

[5] We note that the defendants did not argue in their special motion to dismiss that res judicata barred the plaintiff's claims based on the 2017 publication. Instead, before the trial court, they relied solely on the doctrine of collateral estoppel as to those claims.

years after the articles at issue in the previous litigation.[6] We disagree, however, that collateral estoppel does not apply in the present case.

In his complaint, the plaintiff alleged that the 2017 publication again used the word "impersonation" to describe his conduct in identifying himself as someone else. He also alleged that the use of this word evidenced malice. In his previous complaints in both federal and in state court, the plaintiff had alleged that the use of the word impersonation in the 2015 publications was defamatory and an invasion of privacy. Both the federal District Court and this court rejected that claim and held that such a description of the plaintiff's conduct was "fair and accurate." See *Elder* v. *Tronc, Inc.*, supra, United States District Court, Docket No. 3:17-CV-01285 (WWE) (holding, in part, that "[t]he subject articles, which describe Elder as having impersonated another lawyer, were substantially fair and accurate reports of the Superior Court decision, and the headlines were fair representations of the articles"); *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 427 (articles' representations that plaintiff " 'impersonat[ed]' " another lawyer were substantially accurate).

In *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 427–28, this court also discussed the plaintiff's allegation of malice set forth in the complaint in that case. This court held that, because "the 2015 articles were fair and accurate abridgements of the suspension decision, the plaintiff's claim of malice fails as a matter of law." Id., 428.

Because the issues presented in the current complaint substantially are identical to the issues previously

[6] Because we conclude that collateral estoppel applies to bar the allegations regarding the 2017 publication, we also conclude that it is unnecessary to address the court's conclusion that res judicata barred the plaintiff's complaint because he could have brought these claims in his previous cases.

litigated and decided by both the federal and the state courts; see *Rockwell* v. *Rockwell*, supra, 196 Conn. App. 769 ("issues sought to be litigated in the new proceeding must be identical to those considered [and decided] in the prior proceeding" (internal quotation marks omitted)); we conclude that the plaintiff's complaint is barred by the doctrine of collateral estoppel.

III

The plaintiff's final claim is that § 52-196a is unconstitutional as applied in this case because its application infringed on his state constitutional rights to redress and to a trial by a jury. Having recently addressed substantially the same claim in *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 428–32, we adopt the reasoning contained therein and reject the plaintiff's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

ROBERT ROUSSEAU ET AL. *v.* RICHARD P. WEINSTEIN ET AL.
(AC 42902)

Alvord, Prescott and Moll, Js.

Syllabus

The plaintiffs, R and D Co., sought to recover damages from the defendants, R's former spouse, P, and P's attorneys and their law firms, for, inter alia, vexatious litigation. R and P were married in 2007, and, in 2010, R commenced a dissolution action. P filed a cross complaint, alleging that she suffered personal financial losses as a result of financial misconduct, fraud, and duress committed by R, acting both individually and through D Co., in connection with several financial investments that she made during their marriage. In 2011, P retained the defendant attorneys to assist with the dissolution action and to file a civil action against the plaintiffs, alleging essentially the same claims of financial misconduct that she had made in the dissolution action. Various other individuals and entities who allegedly aided and abetted the plaintiffs were also

named as defendants in the civil action. Following a trial in the dissolution action, the court dissolved the marriage between R and P, found that R had not, either individually or through D Co., engaged in the financial misconduct claimed by P, and ordered P to release and hold the plaintiffs indemnified and harmless from any and all claims pending in the civil action. P appealed the dissolution decision and filed a motion to stay the civil action pending a decision on the appeal, which the court granted. The dissolution decision was affirmed and, a few weeks later, the defendants withdrew the civil action. The plaintiffs then filed this vexatious litigation action against P and her attorneys, alleging that the claims made by the defendants in the civil action were identical to those made in the dissolution action and, therefore, were precluded by the prior pending action doctrine and lacked probable cause. The defendants filed for summary judgment, which the court granted with respect to the defendant attorneys, and the plaintiffs appealed to this court. *Held*:

1. The prior pending action doctrine was not applicable and, therefore, did not prevent the defendants from being entitled to summary judgment as a matter of law: the fact that the civil action may have been subject to dismissal under the prior pending action doctrine did not make it inherently vexatious, even if it was exactly or virtually alike to the dissolution action; moreover, the policies behind the prior pending action doctrine, namely, to prevent unnecessary litigation that burdens the courts and to avoid a multiplicity of actions and inconsistent judgments, did not support expanding the doctrine to adopt a bright-line rule that its applicability could be the foundation for finding a lack of probable cause in a subsequent vexatious litigation action; furthermore, a finding that the applicability of the prior pending action doctrine created a prima facie case of vexatious litigation would conflict with the discretionary nature of the doctrine.
2. There was no genuine issue of material fact as to whether the defendants had probable cause to continue the civil action following the dissolution decision: the standard to determine the existence of probable cause was whether, on the basis of the facts known, a reasonable attorney familiar with Connecticut law would believe that he had probable cause to bring the action, and whether the trial court applied the correct standard was irrelevant because this court conducted a de novo review of the record; moreover, the court declined to review the claim that the defendants lacked probable cause to commence the civil action because that claim was raised for the first time at oral argument; furthermore, the defendants had probable cause to continue the civil action following the dissolution decision, as it was objectively reasonable for them to move for a stay rather than to withdraw the action because, until the court reviewed the propriety of the dissolution decision and the indemnification order, they would not have been able to determine which claims, if any, survived against R, D Co. and the other defendants.

Argued January 6—officially released May 25, 2021

Procedural History

Action to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Hartford, where the court, *Moukawsher*, *J.*, granted the motions for summary judgment filed by the named defendant et al., and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Daniel J. Krisch, for the appellants (plaintiffs).

Cristin E. Sheehan, with whom, on the brief, were *James L. Brawley* and *Patrick J. Day*, for the appellees (named defendant et al.).

Raymond J. Plouffe, Jr., for the appellees (defendant Mark H. Dean et al.).

Opinion

ALVORD, J. The plaintiffs, Robert Rousseau and Preferred Display, Inc.[1] (Preferred Display), appeal from the summary judgment rendered by the trial court in favor of the defendants[2] Mark H. Dean, Mark H. Dean, P.C.,[3] Richard P. Weinstein, and Weinstein & Wisser, P.C.[4] On appeal, the plaintiffs claim the court erred by holding that (1) the marital dissolution action between Rousseau and Madeleine Perricone was not a prior

[1] Rousseau is the president and majority shareholder of Preferred Display.

[2] Madeleine Perricone, the former wife of Rousseau, and Ocean Pier Associates, LLC, also were named as defendants in this action. Perricone's motion for summary judgment was denied and the plaintiffs withdrew their claim against Ocean Pier Associates, LLC. Because Perricone and Ocean Pier Associates, LLC, are not involved in this appeal, our references in this opinion to the defendants are to Mark H. Dean, Mark H. Dean, P.C., Richard P. Weinstein, and Weinstein & Wisser, P.C., only.

[3] Mark H. Dean and Mark H. Dean, P.C., will be referred to collectively in this opinion as Dean.

[4] Richard P. Weinstein and Weinstein & Wisser, P.C., will be referred to collectively in this opinion as Weinstein.

pending action and (2) the defendants had probable cause to continue a civil action based on similar claims against Rousseau in the dissolution action. We conclude that probable cause to continue the action existed and, accordingly, affirm the judgment of the trial court.

The following facts, as alleged in the complaint, and procedural history are relevant to our discussion of the claims on appeal. Rousseau and Perricone were married in 2007. On or about March 30, 2010, Rousseau commenced a dissolution action (dissolution action). Perricone filed a cross complaint in the dissolution action, alleging that she suffered personal financial losses as a result of financial misconduct, fraud, and duress committed by Rousseau, acting both individually and through Preferred Display, in connection with several financial investments she made during the course of their marriage.

On or about September 1, 2011, Perricone retained Weinstein to commence a civil action (civil action) against the plaintiffs. On or about September 22, 2011, Dean was retained to assist with the prosecution of Perricone's claims in the dissolution action. Dean consulted with Carlo Forzani, one of Perricone's dissolution attorneys, and became familiar with the details of the financial misconduct claims that were being made against Rousseau in the dissolution action. Dean also consulted with Weinstein and learned that the proposed civil action would be making the same claims of financial misconduct that had been made by Perricone in the dissolution action.

From about September 1 through November 30, 2011, Weinstein consulted with Perricone, her dissolution attorneys, and the forensic accountant involved in the dissolution action to investigate the details of Perricone's claims of financial misconduct against Rousseau. On November 30, 2011, Weinstein filed the civil action in which Perricone asserted claims of breach of fiduciary

duty, securities fraud, misappropriation of funds, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., against Rousseau and Preferred Display. The civil action also contained claims against various individuals and entities that allegedly aided and abetted Rousseau's financial misconduct.[5] Although the claims of financial misconduct alleged in the civil action were more specific and detailed, they were essentially the same allegations raised and prosecuted by Perricone in her cross complaint against Rousseau in the dissolution action.

On December 2, 2011, in the dissolution action, Perricone moved to consolidate the civil action into the dissolution action. During oral argument on the motion, Perricone's dissolution attorney, Jeffrey Ginzberg, argued that consolidation was necessary because some of the issues that would be litigated were "part and parcel" of both actions. Ginzberg further argued: "I don't think it's fair to have to have my client go through an ordeal that's [going to] take an entire month to present to the court only to have to turn around and do it all over again involving basically the same issues and this time in the second case, having a set of defendants from which to recover the money." The court denied Perricone's motion to consolidate.

On or about December 20, 2011, Dean filed an appearance on behalf of Perricone in the civil action, appearing in addition to Weinstein.

Trial in the dissolution action occurred over twelve days in January, February and March, 2012. On or about

[5] Perricone asserted claims against Valley Bank, now known as New England Bank, Arnaldo Marinelli, Joseph Ramondetta, Hillcrest Investments, LLC, Hillcrest Ventures, LLC, Harry Haralambus, Lambus Partners, Inc., Daniele & Associates, LLC, and James Mitchell III. In addition to alleging that these defendants aided and abetted Rousseau's financial misconduct, Perricone also asserted claims of misappropriation of funds and violation of CUTPA against them.

January 23, 2012, Rousseau wrote to Perricone, Weinstein, and Dean, stating that the claims being made in the civil action as to Rousseau and Preferred Display were the same as those that Perricone was alleging and prosecuting in the dissolution action. As a result, Rousseau demanded that Perricone, Weinstein, and Dean withdraw the civil action. They refused to do so.

On August 6, 2012, the trial court issued its memorandum of decision dissolving the marriage of Rousseau and Perricone (dissolution decision). In the dissolution decision, the court concluded that Rousseau did not, either individually or through Preferred Display, engage in the financial misconduct claimed by Perricone and that Perricone's claims were not credible. The court further explained that it had examined the allegations of the civil action and that the "allegations raised against [Rousseau] and [Preferred Display] are more specific and detailed but essentially the same allegations raised by [Perricone] in the dissolution action." As part of the dissolution decision, the court ordered Perricone to "release and hold [Rousseau and Preferred Display] indemnified and harmless from any and all claims of action pending in Hartford Superior Court captioned *Perricone* v. *Rousseau*, bearing docket number HHD-CV-11-6027402-S. In addition, [Perricone] shall be responsible for 100 percent of [Rousseau's] legal fees in defending the civil action if [Rousseau] and/or [Preferred Display] remain parties to that action."

Perricone timely appealed the dissolution decision, arguing, in part, that the trial court erred by ordering her to release and hold Rousseau harmless in the civil action. On March 25, 2014, this court affirmed the dissolution decision.[6] See *Rousseau* v. *Perricone*, 148 Conn.

[6] In affirming the trial court's release and indemnification order in the dissolution decision, this court held that "[a]nything [Perricone] could recover from third parties was hers; nothing was to come from [Rousseau] and he was to be made whole for any future litigation costs regarding the civil action. In light of the court's determination that there had been no

App. 837, 854, 88 A.3d 559 (2014). On April 17, 2014, Weinstein withdrew the civil action.

In August, 2014, the plaintiffs commenced the present action against Perricone and Weinstein. In October, 2015, the plaintiffs added Dean and his law firm as additional defendants. In their three count third amended complaint, the plaintiffs asserted common-law and statutory claims of vexatious litigation against the defendants. The plaintiffs alleged that the allegations and claims made by the defendants in the civil action were identical to those made in the dissolution action and, therefore, were precluded by the prior pending action doctrine and lacked probable cause.

On January 7, 2019, Weinstein and Dean moved for summary judgment. Weinstein moved for summary judgment on the grounds that the plaintiffs waived their right to assert the prior pending action doctrine as a defense by failing to file timely a motion to dismiss and that he had probable cause to believe that the civil action was not identical to the dissolution action. Dean moved for summary judgment on the ground that there was no prior pending action when the civil action was commenced because the constructive trust claim in Perricone's second amended cross complaint had been withdrawn. The court, *Moukawsher*, *J.*, granted the motions of the defendants,[7] and the plaintiffs appealed. Additional facts will be set forth as necessary.

Before we address the plaintiffs' claims on appeal, we first set forth the applicable standard of review of a trial court's granting of a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is

financial manipulation, which finding is not clearly erroneous, the order regarding the civil [action] was well within the court's discretion and served to maintain the status quo of the overall property mosaic." *Rousseau* v. *Perricone*, 148 Conn. App. 837, 850–51, 88 A.3d 559 (2014).

[7] See footnote 2 of this opinion.

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. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . . Once the moving party has met its burden [of production] . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t [is] incumbent [on] the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. . . . The presence . . . of an alleged adverse claim is not sufficient to defeat a motion for summary judgment. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Amity Partners* v. *Woodbridge Associates, L.P.*, 199 Conn. App. 1, 6–7, 234 A.3d 1109 (2020).

I

The plaintiffs first claim that "the trial court improperly held that the [dissolution action] was not a prior pending action, and, thus, the civil [action] was not vexatious, even though Perricone made the same claims against the same parties in the two suits."[8] We disagree with the plaintiffs' contention that an action subject to

[8] We do not offer an opinion in this decision as to whether the trial court erred in concluding that the dissolution action was not a prior pending action. Even if we were to assume, without deciding, that the dissolution action was a prior pending action, such an assumption would be immaterial in light of our conclusion that the applicability of the prior pending action doctrine would not compel a conclusion that the civil action necessarily was vexatious. Accordingly, we do not address these arguments.

dismissal under the prior pending action doctrine is necessarily vexatious and that the defendants were not entitled to summary judgment as a matter of law.

The following additional facts and procedural history are relevant to our resolution of this claim. In count two of her second amended cross complaint in the 2010 dissolution action, Perricone alleged a constructive trust claim against Rousseau. Specifically, Perricone alleged that Rousseau committed various acts of financial misconduct that caused her to lose millions of dollars. Perricone alleged, inter alia, that Rousseau "exercised undue influence over [her] with respect to her finances," manipulated her and became engaged in numerous finan cial transactions to her detriment, and "exercised super iority or dominance over [her] with respect to her finances." On November 30, 2011, Weinstein filed the civil action. The civil action contained many of the same claims of financial misconduct that Perricone raised against Rousseau in the dissolution action. On December 1, 2011, Perricone withdrew count two of her second amended cross complaint in the dissolution action.

On April 16, 2012, the plaintiffs filed a motion to dismiss the civil action pursuant to the prior pending action doctrine. Specifically, the plaintiffs argued that the prior pending action doctrine was applicable to the civil action because the claims made against the plaintiffs in the civil action were essentially the same as those being made against Rousseau in the dissolution action. In response, Perricone argued that the court lacked authority to grant the motion because the plaintiffs failed to file their motion within thirty days of the filing of their appearances as required by Practice Book § 10-30. She also argued that the prior pending action doctrine did not apply as a result of the significant differences between a tort action and a dissolution action.

While the motion to dismiss was pending, the court issued its memorandum of decision in the dissolution

action. Perricone appealed the decision. On August 29, 2012, Weinstein filed a motion to stay the civil action pending a decision in the dissolution appeal. At oral argument on the motion to stay, the plaintiffs again raised the prior pending action doctrine issue and argued that the court still could decide their motion to dismiss. The court, however, declined to rule on the motion to dismiss and granted the motion to stay, staying all proceedings in the civil action until the resolution of the dissolution appeal. Following the release of this court's decision affirming the dissolution decision, Weinstein withdrew the civil action.

Thereafter, the plaintiffs commenced the present action against the defendants for vexatious litigation. On January 7, 2019, Weinstein, Dean, and Perricone moved for summary judgment. On April 23, 2019, the trial court, *Moukawsher*, *J.*, issued its memorandum of decision on the three motions for summary judgment. The court denied Perricone's motion, concluding that the issue of whether she relied on the advice of her attorneys in good faith when refusing to withdraw the civil action following the dissolution decision was a question for the fact finder. The court, however, granted the Weinstein and Dean motions for summary judgment on the grounds that the dissolution action was not a prior pending action and that they had probable cause to continue the civil action in which they moved for a stay, pending the appeal of the dissolution decision. In regard to its conclusion that the dissolution action was not a prior pending action, the court held that the dissolution action and the civil action "[were not] sufficiently alike to apply the rule." The court further concluded that "[b]ecause the prior pending action rule [did not] apply to the civil [action] it [does not] make the civil [action] automatically vexatious. . . . The only thing decided so far is that [the] civil [action] was not automatically vexatious for violating the prior pending action rule."

On appeal, the plaintiffs argue that the close identity between the two actions, potentially subjecting the civil action to dismissal under the prior pending action doctrine, should have precluded the court from rendering summary judgment in favor of the defendants.[9] The plaintiffs argue, expansively, that "the pendency of a prior suit establishes want of probable cause for a second suit between the same parties over the same issues." The plaintiffs cite authority from other jurisdictions in support of their argument. At oral argument before this court, however, the plaintiffs' counsel conceded that there are no Connecticut cases that apply the prior pending action doctrine in this manner. The plaintiffs, thus, are asking this court to adopt a bright-line rule that the applicability of the prior pending action doctrine of dismissal may be the foundation for finding a lack of probable cause supporting a subsequent vexatious litigation action. For the following reasons, we decline the plaintiffs' invitation.

"It has long been the rule that when two separate lawsuits are virtually alike the second action is amenable to dismissal by the court. . . . [T]he prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always,

[9] In its analysis of whether the prior pending action doctrine was applicable to the civil action, the trial court also concluded that Rousseau's status as a necessary party precluded application of the doctrine. All of the parties address this issue in their principal appellate briefs. In light of our conclusion that, even if the prior pending action doctrine were applicable, it would not compel a conclusion that the civil action necessarily was vexatious, we do not address these arguments.

where the two suits are virtually alike, and in the same jurisdiction. . . . The policy behind the doctrine is to prevent unnecessary litigation that places a burden on crowded court dockets." (Citation omitted; internal quotation marks omitted.) *A1Z7, LLC* v. *Dombek*, 188 Conn. App. 714, 721, 205 A.3d 740 (2019). "The rule, however, is not one of unbending rigor, nor of universal application, nor a principle of absolute law . . . . Accordingly, the existence of claims that are virtually alike does not, in every case, require dismissal of a complaint." (Citation omitted; internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 396, 973 A.2d 1229 (2009).

"[T]he trial court must determine in the first instance whether the two actions are: (1) exactly alike, i.e., for the same matter, cause and thing, or seeking the same remedy, and in the same jurisdiction; (2) virtually alike, i.e., brought to adjudicate the same underlying rights of the parties, but perhaps seeking different remedies; or (3) insufficiently similar to warrant the doctrine's application. In order to determine whether the actions are virtually alike, we must examine the pleadings . . . to ascertain whether the actions are brought to adjudicate the same underlying rights of the parties. . . . The trial court's conclusion on the similarities between the cases is subject to our plenary review." (Internal quotation marks omitted.) *A1Z7, LLC* v. *Dombek*, supra, 188 Conn. App. 721–22.

"Following that initial determination, the court must proceed to a second step. If the court has concluded that the cases are exactly alike or insufficiently similar, the court has no discretion; in the former situation, it must dismiss the second action, and in the latter, it must allow both cases to proceed. . . . Where actions are virtually, but not exactly alike, however, the trial court exercises discretion in determining whether the circumstances justify dismissal of the second action." (Citation omitted; internal quotation marks omitted.)

Kleinman v. *Chapnick*, 140 Conn. App. 500, 506, 59 A.3d 373 (2013).

We conclude that the applicability of the prior pending action doctrine cannot compel a determination that the litigation is vexatious. Even if the civil action was exactly or virtually alike to the dissolution action, the fact that the civil action may have been subject to dismissal under the doctrine does not make it inherently vexatious. The overarching policy concerns for the prior pending action doctrine inform our conclusion. "The policy behind the doctrine is to prevent unnecessary litigation that places a burden on crowded court dockets." (Internal quotation marks omitted.) *A1Z7, LLC* v. *Dombek*, supra, 188 Conn. App. 721. The prior pending action doctrine also is designed to avoid a multiplicity of actions and inconsistent judgments and is "based on the principles of comity, convenience, and the necessity for orderly procedure in the trial of contested issues." 1 C.J.S., Abatement and Revival § 20 (2021); see also *Curcio* v. *Hartford Financial Services Group*, 472 F. Supp. 2d 239, 243 (D. Conn. 2007) ("[t]he prior pending action doctrine is one of federal judicial efficiency to avoid placing an unnecessary burden on the federal judiciary, and to avoid the embarrassment of conflicting judgments" (internal quotation marks omitted)). In addition to the fact that the court is permitted, but not required, to dismiss an action that is virtually alike to one that is already pending; *Kleinman* v. *Chapnick*, supra, 140 Conn. App. 506; in certain circumstances, the court may choose to abate or stay the first action in favor of the second. 1 Am. Jur. 2d, Abatement, Survival, and Revival § 8 (2021). "In some cases, the public interest may be an important factor in determining whether an additional pending action should be abated. Where the court of a slightly later filing provides a more suitable forum for complete and expeditious resolution of issues, that court may choose not to abate the lawsuit." (Footnote

omitted.) Id. The focus of the prior pending action doctrine, therefore, is on judicial efficiency and on promoting orderly procedure in the trial of contested issues. Simply put, none of the enumerated policy considerations for the doctrine indicates that it was intended to apply in the manner that the plaintiffs suggest: that it may be used proactively to establish want of probable cause in a vexatious litigation action.

We are mindful that this court has noted that, when a prior action is pending, there cannot be any reason for bringing a second action and that the second action therefore "must be oppressive and vexatious." (Internal quotation marks omitted.) *A1Z7, LLC* v. *Dombek*, supra, 188 Conn. App. 721. This statement was made within the context of a recitation of the common-law history describing a good cause for the abatement of an action by a court. We are unaware of any Connecticut authority that has used this language to conclude that the applicability of the prior pending action doctrine creates a prima facie case of vexatious litigation, which is the position that the plaintiffs advocate here.

The plaintiffs' argument also fails to consider the nuances and scope of the prior pending action doctrine. The plaintiffs' position that the applicability of the prior pending action doctrine may be the foundation for finding a lack of probable cause in a vexatious litigation action conflicts with the discretionary nature of the doctrine. Dismissal under the doctrine is not mandatory if the second action is "virtually alike" to a pending action. *Kleinman* v. *Chapnick*, supra, 140 Conn. App. 506. If the court has the discretion to decline to dismiss a "virtually alike" action, that action indisputably cannot be vexatious. Moreover, dismissal of a "virtually alike" action pursuant to the prior pending action doctrine does not compel a conclusion that the action necessarily was vexatious. The court may have dismissed the action for policy reasons, including the avoidance

of inconsistent judgments, the convenience of the parties, or to ensure orderly procedure in the trial of contested issues. See 1 C.J.S., supra, § 20. The mere fact that the prior pending action doctrine applies, thus, by itself, cannot support a conclusion that the action is vexatious. This proposition also prevails where an action is "exactly alike" to a prior action. Although the court is required to dismiss a second action that is "exactly alike" to a prior action; *Kleinman* v. *Chapnick*, supra, 506; it does not necessarily follow that the commencement of the second action can establish want of probable cause for purposes of a vexatious litigation action. As previously observed, none of the policy considerations for the prior pending action doctrine indicates that it was intended to be applied in such a manner. Applying the prior pending action doctrine in this way also would expand its scope. The prior pending action doctrine is a doctrine of dismissal that gives parties a tool to dismiss unnecessarily duplicative actions. See *A1Z7, LLC* v. *Dombek*, supra, 188 Conn. App. 721. If we were to adopt the plaintiffs' position, the prior pending action doctrine would cease to remain a doctrine of dismissal. Instead, it could be used by parties expansively to commence a vexatious litigation action. In the absence of any compelling authority[10] or cogent policy considerations supporting such an expansion, we decline the plaintiffs' invitation to adopt a bright-line rule that the applicability of the prior pending action doctrine may be the foundation for finding a lack of probable cause in a vexatious litigation action. We

[10] The plaintiffs rely on three cases from other jurisdictions for their proposition that a lack of probable cause in a vexatious litigation case may be predicated on the applicability of the prior pending action doctrine. See *SBK Catalogue Partnership* v. *Orion Pictures Corp.*, 723 F. Supp. 1053 (D.N.J. 1989); *Timeplan Loan & Investment Corp.* v. *Colbert*, 108 Ga. App. 753, 134 S.E.2d 476 (1963); *Neal* v. *Sparks*, 773 S.W.2d 481 (Mo. App. 1989). We do not find their reasoning persuasive and they are not binding on this court. See *State* v. *Hutton*, 188 Conn. App. 481, 505, 205 A.3d 637 (2019) (cases from other jurisdictions may be persuasive but are not binding).

therefore conclude that the applicability of the prior pending action doctrine has no bearing on the present case and, accordingly, does not prevent the defendants from being entitled to summary judgment as a matter of law.

II

The plaintiffs next claim that the trial court erred in rendering summary judgment in favor of the defendants because there was a genuine issue of material fact as to whether the defendants had probable cause to continue prosecuting the civil action following the dissolution decision and the trial court applied the wrong test for probable cause. Regardless of whether the trial court applied the correct probable cause test, we conclude that the defendants had probable cause to continue the civil action.

The following additional facts and procedural history are relevant to our consideration of this claim. In September, 2011, Perricone contacted Weinstein to inquire whether the firm would represent her in a complicated, commercial matter. Weinstein held an initial conference with Perricone, and, after their conversation, Weinstein began collecting evidence to corroborate Perricone's statements. On the basis of his investigation, Weinstein believed he had substantial evidence in support of Perricone's claim that Rousseau had engaged in self-dealing and, therefore, that he had probable cause to commence a civil action alleging financial misconduct. Weinstein then drafted the civil complaint and, after confirming with Perricone's dissolution attorneys that the facts, as alleged, were accurate, filed the complaint.

Dean originally was retained by Forzani to provide limited assistance in the dissolution action. Dean prepared a comprehensive memorandum of law regarding constructive trusts for Forzani's consideration. On the basis of the documentation he received and research

he conducted, Dean believed there was adequate legal support for a constructive trust claim against Rousseau in the dissolution action. Although he did not file an appearance in the dissolution action, Dean appeared in the civil action. While representing Perricone in the civil action, Dean assisted Weinstein with discovery and with other pleadings and motions as needed. As a result of the facts relayed to him by Forzani, Weinstein, and Perricone, along with the facts gleaned from the documents he reviewed, Dean believed there was probable cause to commence the civil action.

On August 6, 2012, the dissolution decision was issued. Weinstein believed that the dissolution decision was decided incorrectly. Specifically, he disagreed with the court's statement that the civil action and the dissolution action contained essentially the same allegations. He also believed that the court's order that Perricone release and hold the plaintiffs indemnified and harmless in the civil action violated Perricone's constitutional rights. As a result, he advised Perricone to appeal the dissolution decision.

Weinstein moved to stay the civil action while the dissolution appeal was pending, on the ground that Perricone was appealing the dissolution decision, "including but not limited to that portion of the order of [the court] which affected the present litigation. To that extent, [Perricone] has a Hobson's choice of either pursuing this litigation being obligated to pay for Rousseau's cost expenses as well as indemnifying him, or terminating the litigation. Whether [Perricone] ultimately can or would bifurcate litigation or litigate discreet issues in the instant matter remains to be seen, but until the Appellate Court has had an opportunity to review the propriety of [the court's] decision and its implications in regard to the instant case, [Perricone] must regrettably request that the matter be stayed pending appellate

review and determination of the judgment rendered by [the court] in the dissolution [action]."

On September 10, 2012, Weinstein repeated these arguments at the hearing on the motion to stay. He informed the court that Perricone was going "to challenge the ability of the domestic court to issue the order that [it] did, that directly affects this case, namely the indemnity and attorney's fee provision." He also argued that, as a practical matter, "it is virtually impossible for [Perricone] to be able to go forward in light of the decision from [the court]. And we can't even really analyze, in a proper way, to what extent that decision implicates the ability to go forward on the various counts in this case." The court granted the motion, staying the civil action until the appeal of the dissolution decision had concluded.

On appeal from the dissolution decision, Perricone argued, in relevant part, that the court erred in ordering her to release Rousseau and hold him harmless in the civil action. Perricone argued that, although Rousseau may have been entitled to seek dismissal or summary judgment of her claims in the civil action on res judicata or collateral estoppel grounds, "due process [entitled her] to a full and fair opportunity in the civil action to demonstrate that the elements of [these defenses] have not been satisfied." This court disagreed and upheld the dissolution decision, concluding that "the order regarding the civil case was well within the court's discretion . . . ." *Rousseau* v. *Perricone*, supra, 148 Conn. App. 850. We also noted that, should Perricone continue to pursue the civil action, "she would be entitled to keep for herself" any proceeds from the action that were recovered from any defendant other than Rousseau and Preferred Display. Id. Weinstein withdrew the civil action following Perricone's unsuccessful appeal of the dissolution decision.

In their third amended complaint in the instant matter, the plaintiffs alleged that the defendants lacked probable cause to commence and to continue the civil action. Specifically, the plaintiffs alleged that, because it was evident that Perricone was pursuing the same claims in both the dissolution action and the civil action, which the defendants knew or reasonably should have known was improper, unnecessary, oppressive and vexatious, the defendants lacked probable cause in regard to the civil action. Moreover, the plaintiffs alleged that the defendants lacked probable cause to continue the civil action following the dissolution decision, as the findings of the dissolution court "constituted binding factual and legal determinations of the lack of merit of the civil [action] allegations in favor of the plaintiffs in all material respects . . . ."

The trial court addressed the issue of whether the defendants had probable cause in its memorandum of decision on the defendants' motions for summary judgment. The court focused its probable cause analysis on the defendants' conduct following the dissolution decision because, in the court's view, "Rousseau is only suing about continuing rather than beginning the civil [action and] that is all this decision must cover." Citing *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 912 A.2d 1019 (2007), the court stated that the standard for determining whether the defendants had probable cause "amounts to determining whether a reasonable attorney would believe there were facts sufficient to bring the lawsuit and whether the particular attorney in the case believed in these facts in good faith." Under this standard, the court reasoned that, had Perricone's appeal of the dissolution succeeded and had the civil action been withdrawn prior to the resolution of the dissolution appeal, her claims in the civil action, particularly those against the

third parties, would have been lost, exposing the defendants to malpractice actions. The court further stated that "[s]taying the claim, on the other hand, would protect the client's interest while minimizing further expense and harm to the defendants in the civil action by halting those proceedings pending the outcome of the appeal. A reasonable attorney would not think this obviously wrong. And there is no evidence that any of the attorney defendants [did not] sincerely believe there was a long shot chance on appeal. Both lawyers documented the consideration they gave the matter before participating. There is no material dispute that they believed enough of what Perricone claimed to assert those claims on her behalf." In light of these considerations, "after considering the facts in the light most favorable to Rousseau, the court conclude[d] that there was probable cause—it was not obviously wrong—for the lawyers to seek a stay of the civil proceedings pending the appeal of the divorce matter." Accordingly, the court granted the motions for summary judgment as to the defendants.

On appeal, the plaintiffs claim that the trial court applied the wrong test for probable cause. At oral argument before this court, the plaintiffs also stated that, contrary to the trial court's determination, they were challenging the probable cause of the defendants to commence the civil action, in addition to whether they had probable cause to continue it after the dissolution decision. In response, the defendants argue that probable cause existed to commence and to continue the civil action.[11] They further argue that, even if the trial court applied an incorrect standard, this court can

[11] In their principal appellate briefs, the parties also invoke the prior pending action doctrine for their arguments concerning whether the defendants had probable cause to commence and to continue the civil action. In light of our conclusion in part I of this opinion that, even if the prior pending action doctrine were applicable, it would not compel a conclusion that the civil action was vexatious, we do not address these arguments on the merits.

affirm on the basis of our de novo review of the record. We agree with the defendants.

We begin by setting forth the relevant legal principles and standard of review. "In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. Both the [common-law] and statutory causes of action [require] proof that a civil action has been prosecuted . . . . Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under [General Statutes] § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages." (Internal quotation marks omitted.) *Rozbicki* v. *Sconyers*, 198 Conn. App. 767, 773–74, 234 A.3d 1061 (2020).

"[T]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man [or woman] in the belief that he [or she] has lawful grounds for prosecuting the defendant in the manner complained of. . . . Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he [or she] lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted. . . . [T]he existence of probable cause is an absolute protection against an action for [vexatious litigation], and what facts, and whether particular facts, constitute probable cause is always a question of law." (Internal quotation marks omitted.) Id., 774. Because the question of whether there is probable cause in a vexatious litigation case is

a question of law, our scope of review is plenary. *Schaeppi* v. *Unifund CCR Partners*, 161 Conn. App. 33, 46, 127 A.3d 304, cert. denied, 320 Conn. 909, 128 A.3d 953 (2015).

"[In *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 84] [o]ur Supreme Court . . . had the opportunity to consider whether a higher legal standard of probable cause should be applied to attorneys and law firms sued for vexatious litigation. . . . After considering the statute and the competing policy interests, the court concluded that a higher standard should not apply. . . . Instead, in assessing probable cause, the court phrased the critical question as whether on the basis of the facts known by the law firm, a reasonable attorney familiar with Connecticut law would believe he or she had probable cause to bring the lawsuit. . . . As is implied by its phrasing, the standard is an objective one that is necessarily dependent on what the attorney knew when he or she initiated the lawsuit." (Internal quotation marks omitted.) *Rozbicki* v. *Sconyers*, supra, 198 Conn. App. 774–75.

"[P]robable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in [vexatious litigation] must separately show lack of probable cause. . . . The lower threshold of probable cause allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . . Were we to conclude . . . that a claim is unreasonable wherever the law would clearly hold for the other side, we could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law. The vitality of our [common-law] system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories." (Internal quotation marks omitted.) Id., 775.

As a preliminary matter, we decline to review the plaintiffs' claim that Weinstein and Dean lacked probable cause to commence the civil action. "It is well settled that claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court. . . . Claims that are inadequately briefed generally are considered abandoned." (Citations omitted.) *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006); see also *Lafayette* v. *General Dynamics Corp.*, 255 Conn. 762, 781, 770 A.2d 1 (2001) (declining to review issue raised for first time at oral argument because it "was neither timely raised nor properly briefed"). In the present action, the trial court focused its analysis on whether Weinstein and Dean had probable cause to continue the civil action following the dissolution decision because, in the court's view, "Rousseau is only suing about continuing rather than beginning the civil [action and] that is all this decision must cover." The plaintiffs disputed this determination of the trial court at oral argument before this court and asserted that they also were challenging whether the defendants had probable cause to commence the civil action. In their principal appellate brief, however, the plaintiffs argue only that the "trial court improperly held that the defendants had probable cause to continue the civil [action] after the unfavorable [dissolution decision] against Perricone . . . ." Their brief contains no analysis on the issue of whether the defendants had probable cause to commence the civil action. Because the plaintiffs failed to brief this issue and raised it for the first time during oral argument before this court, we decline to review it. See *Grimm* v. *Grimm*, supra, 393. As a result, we will presume that the defendants had probable cause to commence the civil action.

We now turn to the remaining issue on appeal, namely, whether the defendants had probable cause to continue

pursuing the civil action following the dissolution decision. In its memorandum of decision, the trial court, citing *Falls Church Group, Ltd.*, stated that the probable cause "standard amounts to determining whether a reasonable attorney would believe there were facts sufficient to bring the lawsuit and whether the particular attorney in the case believed in these facts in good faith." The court also made several observations about what a "reasonable attorney" would do in a comparable situation. The court opined that the "[dissolution decision] certainly would have given reasonable lawyers pause," that "reasonable lawyers would have had to consider their client," and that a reasonable attorney would not think that staying the claim while the appeal was pending was obviously wrong. By citing to the correct probable cause standard and referring numerous times to what a "reasonable attorney" would do, the court thus appears to have applied the correct, objective legal test for probable cause. The plaintiffs, nevertheless, argue that the court applied the wrong standard. Specifically, the plaintiffs argue that by focusing on whether an attorney's actions are "not obviously wrong," the court improperly interjected a subjective element into the established objective test for a probable cause determination. Although we acknowledge that the language the trial court used in its probable cause analysis is not a model of clarity, even if we were to assume that the court applied an incorrect standard, our de novo review leads us to conclude that the defendants had probable cause to continue the civil action.[12]

[12] As previously observed, because the question of whether there is probable cause in a vexatious litigation case is a question of law, our scope of review is plenary. *Schaeppi* v. *Unifund CCR Partners*, supra, 161 Conn. App. 46. Our review of a trial court's decision to grant a motion for summary judgment also is plenary. *Amity Partners* v. *Woodbridge Associates, L.P.*, supra, 199 Conn. App. 7. The plaintiffs acknowledge this in their principal appellate brief. The plaintiffs, however, still argue that this court should reverse the trial court's decision because "[a]pplication of an improper legal standard is a 'fatal flaw . . .' that, unless harmless, requires a new trial." We do not agree. The cases that the plaintiffs cite in support of their contention that the application of an improper legal standard is reversible error

A party does "not lose probable cause to pursue [an action] because of adverse rulings along the way. The standard for determining probable cause is not whether there are adverse rulings by the court or whether the claim is ultimately determined to be without merit. . . . Rather, the standard is whether the defendant in a vexatious litigation action had knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the [action] in the manner complained of." (Citation omitted; internal quotation marks omitted.) *Schaeppi* v. *Unifund CCR Partners*, supra, 161 Conn. App. 53–54.

We conclude that Weinstein and Dean had probable cause to continue the civil action following the dissolution decision. Although the dissolution decision was unfavorable to the claims alleged in the civil action, Weinstein and Dean did not lose probable cause simply because of this adverse trial court decision. See id., 53. The defendants had probable cause to commence the civil action and, for the same reasons, had probable cause to continue prosecuting the civil action. See id., 53–54 (concluding that defendants had probable cause to continue prosecuting foreclosure action even after unfavorable rulings when they had probable cause to initiate action). Moreover, Weinstein testified during his deposition that he believed the dissolution decision's order that Perricone release and hold Rousseau harm-

are distinguishable procedurally. See, e.g., *McDermott* v. *State*, 316 Conn. 601, 612, 113 A.3d 419 (2015) (reversing trial court when court applied incorrect legal standard during trial to determine whether defendant had assumed greater duty of care than that which was legally required); *Deroy* v. *Estate of Baron*, 136 Conn. App. 123, 125, 43 A.3d 759 (2012) (reversing trial court and remanding for new trial when trial court applied higher legal standard than required by law to question of testamentary capacity during trial); *Stein* v. *Tong*, 117 Conn. App. 19, 25, 979 A.2d 494 (2009) (improper evidentiary finding during trial tainted ultimate determination). Moreover, even if we were to assume that the court applied an incorrect standard, any error that the trial court made is immaterial should this court conclude, following our de novo review, that the defendants were entitled to summary judgment. See *Brown* v. *Otake*, 164 Conn. App. 686, 700 n.9, 138 A.3d 951 (2016). Accordingly, the plaintiffs' argument is unpersuasive.

less in the civil action "was Draconian at best" and that it arguably was "unconstitutional because it creates a muzzle on the ability of a citizen to be able to pursue her rights to litigation." As a result of Weinstein's concerns, Perricone did, in fact, challenge the trial court's indemnification order. Had Perricone prevailed on appeal, the order directing her to release and hold harmless Rousseau and Preferred Display in the civil action would have been reversed, and she would have been permitted to continue prosecuting her claims against the plaintiffs without the sanction of indemnification.

Weinstein's concerns about the indemnification order also led him to believe that moving to stay the civil action during the pendency of the appeal was the preferred course of action. The indemnification order in the dissolution decision stated that Perricone must release only Rousseau and Preferred Display in the civil action. The civil action, however, also contained claims against numerous other parties. See footnote 5 of this opinion. Consequently, Weinstein believed that a stay was necessary because, until the Appellate Court reviewed the propriety of the dissolution decision, Perricone would be unable to determine fully the implications of the indemnity order on her ability to bifurcate or litigate discreet issues in the civil action. At oral argument on the motion to stay, Weinstein repeated this theme, stating that "it is virtually impossible for [Perricone] to be able to go forward in light of the decision from [the court]. And we can't even really analyze, in a proper way, to what extent that decision implicates the ability to go forward on the various counts in this case."

Weinstein further justified his decision to move for a stay instead of withdrawing the action during his deposition, transcript excerpts of which were before the court. Weinstein testified that he pursued a stay in the civil action to "wait to see what the Appellate Court decision would be" because, in his view, "the indemnity

provision, the way I read it, applied even if [Perricone] won in the civil [action]." He further stated that, "even though [he] believed there was probably cause to continue the civil [action, Perricone could not do that] because of the indemnity [provision]."

We conclude that Weinstein's decision to move for a stay of the civil action during the pendency of the appeal was objectively reasonable. The civil action contained claims against other parties that allegedly had aided and abetted Rousseau's financial misconduct. These claims, thus, were intertwined with the claims against Rousseau and Preferred Display. Until this court reviewed the propriety of the dissolution decision and the indemnification order, the defendants would have been unable to determine which claims, if any, survived against Rousseau, Preferred Display, and the other defendants in the civil action. As a result of this uncertainty, it was objectively reasonable for the defendants to move for a stay rather than withdrawing the action. See *Rozbicki* v. *Sconyers*, supra, 198 Conn. App. 774–75. As the trial court stated in its memorandum of decision, "[s]taying the claim . . . would protect [Perricone's] interest while minimizing further expense and harm to the defendants in the civil action by halting those proceedings pending the outcome of the appeal." The defendants, therefore, had probable cause to continue the civil action, move for a stay in that matter, and await the outcome of Perricone's appeal prior to determining how to proceed.

In sum, there was no genuine issue of material fact that the defendants had probable cause to continue the civil action following the dissolution decision. Accordingly, the trial court did not err in granting the defendants' motions for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHRISTOPHER COLEMAN (AC 42911)

Alvord, Prescott and Moll, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of the crimes of promoting a minor in an obscene performance, risk of injury to a child, sexual assault in the second degree, possession of child pornography, and cruelty to persons, appealed to this court, challenging the sentence imposed by the trial court following the court's granting of his motion to correct an illegal sentence. The defendant originally received a total effective sentence of nine years of imprisonment, which would run consecutively to a sentence he was then serving, followed by twenty-five years of special parole. He claimed that his sentence on the conviction of sexual assault in the second degree, one year of imprisonment followed by twenty-five years of special parole, exceeded the statutory (§ 53a-35a) maximum twenty year term of imprisonment applicable to that offense. The court resentenced the defendant by restructuring his sentence to consist of the same total effective sentence of nine years of imprisonment followed by twenty-five years of special parole that he had agreed to in his plea bargain. On appeal, the defendant claimed that his newly imposed sentence violated the multiple punishment prohibition of the double jeopardy clause as well as his rights to due process and that the court lacked jurisdiction to resentence him. The state conceded that the portion of the defendant's new sentence, imposing an eleven year period of special parole on the charge of promoting a minor in an obscene performance, illegally exceeded the statutory (§ 54-125e (c)) maximum ten year special parole limitation. *Held*:

1. The defendant's resentencing did not violate double jeopardy, as his overall sentence had not expired, and the trial court was thus free to restructure the entire sentencing package; the defendant provided no authority for his argument that the legal portion of his sentence should have been bifurcated from the illegal term of special parole, the resentence did nothing more than place the defendant in the same position he originally occupied when he entered his guilty plea, and, as the defendant was still serving his original sentence at the time of resentencing, he had not obtained an expectation of finality in his sentence.
2. The defendant could not prevail on his claim that the trial court lacked jurisdiction to resentence him; the defendant invoked the jurisdiction of the court by filing a motion to correct his sentence, and the court restructured his sentence before the total effective sentence had expired.

3. The defendant's resentencing did not violate his constitutional rights to due process, as he was resentenced to the same total effective sentence and not to a longer term of imprisonment or a longer combined sentence.
4. The trial court's imposition of an eleven year period of special parole for the charge of promoting a minor in an obscene performance exceeded the ten year maximum limit set forth in § 54-125e (c) and, thus, the defendant was entitled to resentencing.

Argued October 21, 2020—officially released May 25, 2021

Procedural History

Substitute information charging the defendant with multiple counts of the crimes of promoting a minor in an obscene performance, risk of injury to a child, sexual assault in the second degree, possession of child pornography, and sexual assault in the first degree, and one count of the crime of cruelty to persons, brought to the Superior Court in the judicial district of Fairfield, where the defendant was presented to the court, *Damiani, J.*, on a plea of guilty of two counts of risk of injury to a child and one count each of promoting a minor in an obscene performance, sexual assault in the second degree, possession of child pornography, and cruelty to persons; judgment of guilty in accordance with the plea; thereafter, the court, *Hon. Robert J. Devlin, Jr.*, judge trial referee granted the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Judie Marshall, for the appellant (defendant).

Linda F. Currie-Zeffiro, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Christopher Coleman, appeals from the judgment of the trial court granting his motion to correct an illegal sentence and imposing a new sentence. On appeal, the defendant claims that

(1) his newly imposed sentence violates the multiple punishment prohibition of the double jeopardy clause of the fifth amendment to the United States constitution and the Connecticut constitution[1] because he had completed the lawful portion of his sentence at the time of his resentencing, (2) the court lacked jurisdiction to resentence him after the lawful portion of his sentence had been served, and (3) the newly imposed sentence violated his due process rights under the federal and state constitutions. We disagree with the defendant's claims.

The state, in its appellate brief, concedes that the defendant's new sentence is illegal because the court imposed an eleven year period of special parole on the charge of promoting a minor in an obscene performance, which exceeds the ten year special parole limitation set forth in General Statutes § 54-125e (c). The defendant agrees and, in his reply brief, argues that this court has the authority to correct the defendant's sentence. We agree with the parties that the defendant's new sentence is illegal and, accordingly, we reverse the judgment of the trial court and remand the case for resentencing.

The record reflects the following procedural history that is relevant to this appeal. On June 12, 2003, pursuant to a plea agreement, the defendant pleaded guilty under

[1] The fifth amendment to the United States constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a [g]rand [j]ury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." "Although the Connecticut constitution has no specific double jeopardy provision, we have held that the due process guarantees of article first, § 9, include protection against double jeopardy." (Internal quotation marks omitted.) *State* v. *Tabone*, 292 Conn. 417, 421 n.6, 973 A.2d 74 (2009). Article first, § 9, of the Connecticut constitution provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

the *Alford* doctrine[2] to one count of promoting a minor in an obscene performance in violation of General Statutes § 53a-196b, two counts of risk of injury to a child in violation of General Statutes (Rev. to 2001) § 53-21 (a) (1), one count of sexual assault in the second degree in violation of General Statutes (Rev. to 2001) § 53a-71 (a) (1), one count of possession of child pornography in violation of General Statutes (Rev. to 2001) § 53a-196d, and one count of cruelty to persons in violation of General Statutes (Rev. to 2001) § 53-20.

On July 15, 2003, the parties appeared before the trial court, *Damiani*, *J.* The court first noted that "[t]he agreed upon sentence . . . was nine years in jail to run consecutive to his present sentence, followed by twenty-five years of special parole." The court offered the parties the opportunity to be heard and then sentenced the defendant as follows: (1) for the charge of promoting a minor in an obscene performance, nine years of imprisonment, (2) for the charge of risk of injury to a child, nine years of imprisonment, (3) for the charge of risk of injury to a child, nine years of imprisonment, (4) for the charge of sexual assault in the second degree, one year of imprisonment, nine months of which was mandatory, followed by twenty-five years of special parole, (5) for the charge of possession of child pornography, five years of imprisonment, and (6) for the charge of cruelty to persons, one year of imprisonment. The trial court ordered the sentences to run concurrently, resulting in a total effective sentence of nine years of imprisonment, nine months of

[2] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Tabone*, 292 Conn. 417, 421 n.7, 973 A.2d 74 (2009).

which was mandatory, followed by twenty-five years of special parole. The sentence was ordered to run consecutively to a sentence that the defendant was already serving.

On November 19, 2018, the defendant filed a motion to correct his sentence pursuant to Practice Book § 43-22.[3] In his motion, he argued that his sentence was illegal because the total sentence imposed for the charge of sexual assault in the second degree, one year of imprisonment followed by twenty-five years of special parole, exceeded the statutory maximum penalty available for that offense.[4] The defendant cited *State* v. *Tabone*, 279 Conn. 527, 533, 902 A.2d 1058 (2006), in which our Supreme Court concluded that a sentence in which the total length of the term of imprisonment and period of special parole combined exceeds the maximum sen-

[3] Practice Book § 43-22 provides: "The 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."

[4] General Statutes (Rev. to 2001) § 53a-71 provides in relevant part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person . . . .

"(b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court."

Although the transcript indicates that the trial court, in resentencing the defendant, referred to the offense of sexual assault in the second degree as a class D felony, the parties agree and the record reveals that the offense was a class B felony because the victim was under sixteen years of age. General Statutes § 53a-35a provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise, the term shall be fixed by the court as follows . . . (6) For a class B felony other than manslaughter in the first degree with a firearm under section 53a-55a, a term not less than one year nor more than twenty years . . . ."

tence of imprisonment violates General Statutes § 54-128 (c).[5]

On December 19, 2018, the parties appeared before the court, *Devlin*, *J.*, on the motion to correct. The court stated: "We discussed this in chambers, and I think there are problems with the sentence that Judge Damiani imposed." Noting that the parties wished to file memoranda, the court continued the matter to January 30, 2019.

On January 22, 2019, the state filed a memorandum of law in opposition to the defendant's motion to correct an illegal sentence. The state agreed that the original sentence was illegal, pursuant to *State* v. *Tabone*, supra, 279 Conn. 533, but contended that the court had "the authority under the aggregate sentencing theory to resentence the defendant to the same sentence that Judge Damiani did in 2003."[6]

On January 28, 2019, the defendant filed an amended motion to correct an illegal sentence, dated January 16, 2019. In his motion, he argued that his sentence was illegal "in that the one year of incarceration that he received on the charge of sexual assault in the second

[5] General Statutes § 54-128 (c) provides: "Any person who, during the service of a period of special parole imposed in accordance with subdivision (9) of subsection (b) of section 53a-28, has been returned to any institution of the Department of Correction for violation of such person's parole, may be retained in a correctional institution for a period equal to the unexpired portion of the period of special parole. *The total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted.*" (Emphasis added.) Although § 54-128 (c) was the subject of amendments in 2004; see Public Acts 2004, No. 04-234, § 8; Public Acts 2004, No. 04-257, §§84, 124; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[6] "Under the aggregate package theory, when a multicount conviction is remanded after one or more of the convictions have been vacated on appeal, the trial court may increase individual sentences on the surviving counts as long as the total effective sentence is not exceeded." *State* v. *Wade*, 297 Conn. 262, 268, 998 A.2d 1114 (2010).

degree does not render him eligible for any period of special parole whatsoever," pursuant to General Statutes § 54-125e (a).[7] He alleged that § 54-125e (a) "supplies the trial court's statutory authority to impose special parole [and] expressly conditions that authority on the receipt of a 'definite sentence of more than two years' . . . ." The defendant maintained that resentencing him to apportion the special parole among the other charges "(1) violates the [d]ouble [j]eopardy [c]lauses of the state and federal constitutions, (2) exceeds the trial court's jurisdiction, and (3) violates the [d]ue [p]rocess [c]lauses of the state and federal constitutions." The defendant requested that the court strike the period of special parole imposed.

The court, *Devlin*, *J.*, held argument on the motion on January 30, 2019. At the conclusion of oral argument, the court, noting that both parties agreed that the sentence imposed was "not in conformance with the statutory structure," set the matter down for a resentencing. The court stated: "And in the resentencing it will either be the suggestion made by the defense, which is essentially [to] vacate the special parole order and then essentially transform the sentence into a nine year flat sentence. Or attempt to, if possible, implement this aggregate package theory to try and, if not achieve, approximate what Judge Damiani intended, which was the agreed sentence of nine years followed by twenty-five years of special parole."

On March 8, 2019, the state filed a supplemental memorandum of law in opposition to the defendant's

[7] General Statutes § 54-125e (a) applies to "[a]ny person convicted of a crime committed on or after October 1, 1998, who received a definite sentence of more than two years followed by a period of special parole . . . ." Although § 54-125e (a) was the subject of amendments in 2004; see Public Acts 2004, No. 04-234, § 5; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

amended motion to correct an illegal sentence. In its supplemental memorandum, the state argued that double jeopardy did not preclude a resentencing because the defendant had not completed his sentence. Next, the state argued that the "defendant bargained for and received what he asked for—a [nine] year jail sentence and [twenty-five] years of special parole," and that a defendant's due process rights are not violated when the court corrects an illegal sentence, so long as the new sentence is not more severe than the original sentence. Finally, the state argued that the court retained jurisdiction to correct the defendant's sentence. The state requested that the court "restructure the sentences to reflect the original intent of Judge Damiani by resentencing the defendant to the same total effective sentence."

The parties again appeared before the court, *Devlin*, *J.*, on March 13, 2019. Following additional oral argument, the court determined that the defendant's sentence of one year of incarceration followed by twenty-five years of special parole was illegal and granted the defendant's motion to correct. The court noted that "this was part of a plea agreement in which [the defendant] agreed to a total sentence of nine years followed by twenty-five years of special parole. The manner in which the court sought to implement that agreed sentence was illegal, but there's nothing illegal about a plea bargain of nine years followed by twenty-five years of special parole."

The court vacated the defendant's sentence and, in an effort to achieve the same total effective sentence that Judge Damiani had imposed, resentenced him to the following: (1) for the charge of promoting a minor in an obscene performance, three years of imprisonment, followed by eleven years of special parole, (2) for the charge of risk of injury to a child, three years of imprisonment, followed by seven years of special parole, (3)

for the charge of risk of injury to a child, three years of imprisonment, followed by seven years of special parole, (4) for the charge of sexual assault in the second degree, one year of imprisonment, (5) for the charge of possession of child pornography, five years of imprisonment, and (6) for the charge of cruelty to persons, five years of imprisonment. The court ordered the sentences on the first three counts, which all involved special parole, to run consecutively to each other. It ordered the sentences on the last three counts to run concurrent with each other and concurrent with the effective sentence on the first three counts. The result was a total effective sentence of nine years of incarceration, followed by twenty-five years of special parole. This appeal followed.

I

The defendant first claims on appeal that the court's restructuring of his sentence violates the multiple punishment prohibition of the double jeopardy clause because, at the time of resentencing, he "had fully served his sentences for each count of his conviction with the exception of the illegally imposed special parole portion of his sentence for sexual assault in the second degree." The defendant maintains that, "[w]hile courts are free to restructure sentencing packages under an aggregate theory without offending the multiple punishment principles of double jeopardy, the exception is that the overall sentence must not be expired. In this case, the defendant had already served the entirety of the *legal* portion of his definite sentence." (Emphasis in original; footnote omitted.) Accordingly, the defendant maintains that "[e]liminating the unlawful period of special parole is the only appropriate remedy in this case . . . ." We disagree with the defendant.

We first set forth our standard of review and applicable legal principles. "[C]aims of double jeopardy involving multiple punishments present a question of law to

which we afford plenary review. . . . The fifth amendment to the United States constitution provides in relevant part: No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .[8] The double jeopardy clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment. . . .

"We have recognized that the [d]ouble [j]eopardy [c]lause consists of several protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. . . . It is the third protection that is implicated in this appeal.

"It is well established that resentencing a defendant does not trigger double jeopardy concerns when the original sentence was illegal or erroneous. . . . Jeopardy does not attach until the avenues for challenging the validity of a sentence have been exhausted, and, therefore, resentencing has repeatedly been held not to involve double jeopardy when the first sentence was, for some reason, erroneous or inconclusive. . . . Sentencing should not be a game in which a wrong move by the judge means immunity for the prisoner. . . .

"In the specific context of a remand for resentencing when a defendant successfully challenges one portion of a sentencing package, the United States Supreme Court has held that a trial court may resentence a defendant on his conviction of the other crimes without offending the double jeopardy clause of the United States constitution. . . . Indeed, the resentencing

[8] The defendant's double jeopardy claim also was brought pursuant to the protection afforded under our state constitution. "That protection is coextensive with that provided by the constitution of the United States." (Internal quotation marks omitted.) *State* v. *Adams*, 186 Conn. App. 84, 87 n.3, 198 A.3d 691 (2018).

court is free to restructure the defendant's entire sentencing package, even for those components assigned to convictions that have been fully served, as long as the overall term has not expired, without offending double jeopardy." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Tabone*, 292 Conn. 417, 439–41, 973 A.2d 74 (2009).

In *State* v. *Tabone*, supra, 292 Conn. 421, the defendant, pursuant to a plea agreement, pleaded guilty under the *Alford* doctrine to sexual assault in the second degree, sexual assault in the third degree, and risk of injury to a child. The defendant was sentenced to a total effective sentence of ten years of imprisonment followed by ten years of special parole. Id., 422. The defendant filed a motion to correct his sentence for sexual assault in the second degree, which sentence was ten years of imprisonment followed by ten years of special parole. Id. The court denied his motion. Id., 424. On appeal, our Supreme Court concluded that the defendant's sentence violated § 54-128 (c), in that it exceeded the maximum term of imprisonment authorized for sexual assault in the second degree. Id. The court remanded the matter for resentencing in accordance with *State* v. *Raucci*, 21 Conn. App. 557, 575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990), and *State* v. *Miranda*, 260 Conn. 93, 127–30, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002). *State* v. *Tabone*, supra, 292 Conn. 424.

On remand in *Tabone*, the trial court "first recognized that *State* v. *Raucci*, supra, 21 Conn. App. 557, and *State* v. *Miranda*, supra, 260 Conn. 93, were applicable to the defendant's sentence, and therefore, [our Supreme Court] had authorized it to impose a sentence closely approximating the defendant's original sentence, which had included a period of supervised release by way of special parole, provided that it did not exceed the parameters imposed by the original sentence. . . .

[T]he trial court imposed a total effective sentence of twenty years incarceration, execution suspended after ten years, with ten years of probation.[9] Specifically, the defendant was sentenced as follows: (1) for sexual assault in the second degree, ten years incarceration; (2) for sexual assault in the third degree, five years incarceration, execution suspended, with ten years of probation, to run consecutively to count one; (3) for risk of injury to a child, five years incarceration, execution suspended, with ten years of probation, to run consecutively to counts one and two." (Footnote added and footnote omitted.) *State* v. *Tabone*, supra, 292 Conn. 425–26.

On appeal after remand, the defendant claimed that his new sentence was illegal "because the ten year period of probation unconstitutionally enlarged his original sentence in violation of his due process rights under the federal and state constitutions." Id., 426. He argued that, "because the terms of incarceration following violations of probation and special parole are calculated differently, he could be exposed to a significantly longer period of incarceration from a probation violation than from a violation of special parole, thereby exceeding the confines of his original sentence." Id.

[9] The trial court on remand concluded that "it could not impose special parole because the minimum ten year special parole period had been determined to be illegal by [our Supreme Court]. The trial court discussed probation as an alternate form of supervised release but expressed the concern that a violation of probation could expose the defendant to incarceration for the full term of his suspended sentence, even on the last day of probation, thereby enlarging his sentence, whereas a violation of special parole would have exposed him to incarceration only for the remainder of the special parole period. To address this concern, State's Attorney John A. Connelly submitted a written agreement to the court under which he committed that, if the court were to sentence the defendant to a term of probation instead of special parole and the defendant thereafter violated his probation, the state would seek incarceration only for the remainder of the probationary period, rather than the full term of the suspended sentence." *State* v. *Tabone*, supra, 292 Conn. 425. The court relied on this agreement in resentencing the defendant. Id., 425–26.

Our Supreme Court in *State* v. *Tabone*, supra, 292 Conn. 427, first set forth legal principles applicable to a remand for resentencing in a case involving multiple convictions. It stated: "[T]he trial court is limited by the confines of the original sentence in accordance with the aggregate package theory set forth in *State* v. *Raucci*, supra, 21 Conn. App. 563, and later adopted by [our Supreme Court] in *State* v. *Miranda*, supra, 260 Conn. 129–30. In *Miranda*, this court recognized that the defendant, in appealing his conviction and punishment, has voluntarily called into play the validity of the entire sentencing package, and, thus, the proper remedy is to vacate it in its entirety. More significantly, the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent. . . . Accordingly, the [resentencing] court's power under these circumstances is limited by its original sentencing intent as expressed by the original total effective sentence . . . . It may, therefore, simply eliminate the sentence previously imposed for the vacated conviction, and leave the other sentences intact; or it may reconstruct the sentencing package so as to reach a total effective sentence that is less than the original sentence but more than that effected by the simple elimination of the sentence for the vacated conviction. The guiding principle is that the court may resentence the defendant to achieve a rational, coherent [sentence] in light of the remaining convictions, as long as the revised total effective sentence does not exceed the original." (Citations omitted; internal quotation marks omitted.) *State* v. *Tabone*, supra, 292 Conn. 427–28.

Applying these principles, our Supreme Court determined that the trial court's substitution of a period

of probation for the period of special parole originally imposed exceeded the defendant's original sentence[10] and, therefore, violated his due process rights. Id., 428–31. Accordingly, it remanded the case for resentencing in accordance with the aggregate package theory. Id., 431.

The court next turned to the defendant's claim that the resentencing on his convictions for sexual assault in the third degree and risk of injury to a child violated the guarantee against double jeopardy under the United States and Connecticut constitutions. Id., 438–39. Specifically, he argued that, because he had been sentenced to five years of incarceration, execution suspended, and five years of special parole on each of those counts, to be served concurrently, he had served those sentences prior to resentencing. Id., 439. As argued by the defendant, because his new sentence included components related to the conviction on those counts, his double jeopardy rights against multiple punishments were violated. Id.

[10] The court explained: "Pursuant to § 54-128 (c), when a defendant violates special parole, he is subject to incarceration only for a period equal to the unexpired portion of the period of special parole. Thus, for a violation that occurs on the final day of the defendant's special parole term, the defendant would be exposed to one day of incarceration. Special parole, therefore, exposes a defendant to a decreasing period of incarceration as the term of special parole is served. On the other hand, when a defendant violates his probation, the court may revoke his probation, and if revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. . . . Accordingly, if the defendant in the present case were to violate his probation on the final day of his ten year term, he would be exposed to the full suspended sentence of ten years incarceration. Thus, in contrast to a term of special parole, the defendant is exposed to incarceration for the full length of the suspended sentence, with no decrease in exposure as the probationary period is served, for the entirety of the probationary period. We conclude, therefore, that the substitution of probation for special parole effectively has enlarged the defendant's sentence by exposing him to incarceration for an additional ten year period in violation of his due process rights." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Tabone*, supra, 292 Conn. 429–30.

The court in *Tabone* rejected the defendant's argument, determining that "[t]he fact that certain component parts of the total sentence had 'expired' [was] irrelevant." Id., 442. It concluded that the "trial court was free to refashion the entire sentence for each of the crimes within the confines of the original package without violating double jeopardy, as long as the entire sentence had not been fully served." Id. The court further explained that, because "the defendant's sentences all had been vacated as a result of his successful challenges to them . . . [r]esentencing . . . did nothing more than place the defendant in the same position he originally had occupied when he entered his guilty plea." (Citation omitted; internal quotation marks omitted.) Id.

In the present case, the defendant recognizes that, pursuant to *State* v. *Tabone*, supra, 292 Conn. 441, a court may restructure a sentencing package, even where component parts of the sentence had expired, without violating double jeopardy principles. He contends, however, that the overall sentence in the present case has expired because all that remained was the "illegal" portion of his sentence. His argument rests on a bifurcation of the legal portion of his sentence from the illegal term of special parole. He has not, however, provided this court with any authority suggesting that we must view his total effective sentence in a bifurcated manner. Although in *State* v. *Tabone*, supra, 292 Conn. 442, the lawful portion of the defendant's sentence had not expired, we disagree that this factual distinction renders *Tabone*'s guidance inapplicable to the present case.[11]

[11] The defendant argues that, because he had fully served his nine year term of incarceration for promoting a minor in an obscene performance, the new sentence of three years of incarceration followed by eleven years of special parole constitutes a second punishment. Similarly, with respect to both of his nine year terms of incarceration for the two charges of risk of injury to a child, he contends that the new sentence of three years of incarceration followed by seven years of special parole constitutes a second penalty. Lastly, with respect to his one year term of incarceration for cruelty

The following additional considerations support our conclusion that the defendant's resentencing did not violate double jeopardy principles. First, the sentence that the court sought to approximate was a sentence to which the defendant had agreed. Second, as conceded by the defendant's counsel during oral argument before this court, the trial court at the time of the defendant's sentencing in 2003, lawfully could have imposed a total effective sentence of nine years of incarceration followed by twenty-five years of special parole. In other words, there was a possible sentencing structure by which the defendant lawfully could have received the sentence to which he agreed in 2003, and that the court ultimately imposed during his resentencing in 2019. Thus, in resentencing the defendant to the same total effective sentence to which he originally agreed, the court did nothing more than "place the defendant in the same position he originally had occupied when he entered his guilty plea." See id.

Furthermore, we consider whether the defendant acquired a legitimate expectation of finality in his sentence, a concept underlying double jeopardy concerns.

to persons, he contends that the new sentence of five years of incarceration is a second punishment. Having rejected the defendant's argument that his "overall sentence ha[s] expired," we likewise reject the defendant's argument that the new sentences on the completed component parts of his total sentence violate double jeopardy. See *State* v. *Tabone*, supra, 292 Conn. 442.

In his reply brief, the defendant raises for the first time an argument that "[t]he longer periods of incarceration the defendant served for promoting a minor and the two counts of risk of injury affected his Department of Correction [department] classification, and, as a policy matter, may have impacted the functional length of his sentence. [Department] classification can affect location of confinement, security level for confinement, access to treatment and programs, employment within [the department], and impact overall length of incarceration due to factors such as suitability for community release, discretionary parole, and ability to earn risk reduction earned credits."

It is a well established principle that "arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Myers*, 178 Conn. App. 102, 106, 174 A.3d 197 (2017). Accordingly, we decline to address this argument. See *State* v. *Jarmon*, 195 Conn. App. 262, 277, 224 A.3d 163, cert. denied, 334 Conn. 925, 223 A.3d 379 (2020).

See *United States* v. *Triestman*, 178 F.3d 624, 630 (2d Cir. 1999) ("[t]he [d]ouble [j]eopardy [c]lause generally prohibits courts from enhancing a defendant's sentence once the defendant has developed a legitimate expectation of finality in the original sentence" (internal quotation marks omitted)). The collective facts of the present case suggest that the defendant did not attain an expectation of finality in his sentence. At the time of his resentencing, he was still serving his original sentence—a sentence to which he had agreed. Additionally, the defendant's exercise of his right to file a motion to correct his sentence undermines any argument as to an expectation of finality in the sentence originally imposed. See *State* v. *LaFleur*, 156 Conn. App. 289, 310, 113 A.3d 472 (defendant's exercise of right to appeal undermined argument of expectation of finality in sentence originally imposed), cert. denied, 317 Conn. 906, 114 A.3d 1221 (2015). The defendant was successful in undermining a portion of his sentencing package, and the legal consequence of doing so resulted in a resentencing proceeding at which his sentence was restructured in accordance with the defendant's plea agreement and the 2003 court's sentencing intent as expressed by the original total effective sentence.

Accordingly, we conclude that because the defendant's overall sentence had not expired, the court was permitted to restructure the entire sentencing package and, thus, the resentencing in the present case did not violate the defendant's right against double jeopardy.

II

The defendant's second claim on appeal, which is closely related to his first claim, is that the trial court had the jurisdiction "to correct the [defendant's] illegal sentence" but that it "lacked jurisdiction to restructure and impose a new sentence because the lawful portion of the defendant's sentence had been fully served." Specifically, he argues that "[t]here is nothing remaining

of the lawfully imposed sentence to restructure, and, therefore, there is no basis for the court to retain jurisdiction." He argues that the "only remedy available to the court due to jurisdictional issues is to vacate the defendant's twenty-five year period of special parole while leaving the remainder of the original sentence intact." The state responds that, "in light of the fact that his overall agreed upon sentence, including the period of special parole, had not expired, the defendant himself invoked the jurisdiction of the trial court by filing a motion to correct an illegal sentence. Once the trial court granted that motion, because the defendant's entire sentence had not expired, it retained jurisdiction to resentence the defendant, on every offense to which he had pleaded guilty . . . ." (Emphasis omitted.) We agree with the state.

We first set forth our standard of review and applicable legal principles. "The issue of whether a defendant's claim may be brought by way of a motion to correct an illegal sentence, pursuant to Practice Book § 43-22, involves a determination of the trial court's subject matter jurisdiction and, as such, presents a question of law over which our review is plenary. . . .

"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. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it

expressly has been authorized to act." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Vivo*, 197 Conn. App. 363, 368–69, 231 A.3d 1255 (2020).

"Although the [trial] court loses jurisdiction over [a] case when [a] defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving [his] sentence . . . [Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . .

"Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . [I]f a defendant's claim falls within one of these four categories the trial court has jurisdiction to modify a sentence after it has commenced. . . . If the claim is not within one of these categories, then the court must dismiss the claim for a lack of jurisdiction and not consider its merits." (Citations omitted; internal quotation marks omitted.) *State* v. *St. Louis*, 146 Conn. App. 461, 466–67, 76 A.3d 753, cert. denied, 310 Conn. 961, 82 A.3d 628 (2013).

The defendant relies on two cases in support of his claim that the court lacked jurisdiction to restructure and impose a new sentence.[12] In *State* v. *Reid*, 277 Conn. 764, 771, 894 A.2d 963 (2006), the defendant filed a motion to withdraw his guilty plea, alleging, inter alia, violations of his right to due process. Noting that at the time he filed the motion to withdraw his plea, the defendant had not only begun serving his sentence but had completed it and been released, our Supreme Court concluded that the trial court lacked jurisdiction to hear and adjudicate the defendant's motion to withdraw his guilty plea. Id., 775–76. Similarly, *State* v. *DeVivo*, 106 Conn. App. 641, 643–44, 942 A.2d 1066 (2008), involved a defendant's motion to vacate his guilty plea, which was filed following the completion of his sentence and probation. This court concluded that the trial court properly determined that it lacked jurisdiction to consider the merits of the defendant's motion. Id., 648.

Reid and *DeVivo* are distinguishable from the present case, in that both involved motions to withdraw guilty pleas. Pursuant to Practice Book § 39-26, "[a] defendant

[12] The defendant briefly suggests that "[c]ourts similarly lack jurisdiction in the context of a habeas [action] once a sentence has been fully served." The state responds that, "[n]ot only does the defendant overlook that our state habeas corpus jurisprudence addresses a distinct avenue of collateral attack on convictions, but he fails to provide a supportive analysis as to the applicability of habeas case law to his claim on appeal from the ruling on a motion to correct an illegal sentence."

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [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. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). The defendant wholly fails to analyze the relationship between the jurisdiction of a habeas court and the facts of the present case. Accordingly, we decline to review this issue.

may not withdraw his or her guilty plea after the conclusion of the proceeding at which the sentence was imposed." Thus, our Supreme Court concluded in *Reid* that, "in the absence of a legislative or constitutional grant of continuing jurisdiction, the trial court lost jurisdiction . . . when the defendant was taken in execution of his sentence and transferred to the custody of the [C]ommissioner of [C]orrection." *State* v. *Reid*, supra, 277 Conn. 774. Accordingly, for purposes of determining whether the trial court had jurisdiction over the motion to withdraw his plea, the determinative time frame was when the defendant was taken in execution of his sentence. See id., 775. As noted previously, Practice Book § 43-22 "embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition." (Internal quotation marks omitted.) *State* v. *St. Louis*, supra, 146 Conn. App. 466. Accordingly, the defendant's reliance on *Reid* and *DeVivo*, neither of which involves a motion to correct an illegal sentence pursuant to Practice Book § 43-22, is misplaced.

The defendant's jurisdictional claim, like his double jeopardy claim, is premised on his attempt to partition his sentence between the legal and illegal portions. In support of this claim, he again argues that, because the lawful portion of his sentence "has been fully served," the court lacked jurisdiction to restructure and impose a new sentence. In part I of this opinion, we rejected the defendant's bifurcated view of his sentence and observed that the original total effective sentence had not expired at the time he was resentenced. Accordingly, we conclude that, once the defendant invoked the jurisdiction of the court by filing a motion to correct his sentence, the trial court had jurisdiction to resentence the defendant.

III

The defendant's third claim on appeal is that the newly imposed sentence violated his due process rights

under the federal and state constitutions when, "after the expiration of the lawful portion of his sentence, the court impose[d] a sentence calling for a more severe penalty on several counts." We disagree.

"[W]hen a case involving multiple convictions is remanded for resentencing, the trial court is limited by the confines of the original sentence in accordance with the aggregate package theory . . . . The guiding principle is that the court may resentence the defendant to achieve a rational, coherent [sentence] in light of the remaining convictions, as long as the revised total effective sentence does not exceed the original." (Citations omitted; internal quotation marks omitted.) *State* v. *Tabone*, supra, 292 Conn. 427–28; see also *State* v. *Crenshaw*, 172 Conn. App. 526, 530, 161 A.3d 638 ("[u]nder the aggregate package theory, when a multicount conviction is remanded after one or more of the convictions has been vacated on appeal, the trial court may increase individual sentences on the surviving counts as long as the original total effective sentence is not exceeded"), cert. denied, 326 Conn. 911, 165 A.3d 1252 (2017). "On appeal, [t]he determination of whether the defendant's new sentence exceeds his original sentence is a question of law over which . . . review is plenary." (Internal quotation marks omitted.) *State* v. *Wade*, 297 Conn. 262, 269, 998 A.2d 1114 (2010); see also *State* v. *Tabone*, supra, 292 Conn. 428.

The defendant argues the following in support of his claim that his new sentence is more severe: "In resentencing the defendant to a period of three years of incarceration, followed by eleven years of special parole for promoting a minor in an obscene performance, the court effectively increased that sentence from nine years to fourteen years. Likewise, in resentencing the defendant on each count of risk of injury to a minor from nine years of incarceration to three

years of incarceration, followed by seven years of special parole, the court effectively increased the defendant's sentences from nine years each to ten years each. Finally, the defendant's sentence for cruelty to persons was increased from one year to five years of incarceration."

The primary authority relied on by the defendant in support of his due process claim, *State* v. *Pecor*, 179 Conn. App. 864, 877–78, 181 A.3d 584 (2018), does not advance his argument. In *Pecor*, the defendant pleaded guilty under the *Alford* doctrine to robbery in the second degree and was sentenced to two years of incarceration followed by eight years of special parole. Id., 867. The defendant filed a motion to correct an illegal sentence, and the court resentenced him on that single conviction to 2 years and 1 day of incarceration followed by 7 years and 364 days of special parole. Id., 868. No appeal was taken from the court's judgment. Approximately sixteen months following his resentencing, the defendant filed a second motion to correct an illegal sentence. Id., 869. The court determined that the second motion was an attempt to collaterally attack the prior judgment in which it had resentenced the defendant. Id., 870. The court dismissed the motion on the basis that it lacked subject matter jurisdiction. Id.

On appeal, this court in *Pecor* determined that the trial court improperly concluded that it lacked jurisdiction over the motion to correct. Id., 872–73. The defendant requested that this court address the merits of his motion to correct an illegal sentence and remand the case with direction to resentence him to the original sentence of two years of incarceration, which he had already served, and eliminate the special parole portion of the sentence. Id., 876. This court concluded that there existed an insufficient factual record to determine whether the defendant's due process rights were vio-

lated, and it remanded the matter for a hearing on the merits of the defendant's motion to correct an illegal sentence. Id., 878. This court in *Pecor* did not reach the merits of the defendant's claim that the court, in resentencing him, had violated his constitutional right against double jeopardy by sentencing him to an additional day of incarceration after he had completed his definite sentence of two years of incarceration. It did note, however, that it had "serious concerns about a purportedly corrective sentence that increased the defendant's period of incarceration, even if only by one day." Id.

The facts of *Pecor* are distinguishable from the present case, in that the defendant in *Pecor* presented a claim that he had been resentenced to an *additional* day of incarceration following his release from custody. The relevant guidance from *Pecor* is this court's recognition of the principle that "a defendant's due process rights are not violated when the court corrects an illegal sentence, so long as the new sentence is not more severe than the original sentence." Id., 877–78. In the related context of claims of vindictiveness following resentencing, "[f]or purposes of evaluating whether a second sentence is more severe than an original sentence, [*North Carolina* v. *Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)] and its progeny consistently equate a more severe sentence with either a longer term of imprisonment or a longer combined sentence." (Internal quotation marks omitted.) *State* v. *LaFleur*, supra, 156 Conn. App. 307.

The defendant in the present case was not subjected to a longer term of imprisonment or a longer combined sentence. Rather, he was resentenced to the same total effective sentence. Accordingly, we conclude that the defendant's resentencing did not violate his due process rights.

IV

Finally, we address the parties' agreement that the court's imposition of an eleven year period of special parole on the charge of promoting a minor in an obscene performance exceeds the ten year special parole limitation set forth in § 54-125e (c). Although this specific illegality was not identified in the defendant's principal brief on appeal, the state brought the issue to this court's attention in its brief. In the defendant's reply brief, he argues that "this court does have the authority to correct the second illegality based on the defendant's eleven year period of special parole for promoting a minor [in an obscene performance], which can only carry a ten year period of special parole." The issue was further discussed at oral argument before this court.

This court has previously stated that "[b]oth the trial court, and this court, on appeal, have the power, at any time, to correct a sentence that is illegal. . . . [T]he issue is one of law, and we afford it plenary review." (Internal quotation marks omitted.) *State* v. *Pecor*, supra, 179 Conn. App. 871. Section 54-125e (c) provides in relevant part that "[t]he period of special parole shall be not less than one year or more than ten years . . . ."[13] Although § 54-125e (c) contains several exceptions to the ten year special parole maximum, the state concedes that none is applicable to the present case and, therefore, that the court's imposition of an eleven year period of special parole is illegal. We agree with the parties that the defendant's sentence violates § 54-125e (c) because the length of the term of special parole imposed on the charge of promoting a minor in an obscene performance exceeds the maximum term authorized

[13] Although § 54-125e (c) was the subject of amendments in 2005, 2015, and 2019; see Public Acts 2005, No. 05-288, § 188; Public Acts 2015, No. 15-2, § 20; Public Acts 2019, No. 19-189, § 34; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

under § 54-125e (c). See *State* v. *Brown*, 310 Conn. 693, 710, 80 A.3d 878 (2013) (concluding that, in enacting § 54-125e (c), legislature "clearly intended to provide the trial court with the authority to impose a sentence of up to ten years of special parole for each offense for which a defendant is convicted"). For that reason, the sentence imposed by the court as to that offense is illegal. See *State* v. *Tabone*, supra, 292 Conn. 426–27 (illegal sentence is one that exceeds relevant statutory maximum limits). Accordingly, we reverse the judgment of the trial court. We remand the case for resentencing in accordance with the aggregate package theory under *State* v. *Raucci*, supra, 21 Conn. App. 557, and *State* v. *Miranda*, supra, 260 Conn. 93. See *State* v. *Tabone*, supra, 292 Conn. 431.

The judgment is reversed and the case is remanded for resentencing according to law.

In this opinion the other judges concurred.