JUDITH KISSEL *v.* CENTER FOR WOMEN'S HEALTH, P.C., ET AL.

(AC 42469)
(AC 42493)
(AC 42505)

Moll, Alexander and Norcott, Js.

Syllabus

The plaintiff sought to recover damages from the defendant acupuncturist, W, and his employer, C Co., for injuries she suffered when a heat lamp used during an acupuncture treatment burned her left foot and toes due to W's alleged medical malpractice. The plaintiff attached to her complaint a good faith certificate from her attorney but did not attach a written and signed opinion letter from a similar health care provider. C Co. filed a motion to dismiss the action on the ground that the plaintiff failed to attach a written opinion letter from a similar health care provider as required by statute (§ 52-190a). Thereafter, W joined C Co.'s motion to dismiss. Subsequently, the plaintiff filed a request to amend her complaint to attach an opinion letter that she indicated had existed at the time the complaint was originally filed but inadvertently was not attached. The plaintiff also objected to the motions to dismiss and claimed that the trial court had discretion to allow the amendment and to deny the motions to dismiss because the opinion letter existed at the time the action was commenced and was only inadvertently not attached to the original complaint. The trial court denied the motions to dismiss and overruled the objections to the plaintiff's request to amend. Thereafter, the court granted W's motion to implead H Co., the distributor of the heat lamp, as a third-party defendant. Subsequently, the plaintiff filed an amended complaint to allege a product liability claim against H Co. Following a trial, the jury returned a verdict in favor of the plaintiff on the medical malpractice and product liability counts. Thereafter, the court granted W's and C Co.'s motions for permission to file a second motion for reconsideration of the denial of their motions to dismiss but denied the requested relief, denied H Co.'s motions for a directed verdict and to set aside the verdict, and rendered judgment in accordance with the verdict. On separate appeals brought to this court by W, C Co., and H Co., *held*:

1. The trial court improperly denied the motions to dismiss filed by W and C Co., the plaintiff having failed to attach a written opinion letter to her complaint as required by § 52-190a and having failed to cure that defect before the statute of limitations expired: this court's decision in *Peters* v. *United Community & Family Services, Inc.* (182 Conn. App. 688), made clear that a plaintiff's efforts to cure a defective opinion letter must be initiated prior to the expiration of the statute of limitations, and the plaintiff did not seek to remedy her failure to attach the written opinion letter to her original complaint before the two year statute of limitations had expired, and, contrary to the plaintiff's argument, W and C Co. did not waive argument on the statute of limitations because they did not raise it in their 2012 motions to dismiss, as that argument was raised in their motions to reargue based on new, controlling case law; moreover, a jury verdict in a medical malpractice action does not insulate a defect in the required opinion letter from appellate review; furthermore, because the plaintiff had knowledge on the date of the incident of the nature and extent of her injuries, she could not rely on the three year statute (§ 52-584) of repose, and, thus, pursuant to § 52-584, the action was subject to a two year statute of limitations.
2. The trial court properly denied H Co.'s motions for a directed verdict and to set aside the verdict; the plaintiff presented alternative bases of causation for her injuries, and, because there was a lack of jury interrogatories to specify which basis of causation the jury used to reach its verdict, H Co. was required to establish that the evidence was insufficient to support any of the specifications of causation pursued by the plaintiff, however, H Co. argued on appeal only that the plaintiff failed to establish how or why the heat lamp came into contact with her foot and its failure to challenge the alternative bases of causation was fatal to its appeal.

Argued October 5, 2020—officially released June 29, 2021

Procedural History

Action to recover damages for medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, denied the defendants' motions to dismiss; thereafter, the court, *Mottolese, J.*, granted the motion of the defendant Reed Wang to implead Health Body World Supply, Inc., as a third-party defendant; subsequently, the plaintiff filed an amended complaint; thereafter, the matter was tried to the jury before *Hon. Kenneth B. Povodator*, judge trial referee; verdict for the plaintiff; subsequently, the

court, *Hon. Kenneth B. Povodator*, judge trial referee, denied the defendants' postverdict motions and rendered judgment in accordance with the verdict, from which the defendants filed separate appeals to this court; thereafter, this court consolidated the appeals. *Affirmed in part; reversed in part; judgment directed.*

Wesley W. Horton, with whom were *Kenneth J. Bartschi* and, on the brief, *Mary Alice Moore Leonhardt*, for the appellant in Docket No. AC 42469 (defendant Reed Wang).

David J. Robertson, with whom was *Keith M. Blumenstock*, for the appellant in Docket No. AC 42493 (named defendant).

Laura Pascale Zaino, with whom were *Paul D. Meade* and, on the brief, *Logan A. Carducci*, for the appellant in Docket No. AC 42505 (defendant Health Body World Supply, Inc.).

William M. Bloss, with whom, on the brief, were *Alinor C. Sterling*, *Matthew S. Blumenthal*, *Sarah Steinfeld*, and *Sean K. McElligott*, for the appellee (plaintiff).

Opinion

ALEXANDER, J. This trilogy of appeals originated when the plaintiff, Judith Kissel, sustained serious burns to her left foot during the course of an acupuncture treatment. The plaintiff commenced a medical malpractice action against the treating acupuncturist, Reed Wang, and his place of employment, the Center for Women's Health, P.C. (Center). The plaintiff subsequently filed a third-party complaint alleging a product liability claim against Health Body World Supply, Inc., also known as WABBO, the distributor of a device commonly referred to as the Miracle Lamp (heat lamp), which injured her. After a trial on both the medical malpractice and product liability claims, the jury returned a verdict for the plaintiff on all counts, awarding her a total of $1 million

in damages. Following the resolution of various post-verdict motions, the court rendered judgment in accordance with the jury's verdict.

Wang, the Center, and WABBO each filed a separate appeal, docketed as AC 42469, AC 42493, and AC 42505, respectively. In AC 42469 and AC 42493, Wang and the Center claim that (1) the trial court improperly denied their motions to dismiss the medical malpractice action for failing to comply with General Statutes § 52-190a because the plaintiff failed to attach to her initial complaint an opinion letter from a similar health care provider and her efforts to cure this defect occurred outside of the limitation period, (2) the court improperly denied the request for an evidentiary hearing with respect to the jurisdictional facts related to the opinion letter, (3) the plaintiff failed to present sufficient evidence with respect to causation, and (4) the court improperly instructed the jury regarding expert testimony and causation. In AC 42505, WABBO claims that the court improperly denied its motions for a directed verdict and to set aside the verdict because the plaintiff failed to present sufficient evidence as to the element of causation. The plaintiff maintains that the judgment of the trial court should be affirmed.

In AC 42469 and AC 42493, we agree with Wang and the Center that the court improperly denied their motions to dismiss the plaintiff's medical malpractice complaint as a result of her failure to attach the requisite opinion letter to the complaint and to cure this defect by the expiration of the statute of limitations.[1] In AC 42505, we conclude that the plaintiff presented sufficient evidence with respect to her product liability complaint. The court, therefore, properly denied WABBO's motions for a directed verdict and to set aside the verdict. Accordingly, we reverse the judgment with respect to Wang and the Center on the medical malpractice claims, and

[1] As a result of this conclusion, we need not reach the other claims raised by Wang and the Center in AC 42469 and AC 42493.

affirm the judgment with respect to the product liability claims.

The following recitation, as set forth by the court in its postverdict memorandum of decision,[2] summarizes the facts and procedural history and serves as a starting point to address the claims raised in these appeals. The plaintiff, a patient at the Center, went to Wang for her first acupuncture treatment on April 22, 2010. At this visit, Wang inserted needles in the plaintiff's body and placed the heat lamp[3] near her foot as part of the treatment. The surface temperature of this device, which was distributed by WABBO,[4] exceeded 500 degrees. As part of his standard practice, Wang left the plaintiff alone in the treatment room, but remained close by. "When . . . Wang returned to the room several minutes later, the head of the heat lamp was resting against the plaintiff's foot, having caused serious injuries to her foot. He removed the lamp from her foot, and he (and the principal of the Center) transported the plaintiff to a hospital for treatment."[5]

[2] The court, *Hon. Kenneth B. Povodator*, judge trial referee, issued a fifty-two page memorandum of decision on January 3, 2019, addressing various motions, including motions for permission to file a late motion to reargue and motions for reconsideration of the 2012 motions to dismiss, motions for directed verdict, motions to set aside the verdict, a motion for remittitur and a motion for judgment notwithstanding the verdict.

[3] Pursuant to a user brochure introduced into evidence, the heat lamp promoted metabolism, regulated physiological deficiencies, diminished inflammation and eased pain, tissue injuries, arthritis, and various skin conditions. This device contained a round plate coated with thirty-three elements and was activated by a built-in heating element. The mineral plate then emitted "a special band of electromagnetic waves" that were absorbed by the patient's body.

[4] "The action was commenced in April, 2012. In December of that year . . . Wang sought to implead [WABBO] the distributor of the heat lamp that caused the injury to the plaintiff . . . . After the motion was granted, and a third-party complaint served on [WABBO], the plaintiff amended her complaint so as to assert a direct claim against . . . [WABBO]. Early in the trial . . . Wang withdrew his complaint directed to . . . WABBO." See part II of this opinion.

[5] The heat lamp brochure introduced into evidence cautioned that the head of the heat lamp should not be touched during operation. It further instructed that the head of the lamp should be positioned eight to twelve inches away from the patient.

A significant issue at trial was the exact manner in which the head of the heat lamp, which housed the heating element, came into contact with the plaintiff's left foot. No one observed whether the head of the heat lamp had descended or whether the entire lamp assembly had tipped over.[6] The parties presented extensive evidence regarding the propensity of the head of the lamp to lower on its own or whether such movement was the result of some external force.

"The jury awarded the plaintiff $1 million as to each of the claim/theories of liability presented. With respect to the medical malpractice claim, the jury determined that the plaintiff was not comparatively negligent. With respect to the product liability claim, the jury determined that the plaintiff was not comparatively responsible for her injuries, but pursuant to General Statutes § 52-572o, the jury determined that . . . Wang, as a party to this action, had been 20 [percent] responsible. The plaintiff had not made any claim for economic damages, so the full award was for noneconomic damages." With this factual overview in mind, we now proceed to the specific claims raised in each of these appeals.

I

AC 42469 and AC 42493

In AC 42469 and AC 42493, Wang and the Center claim, inter alia, that the court improperly denied their motions to dismiss the plaintiff's medical malpractice complaint.[7] Specifically, Wang and the Center contend

[6] The plaintiff was unaware of how the head of the heat lamp ended up on her foot. When Wang returned to the treatment room, "he did not notice or observe whether the lamp assembly had tipped over or whether the arm supporting the lamp head had descended."

[7] "[P]rofessional negligence or malpractice . . . [is] defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. . . . Furthermore, malpractice presupposes some improper conduct in the treatment or operative skill [or] . . . the failure to exercise requisite medical skill." (Emphasis

that the court lacked personal jurisdiction on the basis of the plaintiff's failure (1) to attach an opinion letter from a similar health care provider to her medical malpractice complaint and (2) to cure that defect within the applicable two year statutory limitation period. The plaintiff counters that the court properly denied the motions to dismiss the medical malpractice complaint. She argues that Wang and the Center waived their statute of limitations defense and that the purpose of the statute was satisfied, as evidenced by the jury's verdict in the present case. The plaintiff contends that the three year statute of repose contained in General Statutes § 52-584 applied and, therefore, the amendment to the complaint containing the opinion letter was timely and cured the defect. We agree with Wang and the Center that the medical malpractice complaint should have been dismissed pursuant to § 52-190a (c) and that the plaintiff's efforts to cure the defect were not timely.

A detailed recitation of the facts and procedural history is necessary for the resolution of this claim.[8] The

omitted; internal quotation marks omitted.) *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 576, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009).

[8] "A motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. . . . In a medical malpractice action, despite the allegations in the plaintiff's complaint, it is proper to consider undisputed facts contained in affidavits when deciding a motion to dismiss if the affidavits provide independent evidence of the nature of a defendant's medical practice. . . . Where . . . the motion [to dismiss] is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue and need not conclusively presume the validity of the allegations of the complaint. . . . Generally, [i]f affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails toundermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . . As a general matter, the burden

plaintiff's complaint was served on the Center on April 4, 2012, and on Wang on April 6, 2012. In her two count complaint, dated March 30, 2012, the plaintiff alleged that Wang, as "a servant, agent, apparent agent and/or employee of [the Center]" held himself out as a licensed acupuncturist in Connecticut.[9] She further alleged that she sustained injuries as a result of Wang's failure to exercise the degree and care of a licensed acupuncturist in the following ways: (1) failing to protect her from contact with the heat lamp during the acupuncture treatment; (2) failing to place the heat lamp at a safe

is placed on the defendant to disprove personal jurisdiction." (Citations omitted; internal quotation marks omitted.) *Carpenter* v. *Daar*, 199 Conn. App. 367, 381–82, 236 A.3d 239, cert. granted, 335 Conn. 962, 239 A.3d 1215 (2020).

In the event, however, that the motion to dismiss raises a factual question that is not determinable from the record, the plaintiff bears the burden of proof to present evidence to establish jurisdiction, and due process may require an evidentiary hearing. *LaPierre* v. *Mandell & Blau, M.D.'s, P.C.*, 202 Conn. App. 44, 49 n.3, 243 A.3d 816 (2020).

[9] General Statutes § 20-206aa (3) provides: " 'The practice of acupuncture' means the system of restoring and maintaining health by the classical and modern Oriental medicine principles and methods of assessment, treatment and prevention of diseases, disorders and dysfunctions of the body, injury, pain and other conditions. 'The practice of acupuncture' includes:

(A) Assessment of body function, development of a comprehensive treatment plan and evaluation of treatment outcomes according to acupuncture and Oriental medicine theory;

(B) Modulation and restoration of normal function in and between the body's energetic and organ systems and biochemical, metabolic and circulation functions using stimulation of selected points by inserting needles, including, trigger point, subcutaneous and dry needling, and other methods consistent with accepted standards within the acupuncture and Oriental medicine profession;

(C) Promotion and maintenance of normal function in the body's energetic and organ systems and biochemical, metabolic and circulation functions by recommendation of Oriental dietary principles, including, use of herbal and other supplements, exercise and other self-treatment techniques according to Oriental medicine theory; and

(D) Other practices that are consistent with the recognized standards of the acupuncture and Oriental medicine profession and accepted by the National Certification Commission for Acupuncture and Oriental Medicine."

See generally General Statutes § 20-206bb (setting forth licensing requirement for persons engaging in practice of acupuncture in Connecticut).

distance during the treatment; (3) leaving her unattended during the acupuncture treatment and failing to respond promptly to the her cries for help while she was being burned; (4) failing to use a safe heating system during the acupuncture treatment; and (5) not caring for, treating, monitoring, diagnosing, and supervising her adequately and properly during the acupuncture treatment. As a result of this professional negligence, the plaintiff alleged a variety of injuries.[10]

The plaintiff's counsel attached a certification to the complaint indicating that he had made a reasonable inquiry that led to a good faith belief that grounds existed for this medical malpractice action against Wang and the Center. See footnote 15 of this opinion. The plaintiff did not, however, include a written and signed opinion letter from a similar health care provider[11] to show the existence of a good faith belief for this action as required by § 52-190a (a).[12]

[10] The plaintiff alleged that she suffered third degree burns to her left foot and toes, a broken toe, an infection of a bone in her toe, permanent deformity and scarring of her left toes, foot and leg, permanent pain in her left foot, loss of sensation and numbness in her left toes and foot, and physiological, psychological, and neurological sequelae and required a five day admission to the burn unit of a New York hospital, multiple skin graft surgeries, and multiple debriding procedures.

[11] General Statutes § 52-184c (b) provides: "If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similar health care provider' is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim."

[12] General Statutes § 52-190a (a) provides: "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for

On May 24, 2012, the Center filed a timely motion to dismiss the plaintiff's complaint for lack of personal jurisdiction.[13] It claimed that the plaintiff failed to attach a written opinion letter from a similar health care pro-

a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. *To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion.* Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. The similar health care provider who provides such written opinion shall not, without a showing of malice, be personally liable for any damages to the defendant health care provider by reason of having provided such written opinion. In addition to such written opinion, the court may consider other factors with regard to the existence of good faith. If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney or the apportionment complainant's attorney submitted the certificate." (Emphasis added.)

[13] Practice Book § 10-30 provides in relevant part: "(a) A motion to dismiss shall be used to assert . . . (2) lack of jurisdiction over the person . . . .

"(b) Any defendant, wishing to contest the court's jurisdiction, shall do so by filing a motion to dismiss within thirty days of the filing of an appearance. . . ." The plaintiff does not dispute that the motion to dismiss filed by the Center and joined by Wang was timely.

vider to the complaint as required by § 52-190a (a). It argued that the plaintiff's action sounded in medical malpractice and that her failure to comply with subsection (a) of § 52-190a required dismissal pursuant to subsection (c) of that statute.[14] On June 8, 2012, Wang joined the Center's motion to dismiss.

On June 28, 2012, the plaintiff requested leave to file a first amended complaint. In this request, the plaintiff indicated that "the similar health care provider opinion existed at the time the complaint was originally filed but was inadvertently not attached to the original complaint." The plaintiff attached exhibit A to the request to file an amended complaint. Exhibit A included a copy of a proposed first amended complaint, the original certificate from the plaintiff's counsel, and an unsigned and undated opinion letter.[15] An affidavit from the plaintiff's

[14] In its memorandum of law in support of the motion to dismiss, the Center argued: "The civil summons signed by [the] plaintiff's counsel contains the case code of T 28 which is the code for Medical Malpractice. Appended to the complaint is a document entitled 'Certificate,' which is signed by the plaintiff's attorney and which states in part, 'I . . . hereby certify that I have made reasonable inquiry, as permitted by the circumstances, to determine whether there are grounds for a good faith belief that there has been negligence in the case and treatment of the plaintiff . . . . This inquiry has given rise to a good faith belief on my part that grounds exist for an action against the defendants . . . .' " (Footnote omitted.)

[15] The opinion letter attached to the first amended complaint provided:

"OPINION

PURSUANT TO C.G.S., SECTION 52-190a

"Dear Mr. Lichtenstein:

"Thank you for asking me to review the case of Judith Kissel. As you know, I am a licensed acupuncturist. In my role as a licensed acupuncturist, I am familiar with the standard of care as it relates to the practice of acupuncture in the United States. At your request, I have read and reviewed the following medical records of Judith Kissel:

•Records from the Center for Women's Health

•Records from the Stamford Hospital

"Based upon my review of the medical records, it is my opinion that there was negligence in the care and treatment of Judith Kissel by Reed Wang, L.Ac on April 22, 2010 at the Center for Women's Health. The standard of care dictates that patients receiving acupuncture must be positioned a safe distance from any piece of equipment that has the potential to injure the

attorney was attached as exhibit B. In this affidavit, the plaintiff's counsel averred that he represented the plaintiff in this medical malpractice action, had consulted with an expert, a licensed acupuncturist, beginning on November 16, 2011, and provided this expert with the plaintiff's medical records. He further represented that the expert signed the opinion letter on February 19, 2012, and had transmitted it to his representative that same day. The plaintiff's counsel indicated that he inadvertently failed to attach this letter to the complaint on March 30, 2012.

Additionally, the plaintiff also filed a consolidated opposition to the motions to dismiss filed by Wang and the Center on June 28, 2012.[16] Citing to this court's

patient. In addition, the patient needs to be appropriately monitored to ensure that the patient remains safe throughout the acupuncture procedure. In this case, Ms. Kissel's left foot was burned on a heat lamp while she was receiving acupuncture from Reed Wang, L.Ac. Mr. Wang was negligent in his placement and/or monitoring of Ms. Kissel during the acupuncture procedure. Mr. Wang's departure from the standard of care was a substantial factor in causing the thermal burn to Ms. Kissel's left foot.

"My opinion that there was negligence on the part of Mr. Wang is based upon my review of the medical records as well as my education, training, and experience. The opinion stated herein is based upon the information available to me at this time. Should other information and evidence become available, I reserve the right to supplement and/or amend this opinion." (Emphasis omitted.)

[16] The plaintiff attached a copy of a letter requesting the licensed acupuncturist to review the facts of this case. This letter provided in relevant part: "Thank you for agreeing to review this case. It involves a 52 y/o who scheduled her first acupuncture session with Dr. Reed Wang who provides his service at the OB/GYN office of Center for Women's Health in Stamford. During this session on April 22, 2010, a heat lamp was set up and Dr. Wang exited the room. At some point, this heat lamp fell onto Ms. Kissel's left foot. Dr. Wang and obstetrician, Dr. Joel Evans, took Ms. Kissel to Stamford ED where she was diagnosed with 3rd degree and 2nd degree burns to the left great toe as well as the dorsum aspect of the foot and the left second toe. She has had multiple surgeries and skin grafts as a result.

"The medical records are skimpy because Dr. Wang did not write a note in her chart pertaining to this incident. Only Dr. Evans made a notation after the fact. We are looking to you for comment on this incident and Dr. Wang's care and treatment as an acupuncturist.

decision in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 585, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009), the plaintiff argued that "where the opinion letter exists at the time of the commencement of the action, but is inadvertently not attached to the complaint, a trial court has discretion to allow the amendment and deny a motion to dismiss." She further claimed that the dismissal of her complaint "would elevate form over substance" and would violate Connecticut's public policy of allowing a trial on the merits. The plaintiff emphasized that "the important dividing line is whether the opinion letter existed at the time the lawsuit was commenced or whether it was created after commencement. . . . Accordingly, the rule in *Votre*, which provides a safe harbor when the opinion letter exists prior to commencement of the lawsuit, comports with the purpose of § 52-190a and common sense." The Center filed a reply to the plaintiff's opposition to its motion to dismiss.[17]

On July 9, 2012, the Center objected to the plaintiff's request for leave to amend her complaint. It argued that the court lacked discretion to permit an amendment to the complaint in order for the plaintiff to attach an opinion letter from a similar health care provider. The Center also argued that a hearing was required to resolve its challenge to certain facts contained in the affidavit of the plaintiff's counsel.

On July 16, 2012, the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, heard oral argument on the

"When you have completed your review, please call Attorney Joel Lichtenstein at your earliest convenience to discuss."

[17] The Center disputed, inter alia, that the opinion letter had existed prior to the commencement of the medical malpractice action and that the author of the opinion letter had been sent the plaintiff's medical records. The Center argued additionally that an evidentiary hearing was required to resolve the disputed facts set forth in the affidavit from the plaintiff's counsel and that the plaintiff could not amend her complaint to include the opinion letter.

motions to dismiss. Counsel for the Center argued that the failure to include the opinion letter of a similar health care provider constituted insufficient process and that the plaintiff should not be permitted to amend her complaint. The plaintiff's counsel emphasized that because the opinion letter existed at the time the medical malpractice case had been commenced, the court had discretion to grant the plaintiff's request to amend the complaint so as to include the opinion letter.

On September 6, 2012, the court issued a memorandum of decision denying the motions to dismiss. After summarizing the arguments of the parties and setting forth the relevant law, the court framed the issue as follows: "Although the law is explicit that a written opinion letter complying with § 52-190a (a) must be attached to the complaint in a medical malpractice case in order to subject the defendant to the jurisdiction of the court and to avoid dismissal of the action, the law is less clear as to the legal consequences when a plaintiff obtained a statutorily valid written opinion letter prior to commencing the action but failed to attach it to her original complaint and subsequently seeks to amend her complaint to attach that written opinion letter."

After quoting from our decision in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585,[18] the trial court noted that the discretionary power to permit an amendment to a complaint to include the § 52-190a letter applied only when such a

[18] Specifically, the court quoted the following language from our decision: "Given the fallibility existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of § 52-190a, to prevent groundless lawsuits against health care providers." (Footnote omitted.) *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585.

letter existed prior to the commencement of the action. The court noted the split of authority among decisions of the Superior Court as to whether the referenced passage from *Votre* constituted dicta and concluded that it had the discretion to allow the plaintiff to amend her complaint. "Without taking a position on the viability of the language at issue in *Votre*, this court holds, in the absence of any appellate authority to the contrary, that to the extent that the written opinion letter existed prior to the commencement of this action, then the court, in the exercise of its discretion, may deny the . . . motions to dismiss and consider the written opinion letter that is attached to the amended complaint."

The court next addressed whether the opinion letter had existed prior to the commencement of the plaintiff's medical malpractice action. The court recognized that the plaintiff claimed that the undated letter had been written prior to the lawsuit, while Wang and the Center disputed this fact. Nevertheless, it determined that an evidentiary hearing was not required. The court explained: "Turning, then, to the attestations made in the affidavit, the attorney claims that he signed the complaint in this action on March 30, 2012, and that at that time he filed the complaint, the signed, written opinion letter of the similar health care provider existed and was retained in the plaintiff's file. He further attests that his failure to attach the written opinion letter was inadvertent and an oversight. Such attestations are based on the attorney's personal knowledge, and constitute facts that would be admissible at trial and indicate that the attorney is competent to testify to the matters stated in the affidavit. [Wang and the Center did] not submit any evidence to rebut the attorney's attestations, but rather make conclusory statements challenging the evidence. . . . Therefore, in the absence of counterevidence by [Wang and the Center], the court finds that the written opinion letter existed prior to the commencement of

this action and that the attorney's failure to attach it to the original complaint was inadvertence or an oversight." (Citations omitted.)

In summary, the court found that the opinion letter had been authored prior to the commencement of the action and that the failure to attach it to the original complaint resulted from inadvertence or oversight. It permitted the plaintiff to amend her complaint to include the opinion letter. On September 21, 2012, the court denied the motions to reargue and for reconsideration filed by Wang and the Center.

A number of pretrial filings, motions and hearings ensued and the trial did not commence until November 16, 2017. The jury returned its verdict in favor of the plaintiff on both the malpractice and product liability counts on December 21, 2017. Approximately six months later, Wang filed a motion for permission to file a second motion for reconsideration of the denial of his motion to dismiss.[19] Wang argued that this court's recently released decision in *Peters* v. *United Community & Family Services, Inc.*, 182 Conn. App. 688, 191 A.3d 195 (2018), was "directly on point factually, [was] controlling legally, and [served] as additional grounds for the dismissal of [the plaintiff's] claims in the instant action." On September 6, 2018, the court, *Hon. Kenneth B. Povodator*, judge trial referee, heard oral argument on both the motion for permission to file a second motion for reconsideration and the substantive merits of the request for reconsideration.

At the hearing, Wang argued that, pursuant to *Peters*, any attempt to cure a defect relating to a § 52-190a opinion letter must have occurred prior to the expiration of the statutory limitation period; otherwise, the only available remedy was to commence a new action

[19] Wang, the Center, and WABBO filed a number of various postverdict motions that extended the appellate process.

pursuant to the accidental failure of suit statute, General Statutes § 52-592.[20] The plaintiff countered that Judge Karazin, in his 2012 decision, properly had relied on *Votre*, and that case remained good law even after *Peters*. Six days later, the Center joined Wang's motion for permission to file a second motion for reconsideration of the denial of the 2012 motion to dismiss.

On January 3, 2019, Judge Povodator issued a memorandum of decision addressing the postverdict motions that had been filed, including the motions for reconsideration of the 2012 motions to dismiss.[21] The court began by summarizing the issues relating to § 52-190a in this case and the relevant language from our decisions in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585, and *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 706. After observing that its decision constituted a "close call," the court focused on the issue of judicial economy and that the purpose underlying § 52-190a had been satisfied, given the jury's verdict in favor of the plaintiff.

The court concluded: "It would be inequitable and highly wasteful to reverse the earlier decisions in such a belated fashion. Subject matter jurisdictional issues may be raised at any time, but other jurisdictional issues are subject to waiver—and inferentially subject to other equitable considerations. For all these reasons, the motions to reargue are (have been) granted with respect to entertaining reargument and reconsidering the earlier decision, but the equities overwhelmingly dictate against affording any relief."

On appeal, Wang and the Center argue that the court improperly denied their motions to dismiss. Specifically, they contend that the plaintiff's complaint did not

[20] See, e.g., *Estela* v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 203–21, 180 A.3d 595 (2018) (discussing applicability of § 52-592).

[21] The court granted the motions for permission to file a second motion for reconsideration.

comply with § 52-190a due to the absence of an opinion letter from a similar health care provider. They claim that the plaintiff did not attempt to remedy this defect until after the statute of limitations had expired. Wang and the Center contend that the plaintiff's medical malpractice action should have been dismissed. The plaintiff counters that (1) Wang and the Center waived the argument that the § 52-190a defect was not cured within the statutory limitation period, (2) the purpose underlying § 52-190a was satisfied in this case given the jury's finding of medical malpractice, and (3) her amendment was filed within the three year repose period of § 52-584, which she claims is the limitation period. We agree that the court lacked personal jurisdiction over Wang and the Center as a result of the plaintiff's failure to cure the § 52-190a defect within the statutory limitation period and that the medical malpractice action, therefore, should have been dismissed.

We begin our analysis by setting forth our standard of review and a comprehensive review of the relevant legal principles. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Our Supreme Court has held that the failure of a plaintiff to comply with the statutory requirements of § 52-190a (a) results in a defect in process that implicates the personal jurisdiction of the court. . . .

"When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Citations omitted; internal quotation marks omitted.) *Labissoniere* v. *Gaylord*

Hospital, *Inc.*, 199 Conn. App. 265, 278–79, 235 A.3d 589, cert. denied, 335 Conn. 968, 240 A.3d 284 (2020), and cert. denied, 335 Conn. 968, 240 A.3d 285 (2020); see also *Bennett* v. *New Milford Hospital*, *Inc.*, 300 Conn. 1, 10–11, 12 A.3d 865 (2011). We employ a de novo standard of review with respect to a challenge to the trial court's ultimate legal conclusion and resulting denial of a motion to dismiss. *Perrone* v. *Buttonwood Farm Ice Cream*, *Inc.*, 158 Conn. App. 550, 554, 119 A.3d 659 (2015); see also *Bennett* v. *New Milford Hospital*, *Inc.*, supra, 10; *Labissoniere* v. *Gaylord Hospital*, *Inc.*, 182 Conn. App. 445, 451, 185 A.3d 680 (2018); *Lohnes* v. *Hospital of St. Raphael*, 132 Conn. App. 68, 76, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012).[22]

Next, we turn to the statutory language. Section 52-190a (a) provides in relevant part: "No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . . *To show the existence of such good faith*,

[22] Citing *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 705, Wang argues that this court should apply the plenary standard of review when considering a trial court's decision regarding a motion to dismiss. We note that our Supreme Court has stated that there is no meaningful distinction between plenary and de novo review and that it has used those terms interchangeably. *Ammirata* v. *Zoning Board of Appeals*, 264 Conn. 737, 746 n.13, 826 A.2d 170 (2003); see also *Sherman* v. *Ronco*, 294 Conn. 548, 554 n.10, 985 A.2d 1042 (2010).

the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . ." (Emphasis added.) See also *Torres* v. *Carrese*, 149 Conn. App. 596, 608, 90 A.3d 256, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014). Simply stated, § 52-190a applies when (1) the defendant is a health care provider and (2) the claim is one of medical malpractice. *LaPierre* v. *Mandell & Blau, M.D.'s, P.C.*, 202 Conn. App. 44, 49, 243 A.3d 816 (2020).

In *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 27, our Supreme Court explained that the purpose of § 52-190a "is to discourage the filing of baseless lawsuits against health care providers . . . ." (Internal quotation marks omitted.) See generally *Wilcox* v. *Schwartz*, 303 Conn. 630, 640–43, 37 A.3d 133 (2012) (setting forth history of § 52-190a); *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 54, 12 A.3d 885 (2011) (legislature established comprehensive prelitigation inquiry, including requirement of opinion letter by objectively qualified health care provider, in attempt to reduce filing of frivolous medical malpractice actions).

The court in *Bennett* also considered § 52-190a (c), which provides that "[t]he *failure to obtain and file the written opinion* required by subsection (a) of this section *shall be grounds for dismissal of the action*." (Emphasis added.) In interpreting subsection (c) of

§ 52-190a, our Supreme Court concluded that a motion to dismiss constitutes the proper procedural vehicle to challenge any deficiencies with the requisite letter. *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 29.

Cognizant of the severity of the dismissal of an action as a result of a noncompliant opinion letter, the court noted that such a dismissal was without prejudice and that, in the event that the statute of limitations had run, the accidental failure of suit statute, § 52-592,[23] may afford relief in certain circumstances. Id., 30–31; see also *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 46–47 (holding that when medical malpractice action has been dismissed pursuant to § 52-190a (c) for failure to supply opinion letter by similar health care provider, plaintiff may commence otherwise time barred action pursuant to matter of form provisions of § 52-592 (a), only if that failure was caused by simple mistake or omission, rather than egregious conduct or gross negligence attributable to plaintiff or plaintiff's attorney). It bears emphasizing, however, that "[d]ismissal is the mandatory remedy when a plaintiff fails to file an opinion letter that complies with § 52-190a (a)." (Internal quotation marks omitted.) *Doyle* v. *Aspen Dental of Southern CT, PC*, 179 Conn. App. 485, 492, 179 A.3d 249 (2018); see also *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 701; see

[23] General Statutes § 52-592 (a) provides: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

generally *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 584 (noting that courts are bound to uphold law that legislature adopts and that § 52-190a (c) plainly states that failure to include letter mandated by § 52-190a (a) shall be grounds to dismiss action).

In *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 397, 21 A.3d 451 (2011), our Supreme Court determined "the precise nature of the jurisdiction which is to be challenged pursuant to the dismissal language of § 52-190a (a)." After a review of the relevant case law, it concluded that the failure to comply with the requirements of § 52-190a (a) implicated personal jurisdiction and not the subject matter jurisdiction of the court. Id., 399. It noted that, unlike matters involving subject matter jurisdiction, personal jurisdiction may be obtained via consent or waiver. Id. Additionally, the *Morgan* court noted that a motion to dismiss contesting personal jurisdiction must be filed within thirty days of the filing of an appearance or such a claim would be waived. Id.; see also Practice Book §§ 10-6, 10-7, 10-30, and 10-32. "Accordingly, we conclude that, because the written opinion letter of a similar health care provider must be attached to the complaint in proper form, the failure to attach a proper written opinion letter pursuant to § 52-190a constitutes insufficient service of process and, therefore, Practice Book § 10-32 and its corresponding time and waiver rule applies by its very terms. Because we conclude that the absence of a proper written opinion letter is a matter of form, it implicates personal jurisdiction. It is in the nature of a pleading that must be attached to the complaint." (Footnote omitted.) *Morgan* v. *Hartford Hospital*, supra, 402; see also *Ugalde* v. *Saint Mary's Hospital, Inc.*, 182 Conn. App. 1, 7, 188 A.3d 787, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018); *Gonzales* v. *Langdon*, 161 Conn. App. 497, 513–14, 128 A.3d 562 (2015).

Thus, in a medical malpractice action, a plaintiff must comply with § 52-190a by including an opinion letter from a similar health care provider with the complaint to establish personal jurisdiction, and a timely challenge to the failure to include a legally sufficient opinion letter will result in a dismissal. In a series of decisions, all of which were issued after the 2012 motions to dismiss and during the pendency of these proceedings before the trial court, our court addressed how a plaintiff, whose opinion letter to the medical malpractice complaint was defective, could avoid dismissal or otherwise pursue his or her claim.

In *Gonzales* v. *Langdon*, supra, 161 Conn. App. 508, we considered "whether a complaint alleging medical malpractice that does not include a legally sufficient opinion letter may be amended to avoid dismissal, and under what circumstances an amendment is permitted." In that case, the plaintiff alleged that the defendant, a dermatologist who held himself out as a specialist in cosmetic surgery, negligently performed a neck and jowl face-lift procedure. Id., 500–501. The plaintiff attached an opinion letter from a board certified dermatologist. Id., 501. The defendant moved to dismiss the complaint on the basis that the opinion letter contained insufficient details regarding the qualifications of the author of the opinion letter. Id. In addition to her contention that the original opinion letter was, in fact, legally sufficient, the plaintiff filed a request for leave to amend her complaint more than thirty days from the return date, thus past the time to amend it as of right,[24] but within the applicable statutory limitation period. Id., 501–502. Specifically, she sought to include an amended version of the original opinion letter and a new opinion letter authored by a board certified plastic surgeon. Id., 501. The trial court granted the defendant's motion to dismiss on the basis that the original opinion letter was not legally sufficient. Id., 502–503.

[24] See General Statutes § 52-128 and Practice Book § 10-59.

On appeal, we agreed that the original opinion letter was insufficient because the author was not a similar health care provider as defined by § 52-184c (c).[25] Id., 507. We then considered whether the plaintiff's complaint could be amended and the circumstances under which such an amendment would be permitted. Id., 508. We reasoned that the general applicability of General Statutes § 52-128 and Practice Book §§ 10-59 and 10-60, the policies underlying § 52-190a (a), and judicial economy all favored permitting an amendment filed after the thirty days to amend as of right but *before* the statute of limitations had expired. Id., 517–20. We concluded, therefore, that the trial court had abused its discretion by not granting the plaintiff leave to amend the complaint with the amended original opinion letter and the new opinion letter. Id., 521. We further determined, however, that the amended original opinion letter did not meet the requirements of §§ 52-190a and 52-184c, and that the record was insufficient to determine whether the new opinion letter satisfied § 52-184c (c). Id., 523.

Next, in *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 3, the plaintiff alleged that the defendant, a general surgeon, negligently performed a robot-assisted gastrectomy. The opinion letter attached to the complaint failed to identify the medical qualifications of its author. Id., 5. The defendant, therefore, moved to dismiss the complaint on the basis of a deficient opinion

[25] Specifically, we stated: "The original opinion letter was authored by a board certified dermatologist, who did not claim to have any training or experience in cosmetic surgery, let alone a certification in plastic surgery or cosmetic surgery. Although the board certified dermatologist claimed to know the relevant standard of care and that [the defendant] breached that standard, this is not sufficient to meet the requirements of § 52-184c (c). . . . The plaintiff was required to obtain an opinion letter authored by a health care provider with experience and training in cosmetic surgery, and with board certification in cosmetic surgery or in a specialty requiring greater training and experience. Both of these requirements are missing from the original opinion letter." (Citation omitted.) *Gonzales* v. *Langdon*, supra, 161 Conn. App. 507.

letter. Id. The plaintiff filed a request for leave to amend the complaint by adding details to the opinion letter regarding the author's medical qualifications. Id. The trial court granted the defendant's motion, reasoning that a request for leave to amend the complaint had been filed outside of the applicable limitation period. Id., 6.

On appeal, the plaintiff argued only that she should have been permitted to amend the complaint with a more detailed opinion letter. Id., 8. In rejecting this argument, we first noted: "In *Gonzales* v. *Langdon*, [supra, 161 Conn. App. 510], this court held, as a matter of first impression, that a legally insufficient opinion letter may be cured by amendment under two circumstances. The court held: [I]f a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to amend the original opinion letter, or to substitute a new opinion letter for the original opinion letter, *the trial court (1) must permit such an amendment if the plaintiff seeks to amend as of right within thirty days of the return day and the action was brought within the statute of limitations, and (2) has discretion to permit such an amendment if the plaintiff seeks to amend within the applicable statute of limitations but more than thirty days after the return day*. The court may abuse its discretion if it denies the plaintiff's request to amend despite the fact that the amendment would cure any and all defects in the original opinion letter and there is an absence of other independent reasons to deny permission for leave to amend." (Emphasis added; internal quotation marks omitted.) *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 8.

The plaintiff conceded that she had failed to file her request for leave to amend the complaint within thirty days of the return date. Id., 8–9. We then rejected the plaintiff's reliance on *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, explaining: "The holding in *Gonzales* permits amendment to legally insufficient opinion letters *only if they are sought prior to the expiration of*

the statute of limitations." (Emphasis added.) *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 12.

Finally, in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 691, the plaintiff sued the defendant dentist, who held himself out as a specialist in oral and maxillofacial surgery, for malpractice. The opinion letter attached to the complaint did not indicate if its author was certified as a specialist. Id., 692. The defendant moved to dismiss the complaint, arguing that the opinion letter needed to be authored by an individual trained in the same medical specialty and certified by an American board in the same medical specialty. Id., 693. In response, the plaintiff contended that the author had "inadvertently left out the fact that he was board certified" and sought to cure this defect by submitting an affidavit attesting that the author had been board certified at all relevant times. Id., 694–95. The plaintiff, however, did not seek permission to amend the complaint or to file an amended opinion letter. Id., 695.

At oral argument on the motion to dismiss, the defendant argued that the court lacked discretion to consider the affidavit because the efforts to cure the opinion letter had occurred more than thirty days after the return date of the complaint and *after the statute of limitations had expired*. Id., 695. The court subsequently granted the defendant's motion to dismiss. Id., 696–97. It agreed that the letter was deficient because it had failed to state whether the author was board certified, and concluded that it was not necessary to determine whether this deficiency could be remedied by the filing of an affidavit rather than an amended pleading because neither option remained viable due to the expiration of the statute of limitations. Id., 697–98.

On appeal, the sole issue before this court was "whether the trial court, in ruling on the motion to dismiss, correctly determined that our decision in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497 . . . barred it from

considering the affidavit that [the plaintiff] had attached to his opposition to the motion to dismiss in an effort to cure the defect in the opinion letter attached to the complaint." *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 699.[26] We concluded that the plaintiff's efforts to correct the deficient opinion letter had occurred after the expiration of the statute of limitations and, therefore, the court properly granted the defendant's motion and dismissed the action. Id.

In our analysis, we noted that, prior to our decision in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, our Supreme Court had recognized that a plaintiff whose medical malpractice action that had been dismissed for failing to comply with the opinion letter requirements of § 52-190a (a), could either refile the action or attempt to seek redress via § 52-592. *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 701. We also recognized that, in *Gonzales* v. *Langdon*, supra, 510, this court had held, for the first time, that "a plaintiff who files a legally insufficient opinion letter may, in certain instances, cure the defective opinion letter through amendment of the pleadings, thereby avoiding the need to file a new action." *Peters* v. *United Community & Family Services*, *Inc.*, supra, 701.

Turning to the facts and circumstances in *Peters*, this court acknowledged that certain decisions of the Superior Court had permitted a plaintiff to cure a defective opinion letter via a supplemental affidavit rather than by seeking leave to file an amended pleading. *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 703–704. We ultimately declined

[26] The plaintiff conceded that, based on the allegations set forth in his complaint, he was required to provide an opinion letter from a doctor trained and board certified in oral and maxillofacial surgery, and that the opinion letter attached to the complaint did not set forth these required details. *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 699.

to address that issue[27] and concluded that, because the plaintiff had failed to undertake any attempt to remedy the defective opinion letter until *after* the statute of limitations had expired, the trial court properly had granted the motion to dismiss. Id., 705–706. "Regardless of the type of procedure a plaintiff elects to employ to cure a defect in an opinion letter filed in accordance with § 52-190a, that procedure must be initiated prior to the running of the statute of limitations. Otherwise the sole remedy available will be to initiate a new action, if possible, pursuant to § 52-592." Id., 706.

Guided by these precedents, we return to the facts of the present case. The plaintiff commenced her action against Wang and the Center on April 6, 2012, and April 4, 2012, respectively. In her pleadings, she consistently alleged that, on April 22, 2010, she suffered injuries, namely, the burning of her toes and foot, as a result of Wang's professional negligence. The plaintiff's counsel attached a signed, good faith certificate that he had conducted a reasonable inquiry into the circumstances of the plaintiff's claims and that, on the basis of that inquiry, he believed in good faith that Wang and the Center had been negligent in the treatment of the plaintiff. The plaintiff's counsel, however, failed to attach a

[27] Specifically, we stated: "Although at this juncture it would seem prudent for a plaintiff to follow the corrective measures approved in *Gonzales*, we do not decide at this time whether a trial court has the authority to permit alternative procedures, such as the use of a clarifying affidavit, to remedy a defective opinion letter." *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 705 n.10.

In *Carpenter* v. *Daar*, 199 Conn. App. 367, 389–90, 236 A.3d 239, cert. granted, 335 Conn. 962, 239 A.3d 1215 (2020), we subsequently held that in the case of a defective opinion letter, a plaintiff must amend the complaint and not use a subsequently filed supplemental affidavit from the author of the opinion letter to cure said defect. Our Supreme Court granted certification in that case, limited to the following issue: "Did the Appellate Court properly uphold the trial court's dismissal of the plaintiff's medical malpractice action for failure to comply with . . . § 52-190a?" *Carpenter* v. *Daar*, 335 Conn. 962, 239 A.3d 1215 (2020).

signed opinion letter from a similar health care provider as required by § 52-190a. Accordingly, Wang and the Center timely moved to dismiss the plaintiff's action pursuant to § 52-190a (c).

On June 28, 2012, the plaintiff filed a request for leave to file an amended complaint and a memorandum in opposition to the 2012 motions to dismiss. In the former, the plaintiff indicated that the purpose of the requested amended complaint was to include a written, signed opinion letter from a similar health care provider that had existed at the time the complaint had been filed, but inadvertently was not attached to the original complaint. The plaintiff's counsel also included an affidavit setting forth the details regarding when he had received the opinion letter and the inadvertent failure to attach the signed opinion letter to the complaint.

After hearing oral argument, the court issued a memorandum of decision on September 6, 2012, denying the motions to dismiss and overruling the objection to the plaintiff's request for leave to amend her complaint. The court reasoned that the plaintiff had obtained the opinion letter prior to the commencement of her medical malpractice action, but failed to include it with her original complaint due to inadvertence and oversight. It further concluded that to dismiss the action would elevate form over substance and violate the public policy of permitting a trial on the merits. On September 21, 2012, the court denied the motions to reargue and for reconsideration filed by the Center and Wang.

Pretrial proceedings ensued over the course of several years. During the time period between the denial of the 2012 motions and the second motion for reconsideration filed in 2018, the law concerning § 52-190a developed in our appellate courts. See, e.g., *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 63 A.3d 940 (2013) (released on April 23, 2013); *Torres* v. *Carrese*, supra, 149 Conn.

App. 596 (released on April 22, 2014); *Gonzalez* v. *Langdon*, supra, 161 Conn. App. 497 (released on December 1, 2015); *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 1 (released on May 15, 2018); *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688 (released on June 19, 2018). Significantly, our jurisprudence shifted from consideration of whether the opinion letter had existed at the time the plaintiff commenced the malpractice action to a focus on whether the elected procedure to remedy a defective opinion letter had begun prior to the expiration of the statute of limitations.

The trial occurred in November and December, 2017. On December 21, 2017, the jury returned a verdict for the plaintiff. Wang, the Center, and WABBO each filed various postverdict motions, seeking, inter alia, to set aside the verdict, judgment notwithstanding the verdict, and for remittitur. On June 26, 2018, Wang filed a motion for permission to file a second motion to reconsider the 2012 denial of the motion to dismiss. In that motion, Wang directed the trial court to our decision in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, and described that opinion as legally controlling and supporting the dismissal of the medical malpractice action. The court heard oral argument on September 6, 2018.[28] During this proceeding, Wang's counsel argued that any remedy to correct a defect in the opinion letter must have been commenced within the applicable statute of limitations, pursuant to our then relatively recently released decision in *Peters*.

[28] Six days later, the Center joined Wang's June 26, 2018 motion. In this motion, the Center argued that "[t]he issues as to the Center and . . . Wang are identical as to the same motion to dismiss and ruling applied to the Center. . . . The undersigned defendant does not seek to further brief or argue any of the issues and relies upon the motion that was filed by . . . Wang . . . and the oral argument that took place on the motion on September 6, 2018. To avoid inconsistent rulings between [Wang and the Center] who filed identical motions to dismiss and received the same ruling, the [Center] seeks to join this motion for reconsideration."

On January 3, 2019, the court issued its memorandum of decision addressing the various postverdict motions that had been filed. At the outset of its analysis relating to the motion for reconsideration of the 2012 motions to dismiss, the court recognized that, at the time of the 2012 decision denying the motions to dismiss, "the sole relevant appellate authority was *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, [supra, 113 Conn. App. 585], which contained language—disputed as to whetherit was dictum or controlling—relating to the propriety of a belated filing of an already-existing opinion letter, and it was the significance of that language that was subject to disagreement by trial courts." The court noted that in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, our court "held that corrective action relating to an opinion letter from a similar health care provider *had to be undertaken within the applicable statute of limitations*." (Emphasis added.) Thus, the court had to consider whether our 2018 opinion in *Peters* necessitated a contrary decision from the 2012 denial of the motions to dismiss.

The court began its consideration of this statute of limitations issue by noting that the request to amend the complaint had been filed "substantially" more than two years after the date of the plaintiff's injury and that there had been no claim that the plaintiff took any ameliorative action prior to the expiration of the statute of limitations. It then identified two related concerns regarding the timing and nature of the 2018 requests for reconsideration of the 2012 denial of the motions to dismiss. First, it stated that a motion for reconsideration generally is filed not years after the underlying decision, but rather within days. Thus, as a general matter, only a minimal chance exists that controlling precedent materially will alter the relevant legal landscape. Second, the court posited whether the motions to dismiss could be revisited six years after their initial denial and

after an intervening trial on the merits, particularly at the trial court level.[29] The court granted the motions for reconsideration "to reconcile, or determine the interplay between, two Appellate Court decisions, *Peters* and *Votre*."

With respect to the substantive merits regarding whether the motions to dismiss should be granted, albeit belatedly, the court recognized that, subsequent to the 2012 memorandum of decision, which had focused on whether a valid opinion letter existed at the time the medical malpractice action had been commenced, our appellate courts determined that a plaintiff must take corrective action with respect to a defective opinion letter within the applicable statute of limitations. Nevertheless, the court ultimately concluded that the prior denials of the motions to dismiss should stand for several reasons.

First, the court noted that both *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, and *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, concerned the correction of attached, but defective opinion letters, whereas the plaintiff in the present case had failed to attach the opinion letter to her complaint.[30] Second, it observed that *Gonzales* v. *Langdon*, supra, 497, and *Torres* v. *Carrese*, supra, 149 Conn. App. 596, mentioned the statute of limitations as the benchmark for when correction of a defective opinion letter must

[29] Perhaps presciently, the court aptly noted: "There seems to be no identified impediment to the [Center and Wang] raising the issue on appeal—notwithstanding the earlier denial of the motions to dismiss, *Peters* is claimed to represent the current accurate state of the law, and no reason had been identified why it would not be applicable prior to final judgment in this case, if in fact that decision controls the jurisdictional issue first raised more than six years ago."

[30] For the purposes of our analysis, whether the opinion letter was missing from the complaint or was deficient in some other manner appears to constitute a distinction without a difference. Under both scenarios, the result is a defective letter pursuant to § 52-190a.

occur and that both of these cases had been issued prior to the commencement of the present trial. The court noted that neither the goal of judicial economy nor the purpose of § 52-190a would be advanced if it nullified the trial and the jury's verdict based on the statute of limitations argument advanced by Wang and the Center. Ultimately, the court concluded: "It would be inequitable and highly wasteful to reverse the earlier decisions in such a belated fashion. Subject matter jurisdictional issues may be raised at any time, but other jurisdictional issues are subject to waiver—and inferentially subject to other equitable considerations."

Given our decision in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 706, it cannot be disputed that regardless of the method employed to cure a defect in an opinion letter filed pursuant to § 52-190a, such correction must be initiated prior to the expiration of the statute of limitations. Wang and the Center argue that the *Peters* holding applies in the present case and the denials of the 2012 motions to dismiss must be reversed. The plaintiff counters that Wang and the Center waived this statute of limitations argument, the purpose of § 52-190a was satisfied as a result of the jury's verdict, and the amendment to the medical malpractice complaint was filed timely within the three year statute of repose contained in § 52-584, and, therefore, the judgment of the court must stand.[31]

We first consider the plaintiff's argument that Wang and the Center waived their statute of limitations claim as it related to § 52-190a and *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688. In her brief, the plaintiff notes that, as a general

[31] The plaintiff does not argue that the judgment should be affirmed based on the reasoning utilized in the court's 2012 memorandum of decision—that is, the court had discretion to permit the plaintiff to amend the medical malpractice complaint to include the opinion letter because the opinion letter had been in existence at the time that the action was commenced.

matter, our courts have "made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial." (Internal quotation marks omitted.) *C.R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 87, 919 A.2d 1002 (2007). She then contends that the statute of limitations argument related to § 52-190a could have been made in the 2012 motions to dismiss; see, e.g., *Bennett* v. *New Milford Hospital*, supra, 300 Conn. 30–31; or raised in 2014 and 2015, or when this court released its decision in *Torres* v. *Carrese*, supra, 149 Conn. App. 596, and *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, respectively. We are not persuaded that Wang and the Center waived their statute of limitations argument.

A discussion of *Torres* v. *Carrese*, supra, 149 Conn. App. 596, is instructive. In that case, the plaintiff commenced a medical malpractice action against her obstetricians in September, 2006. Id., 601–602. She attached to her complaint an opinion letter from a board certified urologist. Id., 603. In November, 2006, the obstetricians moved to dismiss the complaint on the ground that the opinion letter had not been written by a similar health care provider. Id., 604. The trial court ultimately denied the motions to dismiss, reasoning that an insufficient letter, as opposed to the absence of such a letter, was not a sufficient ground for dismissal. Id., 605.

"On January 19, 2011, the case was called for trial. On January 31, 2011, and February 10, 2011, after our Supreme Court released its opinion in *Bennett* v. *New Milford Hospital, Inc.*, [supra, 300 Conn. 21] (holding in cases against specialists, author of written opinion letter pursuant to § 52-190a (a) must be similar health care provider as defined in § 52-184c (c), regardless of author's potential qualifications to testify at trial, and insufficient written opinion letter, while not impairing

subject matter jurisdiction, requires dismissal of action under § 52-190a (c)), the [obstetricians] each filed new motions to dismiss the plaintiff's complaint. On March 7, 2011, the court granted the [obstetricians'] motions to dismiss the plaintiff's complaint because the plaintiff failed to attach an opinion letter from a similar health care provider to the complaint as required by § 52-190a." (Footnotes omitted; internal quotation marks omitted.) *Torres* v. *Carrese*, supra, 149 Conn. App. 605–606.

On appeal, the plaintiff argued, inter alia, that the obstetricians' 2011 motions to dismiss had been filed outside of the time period set forth by Practice Book § 10-30 and the trial court erred by considering and granting them. Id., 607. The obstetricians countered that their "2011 motions to dismiss were functionally motions to reargue their timely filed 2006 motions to dismiss the plaintiff's complaint." Id., 612. Due to the unique circumstances of that case, we agreed with the obstetricians. Id. First, we concluded that, despite their title, the 2011 motions "essentially sought to reverse or to modify the denials of their earlier 2006 motions to dismiss" and therefore the trial court properly had concluded that, in reality, these were motions to reargue. Id., 614.

Next, we determined that the court had not abused its discretion by considering the 2011 motions to reargue, despite the twenty day time period set forth in Practice Book § 11-12 (a). Id., 614–15. We explained: "[T]he [obstetricians], in filing their 2011 motions to dismiss, *sought reconsideration because of a newly articulated controlling principle of law set forth by our Supreme Court* in *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 1. . . . See *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001) ([T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension

of facts. . . . [A] motion to reargue . . . is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument. . . .). *Thus, it was reasonable for the* [*obstetricians*] *to file what amounts to a late motion to reargue before a second judge in light of the Supreme Court's decision in Bennett, issued almost four years after* [*the trial court*] *issued* [*its*] *ruling on the* [*obstetricians'*] *2006 motions to dismiss.*" (Emphasis added; internal quotation marks omitted.) *Torres* v. *Carrese*, supra, 149 Conn. App. 616–17.

We further noted the particular circumstances of *Torres* with respect the trial court's consideration of the obstetricians' motions to reconsider after an extended time period. "The trial court correctly determined that *Bennett* [v. *New Milford Hospital, Inc.*, supra, 300 Conn. 1] was to have retroactive effect. See, e.g., *Marone* v. *Waterbury*, 244 Conn. 1, 10, 707 A.2d 725 (1998) ('judgments that are not by their terms limited to prospective application are presumed to apply retroactively'). In light of *Bennett*, the court was faced with a situation in which any judgment rendered on the professional negligence issues in favor of the plaintiff would likely be reversed in any event. By dealing with the issue, the court avoided the time and expense, to the state and to the parties, of a perhaps pointless trial." *Torres* v. *Carrese*, supra, 149 Conn. App. 617 n.23.

Similar circumstances exist in the present case that warrant and justify consideration of the argument regarding the statute of limitations and § 52-190a, even though it was raised approximately six years after the initial 2012 motions to dismiss. First, Wang and the Center, in their 2012 motions to dismiss, claimed that the plaintiff had failed to comply with the requirements of § 52-190a due to her counsel's failure to include an opinion letter, raising a challenge pertaining to personal

jurisdiction. Second, during the pendency of the proceedings, new appellate authority was released in 2018, namely, *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, and that opinion presumptively applied retroactively. The decision in *Peters*, which related to the claim set forth in the 2012 motions to dismiss, expressly held that efforts to remedy a defective opinion letter must be initiated prior to the running of the statute of limitations.[32] Id., 706. Wang and the Center *may have raised* this argument during the pretrial proceedings, but we are not aware of, nor has the plaintiff directed us to any controlling case, statute, or rule of practice that would require them to do so or face the consequences of waiver. For these reasons, we are not persuaded by the plaintiff's contention that Wang and the Center waived the argument relating to the statute of limitations and § 52-190a.

Next, we consider the plaintiff's contention that, as a result of the jury's verdict, the purpose of § 52-190a, preventing frivolous medical malpractice actions, was served in the present case, and, therefore, to dismiss the medical malpractice action at this juncture would elevate form over substance to an unreasonable degree. We are not persuaded.

Indisputably, the purpose of § 52-190a is to prevent frivolous medical malpractice actions, and the requirement of a letter from a similar health care provider "was intended to address the problem that some attorneys, either intentionally or innocently, were misrepresenting in the certificate of good faith the information that they

[32] In *Torres* v. *Carrese*, supra, 149 Conn. App. 611 n.14, we mentioned that the court could not consider an opinion letter that had been obtained after the action had been commenced, after the motions to dismiss had been filed, and after the statute of limitations had expired. This reference to the statute of limitations is not the equivalent of the specific holding of *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 706, that efforts to cure a defect in an opinion letter must be initiated prior to the expiration of the statute of limitations.

obtained from the experts." (Internal quotation marks omitted.) *Shortell* v. *Cavanagh*, 300 Conn. 383, 388, 15 A.3d 1042 (2011); see also *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 55; *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 12; *Barrett* v. *Montesano*, 269 Conn. 787, 796, 849 A.2d 839 (2004); *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 584.

The plaintiff argues that, because the jury found in her favor with respect to the medical malpractice action, it could not constitute a frivolous action. We acknowledge the pragmatic nature of this contention. Our legislature, however, specifically authorized the dismissal of a medical malpractice action for the failure to attach an opinion letter to the complaint. General Statutes § 52-190a (c); *Rios* v. *CCMC Corp.*, 106 Conn. App. 810, 822, 943 A.2d 544 (2008); see also *Santorso* v. *Bristol Hospital*, supra, 308 Conn. 349 (noting *mandatory* dismissal where plaintiff fails to comply with § 52-190a (c)); *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 398 (Supreme Court recognized that opinion letter was akin to pleading that *must* be attached to complaint in order to commence medical malpractice action); *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 6 (trial court was *required* to dismiss action as consequence of failure to provide opinion letter); *Wood* v. *Rutherford*, 187 Conn. App. 61, 73, 201 A.3d 1025 (2019) (failure to attach proper written opinion letter mandates dismissal of action); *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 12 (if amendment to legally insufficient opinion letter is not sought prior to expiration of statute of limitations, dismissal is required by § 52-190a); *Doyle* v. *Aspen Dental of Southern CT, PC*, supra, 179 Conn. App. 492 (dismissal is mandatory remedy when plaintiff fails to file opinion letter in compliance with § 52-190a). As we noted in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 584–85: "We are

bound to uphold the laws the legislature adopts. . . . Legislative power under article third [of our state constitution] reposes in the Senate and the House of Representatives, not in the Judiciary."

The argument advanced by the plaintiff would effectively deprive medical providers of the ability to appeal from an adverse ruling with respect to the existence and sufficiency of an opinion letter following a trial on the merits. Although we understand the practical aspect of the plaintiff's argument with respect to judicial economy and the fact that these proceedings occurred over several years and culminated in a five week trial, we decline to foreclose the ability of litigants to seek appellate review with respect to § 52-190a. Consistent with established precedent, an appellate determination that the trial court improperly concluded that personal jurisdiction existed has resulted in the dismissal or vacatur of the subsequent proceedings before the trial court. See *Green* v. *Simmons*, 100 Conn. App. 600, 606–609, 919 A.2d 482 (2007) (judgment in favor of plaintiff reversed and remanded with direction to dismiss action where Appellate Court determined plaintiff failed to establish that requirements of long arm statute had been satisfied and therefore court had improperly exercised personal jurisdiction over defendants); see, e.g., *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 535, 923 A.2d 638 (2007); *Narayan* v. *Narayan*, 122 Conn. App. 206, 216, 3 A.3d 75 (2010), rev'd on other grounds, 305 Conn. 394, 46 A.3d 90 (2012). For these reasons, we are not persuaded by the plaintiff's argument that a jury verdict in a medical malpractice action would insulate a defect in the required opinion letter from appellate review.

Finally, the plaintiff argues, for the first time on appeal and as an alternative ground for affirming the verdict, that, pursuant to the repose section of § 52-584, she timely amended her complaint to include the opinion letter before the expiration of the three year

statute of repose.[33] Under these facts and circumstances, we conclude that the two year statute of limitations applied in the present case.

We begin with language of the applicable statute of limitations for medical malpractice actions. Section 52-584 provides in relevant part: "No action to recover damages for injury to the person . . . caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, advanced practice registered nurse, hospital or sanatorium, *shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . .*" (Emphasis added.)

In *Wojtkiewicz* v. *Middlesex Hospital*, 141 Conn. App. 282, 60 A.3d 1028, cert. denied, 308 Conn. 949, 67 A.3d 291 (2013), we distinguished the different time periods identified in § 52-584. "[T]his statute imposes two specific time requirements on plaintiffs. The first requirement, referred to as the discovery portion . . . requires a plaintiff to bring an action within two years from the date when the injury is first sustained or *discovered* or in the exercise of reasonable care should have been discovered . . . . The second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of. . . . The three year period specifies the time beyond which an action under § 52-584 is absolutely barred,

[33] In the January 3, 2019 postverdict memorandum of decision, the court did not address the three year repose section of § 52-584. It did note, however, that the plaintiff's request to amend her complaint "was filed substantially more than two years after the date of the occurrence . . . [and that] [t]here is no claim that the corrective action taken by the plaintiff occurred prior to the expiration of the statute of limitations."

and the three year period is, therefore, a statute of repose." (Emphasis in original; internal quotation marks omitted.) Id., 286–87; *Rosato* v. *Mascardo*, 82 Conn. App. 396, 401–402, 844 A.2d 893 (2004); see also *Neuhaus* v. *DeCholnoky*, 280 Conn. 190, 200–201, 905 A.2d 1135 (2006).

In *Lagassey* v. *State*, 268 Conn. 723, 846 A.2d 831 (2004), our Supreme Court stated: "The limitation period for actions in negligence begins to run on the date when the injury is first discovered or in the exercise of reasonable care should have been discovered. . . . In this regard, the term injury is synonymous with legal injury or actionable harm. Actionable harm occurs when the plaintiff discovers, or in the exercise of reasonable care, should have discovered the essential elements of a cause of action. . . . A breach of duty by the defendant and a causal connection between the defendant's breach of duty and the resulting harm to the plaintiff are essential elements of a cause of action in negligence; they are therefore necessary ingredients for actionable harm. . . . Furthermore, actionable harm may occur when the plaintiff has knowledge of facts that would put a reasonable person on notice of the nature and extent of an injury, and that the injury was caused by the negligent conduct of another. . . . In this regard, the harm complained of need not have reached its fullest manifestation in order for the limitation period to begin to run; a party need only have suffered some form of actionable harm." (Citations omitted; internal quotation marks omitted.) Id., 748–49; see also *Barrett* v. *Montesano*, 269 Conn. 787, 793, 849 A.2d 839 (2004); *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 168, 204 A.3d 717 (2019). The focus, however, is on the plaintiff's knowledge of the facts, rather than the discovery of applicable legal theories. *Catz* v. *Rubenstein*, 201 Conn. 39, 47, 513 A.2d 98 (1986).

As a general matter, the determination of whether a plaintiff, in the exercise of reasonable care, should have discovered actionable harm for purposes of § 52-584 is for the trier of fact. *Lagassey* v. *State*, supra, 268 Conn. 749. Under some circumstances, however, the start of the two year statute of limitations in a medical malpractice action may be decided as a matter of law. For example, in *Burns* v. *Hartford Hospital*, 192 Conn. 451, 472 A.2d 1257 (1984), our Supreme Court considered whether summary judgment properly had been rendered in favor of the defendant physician and hospital. In that case, the two year old plaintiff had been treated following an automobile accident. Id., 452. This medical treatment included the insertion of intravenous tubes into the plaintiff's legs. Id. Approximately one week later, the child's left leg became swollen and red. The physician initially diagnosed the condition as a hematoma, but after further procedures and testing, discovered an infection, likely from contaminated intravenous tubes. Id., 452–53.

The plaintiff filed an action more than two years from the date on which the infection in his leg was first discovered. Id., 453. The physician and the hospital moved for summary judgment based on the statute of limitations. Id., 453–54. The trial court granted the motions for summary judgment. Id., 454. Our Supreme Court held that that the two year statute of limitations commenced on the date the child's mother was aware he had an infection and not a hematoma. Id., 459–60. "Because the plaintiff did not bring suit within two years of discovering the injury, the trial court correctly ruled that the action was barred by the statute of limitations." Id., 460.

Although the procedural posture of *Burns* v. *Hartford Hospital*, supra, 192 Conn. 451, differs from the present case, its reasoning guides us to reject the plaintiff's reliance on the repose section of § 52-584. In the

present case, the allegations in the complaint conclusively establish that the plaintiff had knowledge, on the date of the incident, of the nature and extent of the injuries to her foot. The knowledge of these facts would put a reasonable person on notice that those injuries were the result of Wang's alleged negligent conduct. To conclude otherwise would eviscerate the policies underlying the statute of limitations. See *Lindsay* v. *Pierre*, 90 Conn. App. 696, 701, 879 A.2d 482 (2005). For these reasons, we reject the plaintiff's reliance on the repose section of § 52-584 and her claim that the efforts to cure the opinion letter were timely.

In sum, the plaintiff failed to attach an opinion letter as required by § 52-190a to her complaint. None of the arguments advanced by the plaintiff disputes this fact. Wang and the Center demonstrated that her efforts to cure this defect were not commenced within the statutory limitation period. We are not persuaded by the plaintiff's additional arguments regarding § 52-190a. We conclude that the court did not have personal jurisdiction as to Wang and the Center and that the medical malpractice action should have been dismissed.

II

AC 42505

In AC 42505, WABBO claims that the court improperly denied its motions for a directed verdict and to set aside the verdict because the plaintiff did not establish the element of causation. Specifically, WABBO argues that it was entitled to judgment in the product liability action because the plaintiff failed to prove how the heat lamp came into contact with her foot. The plaintiff responds that she satisfied her burden with respect to the element of causation, including by means not challenged by WABBO on appeal. We agree with the plaintiff.

In her third amended third-party complaint (operative third-party complaint) against WABBO,[34] the plaintiff alleged a violation of the Connecticut Product Liability Act, General Statutes § 52-572m et seq.[35] In this pleading, the plaintiff alleged that WABBO was a foreign corporation authorized to do business in Connecticut and that it sold the heat lamp to Wang for use in Connecticut. She further alleged that WABBO placed the heat lamp into the stream of commerce with the expectation that it would reach consumers without a substantial change in condition. On April 22, 2010, Wang used the heat lamp, which had not been substantially changed, during the plaintiff's acupuncture treatment. The plaintiff claimed that the stabilizing hardware and hydraulic mechanisms for the head and arm of the heat lamp were deficient and resulted in the heating element coming into contact with her foot and injuring her.

The plaintiff alleged that WABBO was negligent and strictly liable in distributing, selling, and/or otherwise placing the heat lamp into the stream of commerce by failing (1) to affix a warning on the heat lamp regarding the propensity of its arm to lower, (2) to include any

[34] On February 6, 2013, Wang filed a third-party complaint against WABBO. Approximately one month later, the plaintiff filed a third-party complaint against WABBO. At the start of the trial, Wang withdrew his action against WABBO.

[35] General Statutes § 52-572m (b) provides in relevant part: " 'Product liability claim' includes all claims or actions brought for personal injury . . . caused by the manufacture, construction, design . . . warnings, instructions, marketing, packaging or labeling of any product. 'Product liability claim' shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent." See generally *Allard* v. *Liberty Oil Equipment Co.*, 253 Conn. 787, 799–800, 756 A.2d 237 (2000) (complaint set forth "classic allegations of product liability"); *Gajewski* v. *Pavelo*, 36 Conn. App. 601, 611, 652 A.2d 509 (1994) (noting that current statutory scheme intended to merge various common-law theories of product liability into one cause of action), aff'd, 236 Conn. 27, 670 A.2d 318 (1996).

locking devices on the hydraulic mechanisms and joints of the heat lamp, (3) to include a safety guard over the face of the heating element, and/or (4) to provide a user manual or instructions with the heat lamp or on its website.[36] She further alleged that "[*o*]*ne or more of these defects and acts of negligence described herein was a substantial factor in causing the injuries to the plaintiff*." (Emphasis added.)

Wang testified that the heat lamp he had purchased from WABBO did not come with a manual or warnings about the propensity of the head of the heat lamp to fall down. He also stated that the absence of a locking mechanism, a safety guard, a manual, or warnings made the heat lamp unreasonably dangerous.

Sami Kuang Wu, the owner of WABBO, testified that Wang had purchased the heat lamp in March, 2008. She also stated that the heat lamp was shipped without locking devices on the joints of its arms or a "safety shield" between the heating element plate and the patient. Wu further testified that the spring pistons that provided the upward force needed to hold the heat lamp in place would lose their function as the device was used and eventually would no longer maintain the placement of the heat lamp. She explained that as the spring pistons became worn, the heat lamp had a tendency to lower inadvertently and spontaneously on its own, and that WABBO was aware of this tendency in 2008. Wu also indicated that Wang should have received a manual and that a warning sticker should have been affixed to the heat lamp.

The plaintiff presented testimony from Victor A. Popp, a registered professional engineer. Popp testified about various locking mechanisms that could have been

[36] See, e.g., *Wagner* v. *Clark Equipment Co.*, 243 Conn. 168, 174–75, 700 A.2d 38 (1997) (plaintiff filed product liability action alleging theories of strict liability for defective design, strict liability for failure to warn or instruct, negligent design, and negligent failure to warn or instruct).

used to prevent the inadvertent downward movement of the head of the heat lamp, where the heating element was located. He indicated that the use of a safety guard would have prevented the heating element from coming into contact with the skin of a patient if the arm lowered. He opined that in 2008, both a locking mechanism and a safety guard would have been economically and technologically feasible.

The plaintiff's counsel asked a lengthy hypothetical question in which Popp was to assume as true various facts regarding the heat lamp and the April 22, 2010 incident. Popp concluded that the defective condition of the heat lamp was a substantial factor contributing to the plaintiff's injuries and opined, to a reasonable degree of engineering certainty, that the heat lamp was in a defective condition in March, 2008, when it was sold without a locking mechanism for the arm and without a safety guard over the heating element and that the inclusion of these devices on the heat lamp would have prevented the plaintiff from being burned.

The parties presented their closing arguments on December 19, 2017. The plaintiff's counsel argued that there was evidence that the heat lamp was unreasonably dangerous due to (1) the propensity of the arm to lower, (2) the lack of a locking mechanism on the arm, (3) the lack of a safety guard over the heating element, (4) the lack of a warning sticker on the heat lamp, and/or (5) the lack of a user's manual. The plaintiff's counsel specifically argued that if there had been a safety guard over the heating element, then the plaintiff would not have been injured. During his rebuttal argument, counsel again emphasized that the lack of a safety guard caused the plaintiff's injuries.

The court charged the jury on December 19 and 20, 2017. At the outset, the court instructed the jury that the plaintiff had asserted a claim against WABBO that

the heat lamp used by Wang was unreasonably dangerous and defective. The court stated: "The plaintiff's specific allegations of defects and *inadequate preventative measures* include claims that WABBO placed the lamp into commerce, namely, sold it to . . . Wang, despite the absence of any warning affixed to the lamp concerning the heat plate's potential to cause harm and/or injury; the negligently-designed and/or manufactured condition of the lamp due to the failure to include adequate locking devices to prevent unintended lowering; the failure to provide a user manual or instructions for use with the lamp or on its website; and/or the failure to place a heating shield of some sort in front of the heating plate." (Emphasis added.)

The court then instructed the jury as to the elements of a claim under the Connecticut Product Liability Act. It informed the jury that the plaintiff only needed to prove one such deficiency or hazard in order to satisfy the necessary elements for this cause of action. With respect to the element of causation, the court defined "cause in fact" and proximate cause.

WABBO challenged the absence of proof regarding the causation element during the evidentiary phase of the trial and in a postverdict motion. On December 13, 2017, WABBO moved for a directed verdict, claiming that the plaintiff failed "to remove her claims that her injuries were caused by a defect in [WABBO's] product from the realm of speculation and conjecture." The court deferred its ruling on WABBO's motion pursuant to Practice Book § 16-37.[37]

[37] Practice Book § 16-37 provides: "Whenever a motion for a directed verdict made at any time after the close of the plaintiff's case-in-chief is denied or for any reason is not granted, the judicial authority is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. After the acceptance of a verdict and within the time stated in Section 16-35 for filing a motion to set a verdict aside, a party who has moved for a directed

On December 29, 2017, WABBO filed a motion to set aside the jury's verdict and incorporated the arguments it previously had set forth in its motion for a directed verdict. Specifically, WABBO again claimed that "the evidence presented by the plaintiff has failed to remove the issue of causation of her injuries from the realm of speculation and conjecture and the plaintiff has failed to sustain her burden of proof as to her claims of the Connecticut [Product] Liability Act . . . ."

In its January 3, 2019 memorandum of decision, the trial court addressed WABBO's causation arguments. The court noted that the plaintiff "need not prevail on more than one specification of negligence or product defect, in order to sustain the verdict." The court observed that "*the claimed lack of any specific mechanism for the lamp head to come into contact with the plaintiff's foot would not undermine the causative link between failing to protect against a hot surface coming into contact with the skin of a user or a user's client/patient. . . . [H]ow the lamp came into contact with the plaintiff's foot is not the issue when there is a claim that there should have been a protective feature or device which would have prevented an injury* however the lamp might have come into contact with an individual such as the plaintiff." (Emphasis added.)

Continuing its analysis, the court stated that Wu had acknowledged that, in 2008, it was technologically feasible and would have involved a minimal cost to add

verdict may move to have the verdict and any judgment rendered thereon set aside and have judgment rendered in accordance with his or her motion for a directed verdict; or if a verdict was not returned such party may move for judgment in accordance with his or her motion for a directed verdict within the aforesaid time after the jury has been discharged from consideration of the case. If a verdict was returned, the judicial authority may allow the judgment to stand or may set the verdict aside and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the judicial authority may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

protection over the face of the heat lamp. Wu also had indicated that locking mechanisms for the movable arm of the heat lamp were in use in similar products in 2008. The court found that "WABBO, as distributor of the product, was aware of the propensity for such lamps, over time to lose tension such that the lamp head could spontaneously lower. (A spring piston mechanism holds the arm and lamp head in position, but over time and with usage, the spring loses some of its ability to maintain the position of the lamp as originally set.) As a progression of loss of ability to hold its position, there would be an intermediate loss of tension, whereby some (decreasing over time) disturbance would be sufficient to cause a lowering, which technically would not be 'spontaneous.' " (Footnote omitted.)

The court then determined that there was "ample" evidence that there was no guard or safety mechanism to protect against contact with the head of the heat lamp. The court concluded: "With respect to the product liability claim . . . the jury was presented with sufficient evidence (lay and expert) that, combined with its own common sense and experience, was sufficient to support a finding that the [heat] lamp was defective, and that the defect caused the injuries to the plaintiff."

We begin by setting forth our standard of review and the relevant legal principles. Initially, we note that a "defendant must overcome a high threshold to prevail on either a motion for a directed verdict or a motion to set aside a judgment." (Internal quotation marks omitted.) *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 775, 83 A.3d 576 (2014). "A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny the defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts

proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Demond* v. *Project Service, LLC*, 331 Conn. 816, 833, 208 A.3d 626 (2019); see also *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017). The question of whether the evidence presented by the plaintiff was sufficient to withstand a motion for a directed verdict is a question of law, subject to plenary review by this court. *Pellet* v. *Keller Williams Realty Corp.*, 177 Conn. App. 42, 50, 172 A.3d 283 (2017); see also *Theodore* v. *Lifeline Systems Co.*, 173 Conn. App. 291, 307, 163 A.3d 654 (2017).[38]

Regarding a motion to set aside the verdict, the standard for appellate review is the abuse of discretion standard. "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached

[38] In *Pellet* v. *Keller Williams Realty Corp.*, supra, 177 Conn. App. 42, we noted that some of our decisions had applied the abuse of discretion standard when reviewing the granting of a motion for a directed verdict. "[A] line of cases out of this court has stated that we review a trial court's granting of a motion for a directed verdict for an abuse of discretion. . . . In tracing the origins of this assertion, it is clear that this standard improperly became conflated at one point with the standard of review for challenges to the grant or denial of motions to set aside a verdict. . . . In any event, because we are bound by the precedent of our Supreme Court as the ultimate arbiter of state law; see *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010); we apply the standard of review that it has held proper for a challenge to a trial court's granting of a motion for a directed verdict. That standard is plenary. See, e.g., *Curran* v. *Kroll*, [303 Conn. 845, 855, 37 A.3d 700 (2012)]." (Citations omitted.) *Pellet* v. *Keller Williams Realty Corp.*, supra, 50 n.9.

the verdict that it did. . . . In reviewing the action of the trial court in denying [or granting a motion] . . . to set aside the verdict, our primary concern is to determine whether the court abused its discretion . . . ." (Internal quotation marks omitted.) *Rendahl* v. *Peluso*, 173 Conn. App. 66, 94–95, 162 A.3d 1 (2017); see also *Viking Construction, Inc.* v. *TMP Construction Group, LLC*, Conn. , , A.3d (2021).

We are mindful that "[t]his court has emphasized two additional points with respect to motions to set aside a verdict that are equally applicable to motions for a directed verdict: *First, the plaintiff in a civil matter is not required to prove his case beyond a reasonable doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical function of the jury find their roots in the constitutional right to a trial by jury.* . . . This standard also requires the trial court to consider the evidence, including reasonable inferences, in the light most favorable to the plaintiff." (Citation omitted; emphasis added; internal quotation marks omitted.) *Pellet* v. *Keller Williams Realty Corp.*, supra, 177 Conn. App. 48–49.

The elements of a product liability action are well established. "In a products liability action, the plaintiff must plead and prove that the product was defective and that the defect was the proximate cause of the plaintiff's injuries. . . . A product is defective when it is unreasonably dangerous to the consumer or user. . . . The established rule in Connecticut is that [a] product may be defective because a manufacturer or seller failed to warn of the product's unreasonably dangerous propensities. . . . Under such circumstances, the failure to warn, by itself, constitutes a defect." (Citations omitted; internal quotation marks omitted.) *Battistoni* v. *Weatherking Products, Inc.*, 41 Conn. App. 555, 562, 676 A.2d 890 (1996); see also *Haesche* v. *Kissner*, 229 Conn. 213, 218, 640 A.2d 89 (1994).

WABBO has challenged only the causation element in its appeal. We note that "[*p*]*roof that a defect in the product caused the injury in controversy is a prerequisite to recovery for product-caused injury in every products liability case*, whether the action is grounded on negligence, breach of warranty, strict liability in tort . . . or a combination of such theories. . . . *Theodore* v. *Lifeline Systems Co.*, supra, 173 Conn. App. 308. When the causation issue involved goes beyond the field of ordinary knowledge and experience of judges and jurors, expert testimony is required." (Emphasis added; internal quotation marks omitted.) *Ferrari* v. *Johnson & Johnson, Inc.*, 190 Conn. App. 152, 162, 210 A.3d 115 (2019); see also *Sharp* v. *Wyatt, Inc.*, 31 Conn. App. 824, 833, 627 A.2d 1347 (1993) (plaintiff must plead and prove that defendant's product was defective and proximately caused injuries), aff'd, 230 Conn. 12, 644 A.2d 871 (1994); *Wierzbicki* v. *W.W. Grainger, Inc.*, 20 Conn. App. 332, 334, 566 A.2d 1369 (1989) (same).

Our courts have applied the following test for causation in cases involving a claim under our Product Liability Act. "The causation inquiry has two facets: (1) cause-in-fact; and (2) legal or proximate cause. These two components ask the following questions respectively: (1) whether the defendant's conduct was the cause-in-fact of the injury; and, if so; (2) whether as a matter of social policy the defendant should be held legally responsible for the injury. Proof of proximate cause requires proof of both cause-in-fact and legal cause. . . . 63 Am. Jur. 2d 55–58, Products Liability § 21 (2010). Cause-in-fact, also referred to as actual cause, asks whether there was a sufficiently close, actual, causal connection between the defendant's conduct and the actual damage suffered by the plaintiff. It requires that there be a direct causal connection between the negligence or product defect and the injury. That is, it refers to the physical connection between an act and an

injury. . . . 63 Am. Jur. 2d, supra, § 24, p. 60." (Internal quotation marks omitted.) *Theodore* v. *Lifeline Systems Co.*, supra, 173 Conn. App. 308–309. "[*T*]*he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the* [*victim's*] *injuries*." (Emphasis added; internal quotation marks omitted.) *DeOliveira* v. *PMG Land Associates, L.P.*, 105 Conn. App. 369, 378, 939 A.2d 2 (2008); see also *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 433, 820 A.2d 258 (2003) (test for proximate cause is whether defendant's conduct is substantial factor in bringing about plaintiff's injuries); *Wagner* v. *Clark Equipment Co.*, 243 Conn. 168, 178, 700 A.2d 38 (1997) (same).

A thorough review of the pleadings, evidence, closing arguments, and jury charge establish that the plaintiff alleged and presented evidence of various means in which WABBO's defective product, the heat lamp, caused her injuries. In addition to the lowering of the arm holding the heat lamp, the plaintiff maintained that the lack of (1) a locking mechanism, (2) a safety guard, (3) a user manual, or (4) a warning regarding the propensity of the arm to lower each constituted a substantial factor, and thus proximately caused her injuries on April 22, 2010. In its appellate brief, WABBO focuses primarily on the question of how the heat lamp lowered onto the plaintiff's foot and whether there was evidence that this lowering occurred spontaneously or due to some outside force. WABBO summarily contends that the absence of a locking mechanism and the guard went to the issue of a defect and not causation.

Contrary to the bald assertion made by WABBO, we conclude, on the basis of our comprehensive review of the pleadings and evidence in this case, that the plaintiff presented to the jury alternative methods of causation and did not limit consideration of the causation element to how or why the arm of the heat lamp lowered. There was sufficient evidence in the court record for the jury to find that the lack of a safety guard over the heating

element was a substantial factor, and thus a proximate cause, of the plaintiff's injuries to her left foot. WABBO did not submit jury interrogatories to specify which of the alternative bases of causation the jury used to reach its verdict.

In the present case, due to the lack of jury interrogatories, the only manner in which WABBO can prevail would be to establish that the evidence was insufficient to support any of the specifications of causation pursued by the plaintiff. See *Seven Oaks Enterprises, L.P.* v. *Devito*, 185 Conn. App. 534, 558–59, 198 A.3d 88, cert. denied, 330 Conn. 953, 197 A.3d 893 (2018); *Jackson* v. *H.N.S. Management Co.*, 109 Conn. App. 371, 372–73, 951 A.2d 701 (2008). It failed, however, to challenge the claims that the lack of a locking mechanism, safety guard, user manual or warning regarding the propensity of the arm of the heat lamp to lower was a substantial factor, and thus the proximate cause, of the burns suffered by the plaintiff. The failure to challenge these matters is fatal to WABBO's appeal. Accordingly, we conclude that the court properly denied WABBO's motions for a directed verdict and to set aside the verdict.

The judgment is reversed with respect to the medical malpractice claims against Wang and the Center for Women's Health, P.C., and the case is remanded with direction to render judgment dismissing those claims against them; the judgment with respect to the product liability claim is affirmed.

In this opinion the other judges concurred.

KENNETH S. KEMON *v.* KENNETH BOUDREAU, EXECUTOR (ESTATE OF ELIZABETH LEE KEMON BOUDREAU), ET AL.
(AC 42918)

KENNETH KEMON *v.* KENNETH BOUDREAU, EXECUTOR (ESTATE OF ELIZABETH LEE KEMON BOUDREAU), ET AL.
(AC 42919)

Alvord, Moll and Alexander, Js.

Syllabus

The plaintiff, S, and his sister, E, were beneficiaries of a trust, executed by their father. E was the original trustee until her death in 2016, when the defendant K became the successor trustee. Upon E's death, K represented to S that the trust's assets had been fully disbursed to S and E, but for $50,000 that had been set aside in a lawyers' trust account as a litigation reserve. Thereafter, the Probate Court approved an accounting submitted by K in 2016. Subsequently, S appealed to the Superior Court in 2017 from the probate order approving the 2016 accounting, claiming that the 2016 accounting was incomplete. In addition, S commenced a separate action in 2018 in the Superior Court, with similar claims to the probate appeal, but he also included claims asserting breach of trust, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and tortious interference with an expectation of inheritance in counts two, three, four and six against K for his actions involving the payment of various fees and the $50,000 litigation reserve. The cases were consolidated for trial, and the trial court rendered judgment for the defendants in each case. *Held*:

1. The trial court erred in determining that S had abandoned counts two, three, four, and six at trial in the Superior Court action on the basis of statements by S's counsel made during closing argument, as S adequately advanced counts two, three, four, and six at trial for the court's consideration: during closing argument, S's counsel identified punitive damages in the form of attorney's fees as one of S's requests for relief predicated on K's alleged "wilful, wanton conduct," counts two, three, four, and six were supported by allegations that K had engaged in "wilful, wanton" conduct, and, collectively, counsel's statements implicated the allegations pleaded by S in support of those counts concerning K's conduct; moreover, the trial court's articulation addressing counts two, three, four, and six must be disregarded, as the articulation was inconsistent with the memorandum of decision in which the trial court originally disposed of those counts only on the ground that S had abandoned them, and the articulation instead improperly addressed the merits of all or some of S's claims.

2. The trial court erred in rendering judgment in favor of K in the probate appeal, as S's receipt of an accounting in 2018 satisfied the relief he was pursuing in his probate appeal during its pendency; because there was no practical relief that the court could have granted him, the court was deprived of subject matter jurisdiction over the probate appeal, and, accordingly, the court's lack of subject matter jurisdiction necessitated a judgment of dismissal rather than a judgment for the defendants on the merits and, therefore, the form of the judgment was improper.

Argued February 11—officially released June 29, 2021

Procedural History

Action, in the first case, for an order to compel an accounting of a trust, and for other relief, brought to the Superior Court in the judicial district of Hartford, and an appeal, in the second case, from an order of the Probate Court approving an accounting, brought to the Superior Court in the judicial district of Hartford, where the cases were consolidated and transferred to the Complex Litigation Docket and tried to the court, *Moukawsher, J.*; judgments for the named defendant et al., from which the plaintiff filed separate appeals to this court. *Reversed in part*; *new trial in Docket No. AC 42918*; *improper form of judgment*; *reversed*; *judgment directed in Docket No. AC 42919*.

E. James Loughlin, for the appellant in each case (plaintiff).

Charles D. Ray, with whom, on the brief, were *James E. Regan* and *Angela M. Healey*, for the appellees in each case (named defendant et al.).

Opinion

MOLL, J. These consolidated appeals arise from a dispute between the plaintiff, Kenneth S. Kemon, who is a trust beneficiary, and the defendant Kenneth Boudreau, who is, among other things, the executor of the estate of the deceased trustee, Elizabeth Lee Kemon Boudreau (trustee). With respect to Docket No. AC 42918, the plaintiff appeals from the judgment of the

trial court rendered in favor of the defendant[1] on the plaintiff's amended complaint. On appeal, the plaintiff claims that the court improperly concluded that (1) he had abandoned at trial counts two, three, four, and six of his amended complaint, and (2) to the extent that the court addressed, in a postappeal articulation, the merits of his breach of fiduciary duty claim set forth in count four of his amended complaint, the court improperly determined that there was no evidence in the record demonstrating that the defendant breached any duty owed to the plaintiff. We agree with the plaintiff that the court committed error in concluding that he had abandoned the aforementioned counts of his amended complaint. Accordingly, we reverse in part the judgment rendered in AC 42918. With respect to Docket No. AC 42919, the plaintiff appeals from the judgment of the court rendered for the defendant in the plaintiff's appeal from a probate order approving an accounting. On appeal, the plaintiff claims that the court incorrectly rendered judgment in the defendant's favor notwithstanding that the probate appeal had been rendered moot. We conclude that the probate appeal became moot during its pendency, at which point the court was divested of subject matter jurisdiction over it. We further conclude that the form of the judgment is improper because the court's lack of subject matter jurisdiction necessitated a judgment dismissing the probate appeal, rather than a judgment for the defendant on the merits. Accordingly, we reverse the judgment rendered in AC 42919.

[1] In the two matters underlying these consolidated appeals, Kenneth Boudreau was named as a defendant (1) in his capacity as the executor of the trustee's estate, (2) in his capacity as the legal representative of the trustee, and/or (3) in his personal capacity. See footnotes 4 and 5 of this opinion. Several other individuals were named as defendants in one or both of the underlying matters, but none of those other defendants is participating in these consolidated appeals as the plaintiff did not pursue any claims against them. For the sake of simplicity, we will refer in this opinion to Kenneth Boudreau in his collective capacities as the defendant.

The following facts and procedural history are relevant to our resolution of these consolidated appeals. On December 21, 2009, Solon B. Kemon, the plaintiff's father (grantor), executed an inter vivos trust (trust). The trust named Elizabeth Lee Kemon Boudreau, the plaintiff's sister, as the trustee. The plaintiff and the trustee were the primary beneficiaries of the trust.

Section 5.5 of the trust provided in relevant part that, upon request, the trustee "shall render an account of the administration of the trust to the then living adult income beneficiaries and adult remainderman . . . and the approval thereof by the living adult beneficiaries and living adult remainderman shall be conclusively binding upon all parties in interest under this [a]greement. . . ."

On August 8, 2012, the grantor died. On May 1, 2016, the trustee died. Thereafter, the defendant was appointed as the executor of the trustee's estate.

On August 11, 2016, in order to "resolve the issues" raised in a civil action filed in July, 2016, by the plaintiff against the trustee,[2] the defendant filed with the Probate Court for the district of Simsbury a petition to approve an appended accounting reflecting the trust's transactions from August 8, 2012, to April 30, 2016 (2016 accounting). The defendant represented that, at the time of the trustee's death on May 1, 2016, the trust's assets had been fully disbursed to the plaintiff and the trustee with the exception of $50,000 that had been set aside in a lawyers' trust account by Attorney John F. Kearns III, who was the defendant's attorney at the time and who had represented the trustee prior to her death,

[2] In July, 2016, the plaintiff filed an action in the Superior Court demanding that the trustee provide him with an accounting of the trust. See *Kemon* v. *Boudreau*, Superior Court, judicial district of Hartford, Docket No. CV-16-6069772-S. On October 7, 2016, the plaintiff withdrew that action after having learned that the trustee had died prior to service of process.

"for litigation and probate accounting fees due to the acrimony between the parties" ($50,000 litigation reserve).[3] On January 18, 2017, the Probate Court, *Becker*, *J.*, approved the 2016 accounting, but ordered the defendant to amend it to include a certain condominium unit in Simsbury (Simsbury condominium unit) and its fair market value. On January 20, 2017, the defendant filed an informational schedule to the 2016 accounting, which listed the Simsbury condominium unit as having no value.

Soon thereafter, the plaintiff appealed to the Superior Court from the probate order approving the 2016 accounting (2017 probate appeal). In a revised complaint filed on May 18, 2017, which became the plaintiff's operative pleading in the 2017 probate appeal, the plaintiff alleged, inter alia, that the 2016 accounting was incomplete. The defendant[4] subsequently filed an answer denying the material allegations set forth in the revised complaint.

On February 5, 2018, during the pendency of the 2017 probate appeal, the plaintiff commenced a separate civil action in the Superior Court against the defendant (2018 action).[5] The plaintiff's original one count complaint filed in the 2018 action was substantively similar to his revised complaint filed in the 2017 probate appeal—that is, the crux of the allegations in those pleadings was that the 2016 accounting was incomplete.

On March 31, 2018, the 2017 probate appeal and the 2018 action were consolidated for trial, and they subse-

[3] During trial, Attorney Kearns testified that, upon his recommendation, the trustee decided to set aside the $50,000 litigation reserve.

[4] In the 2017 probate appeal, the defendant was named as a party only in his capacity as the executor of the trustee's estate.

[5] In the plaintiff's original complaint filed in the 2018 action, the defendant was named as a party only in his capacity as the executor of the trustee's estate. The plaintiff subsequently moved to cite in the defendant, both in his personal capacity and in his capacity as legal representative of the trustee, which the court, *Budzik*, *J.*, granted on October 3, 2018.

quently were transferred to the Complex Litigation Docket. In August, 2018, while the 2017 probate appeal and the 2018 action were pending, the defendant delivered to the plaintiff an updated accounting for the trust (2018 accounting).

On October 26, 2018, the plaintiff filed an amended six count complaint in the 2018 action, which became his operative complaint therein. In count one, titled "Action to Compel Accounting," the plaintiff alleged only that the defendant had delivered to him the 2018 accounting. The remaining counts included an objection to the 2018 accounting, as well as claims asserting breach of trust, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and tortious interference with an expectation of inheritance. On January 31, 2019, the defendant filed a revised answer denying the material allegations of the amended complaint, except for his admission to the allegation in count one that he had delivered the 2018 accounting to the plaintiff. The defendant also asserted various special defenses and claimed two setoffs. On February 19, 2019, the plaintiff filed a reply denying the special defenses and the setoffs.

The 2017 probate appeal and the 2018 action were tried to the trial court, *Moukawsher*, *J.*, on March 26, 27, and 28, 2019.[6] On March 29, 2019, the court issued a memorandum of decision rendering judgment in the defendant's favor in each of the matters. On April 17,

[6] With respect to the 2017 probate appeal, we observe that "[a]n appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court. . . . When, as here, no record was made of the Probate Court proceedings, the absence of a record requires a trial de novo." (Citation omitted; internal quotation marks omitted.) *Silverstein* v. *Laschever*, 113 Conn. App. 404, 409, 970 A.2d 123 (2009).

2019, the plaintiff filed a combined motion seeking to open the judgments and to reargue, which the court denied on April 23, 2019. These consolidated appeals followed.[7] Additional facts will be set forth as necessary.

I

AC 42918

In AC 42918, the plaintiff appeals from the judgment rendered by the trial court in the defendant's favor in the 2018 action. The plaintiff claims that (1) the court improperly concluded that he had abandoned counts two, three, four, and six of his amended complaint at trial, and (2) to the extent that the court adjudicated count four of his amended complaint, asserting breach of fiduciary duty, in a postappeal articulation, the court improperly determined that there was no evidence demonstrating that the defendant breached a legally recognized duty owed to the plaintiff. We agree with the plaintiff's first claim of error.[8]

The following additional facts are relevant to our resolution of this appeal. The plaintiff's amended complaint contained the following six counts: (1) demand to compel an accounting (count one); (2) breach of trust (count two); (3) breach of the implied covenant of good faith and fair dealing (count three); (4) breach of fiduciary duty (count four); (5) objection to the 2018 accounting (count five);[9] and (6) tortious interference

[7] On May 9, 2019, the plaintiff filed separate appeals from the respective judgments rendered in the 2017 probate appeal and in the 2018 action. These appeals were consolidated on June 25, 2019.

[8] As we explain later in part I of this opinion, the court could not use its articulation to address the merits of the plaintiff's claims that the court, in its memorandum of decision, had deemed to have been abandoned. Thus, our conclusion that the court improperly concluded that the plaintiff had abandoned counts two, three, four, and six of his amended complaint at trial is dispositive of the plaintiff's appeal in AC 42918.

[9] Because count five is not at issue on appeal, we limit our discussion of the allegations in support of that count. See footnote 16 of this opinion.

with an expectation of inheritance (count six). Count one did not assert a claim actually seeking relief; rather, the plaintiff alleged only that the defendant had delivered the 2018 accounting to him.[10] In support of counts two, three, four, and six, the plaintiff alleged, inter alia, that he had suffered harm as a result of the defendant's failure to provide him with the 2018 accounting until more than two years following the trustee's death. Counts three, four, and six also alleged certain "aggravating circumstances," including that the defendant refused to provide the plaintiff with access to trust records. To further support counts two, three, four, and six, the plaintiff alleged, either directly or by incorporation, that the defendant's conduct had been "wilful, wanton and carried out with the reckless disregard for the interests and rights of the plaintiff, causing damages for which the defendant is liable." In count five, the plaintiff alleged that the 2018 accounting was "unsatisfactory" in a number of ways.

At the end of the first day of evidence, the trial court notified the parties that, as a matter of procedure, the court preferred that they "get done with the evidence and then we have what argument we need to have. In other words, I don't ask the parties to make one hour presentations followed by half an hour followed by twenty minutes or anything like that. What I prefer is a lively exchange, which, in other words, I'll give the parties some idea of what I'm thinking about, and then we can have an exchange in which I ask questions and make notes and do that to the extent we have to. If there are any questions of law that are in dispute, which I'm not sure there will be, then that would be the time to bring them to my attention. In other words, I don't need posttrial briefs. What I need is a thorough closing—closing argument exchange. And if there's something that comes up during closing argument that you

[10] In his principal appellate brief, the plaintiff states that his receipt of the 2018 accounting "dispensed with count [one]."

need more time about or you want to submit something about, we just discuss it at the time. I'm not going to cut anybody off or prevent them from providing me with things that are needed, but I'd much prefer a vigorous closing argument to a period of thirty days going by where everyone forgets about the case and then we try to brief it and then, you know, several months later we have argument or something like that. So my intention is we go right into argument once—once evidence is over. And I don't mean that entirely literally. Sometimes people say, 'Well, can't we come back tomorrow or something?' I'm not going to press you instantly to go into closing argument. But don't be thinking so much about speech making for closing arguments as an exchange. I'm going to give you some ideas of what I'm thinking about, and then you can answer my questions and tell me where I've got it wrong and where you think I've got it right. And we can go back and forth as long as we need to make it productive. So any questions on that?" Neither party objected to that proposed procedure.

On the final day of trial, after the close of evidence, the following colloquy occurred:

"The Court: Now we have closing arguments to discuss. So what I'd suggest is that if the parties want the time we can do closing arguments at 2 p.m. If you are urgently wishing to end this whole thing by 1 [p.m.] we could start closing arguments at 12:30 [p.m.] and get them over with. I'll leave it up to the parties.

"[The Plaintiff's Counsel]: My understanding was there was going to be a lively exchange, you were going to give us some issues to think about and then—

"The Court: Yeah, I'm going to ask questions and we'll be back and forth.

"[The Plaintiff's Counsel]: And I'm looking forward to that to bring more issues that I can understand and look into and then I got the impression that we were going to come back a day or two later after that?

"The Court: Well, what I indicated about that—no, no, no, what I indicated about that is if you wanted to come back a day or two from now to do closing arguments, which would be the lively exchange I described we can do that. I don't see any reason why we shouldn't do them while you're here. And I think probably to give you enough time you might want to wait until 2 [p.m.], but if you don't want to we can take a break . . . and pick it up at 12:30 [p.m.], but I wouldn't want to go less than a half an hour. But I'm going to ask questions, such as, I want to make sure I understand the universe of things that you're claiming in the case. What is the relief that you're after and then the evidence that supports these things and then that tends to lead to the back and forth. [The defendant's counsel] will comment on those things and we'll go back and forth about it. So the question is do you want to do [it] at 12:30 [p.m.] or 2 [p.m.]?

"[The Plaintiff's Counsel]: I'm sort of feeling like doing it right now.

"The Court: Oh.

"[The Plaintiff's Counsel]: But what happens if in the middle of it there's a question of law that I hadn't thought of?

"The Court: Well, then you'd indicate that to me and I can give you time or we'll do whatever it is.

"[The Plaintiff's Counsel]: Okay.

"The Court: Sometimes what happens is something comes up and I can get a quick answer to it, sometimes I can't. But I'm not going to just say times up you don't get to look up this case or something like that. I won't do that to you. But you want to start right now?

"[The Plaintiff's Counsel]: I'm ready right now.

"[The Defendant's Counsel]: Your Honor, that's certainly fine with the defendant to start now."

After a brief discussion regarding the status of an exhibit, counsel for both parties reaffirmed that they were prepared to proceed with argument. The court then asked the plaintiff's counsel to specify "each thing that [the plaintiff is] asking for in terms of relief." The plaintiff's counsel identified four items. First, he requested that the $50,000 litigation reserve be returned to the trust. He argued that, under the common law, the defendant was not entitled to those funds unless the defendant prevailed in the litigation.[11]

Second, the plaintiff's counsel requested $9225 as reimbursement for legal fees that the plaintiff had incurred with respect to his portion of certain real property in Vermont that had been left to the plaintiff and the trustee by their deceased mother's trust (Vermont property). He argued that the trustee had used funds from the trust (that is, the inter vivos trust executed by the grantor) to pay fees in developing her portion of the Vermont property, such that he was entitled to reimbursement for fees that he had expended in relation to his portion of the Vermont property.

Third, the plaintiff's counsel requested $11,907, which represented condominium fees for the Simsbury condominium unit that the trustee had paid using trust funds. He argued that those fees could have been avoided.

Last, the plaintiff's counsel requested common-law punitive damages in the form of attorney's fees for "wilful, wanton conduct." In support thereof, the plaintiff's counsel referenced the portion of count six alleging that the defendant had engaged in tortious conduct

[11] Initially, as an alternative argument, the plaintiff's counsel argued that the terms of the trust barred the expenditure of the $50,000 litigation reserve. Subsequently, the plaintiff's counsel appeared to abandon that alternative argument. The court then asked the plaintiff's counsel to confirm that he had "one argument here. . . . [T]he claim here is not that the [trust] instru-

interfering with the plaintiff's expectation of an inheritance, which, the plaintiff further alleged, was "wilful, wanton and carried out with the reckless disregard for the interests and rights of the plaintiff . . . ." The court asked the plaintiff's counsel to confirm that he was requesting that the court "make a finding [awarding attorney's fees as punitive damages] and then hold a hearing later on [regarding] the amount if [the court made] such a finding," to which counsel replied in the affirmative.

At the close of argument, the plaintiff's counsel stated the following: "We have spoken about please give us an inventory and all the receipts and all the distributions [with respect to the trust] for the period from inception until . . . death. That's what we have said. All along the way counsel has addressed other issues that we may have brought up during the litigation that were not presented here at trial. But when we came here to trial all we talked about was we needed information about [the trust from] inception to death and we didn't get those until about a month ago [in February, 2019],[12] notwithstanding all the demands that we had made. And [the defendant] acknowledge[s] that [the] $50,000 [litigation reserve] was held back. [The trustee] told [the defendant] 'don't tell [the plaintiff] that I've died.'[13] It's almost like a movie. Those were [the trustee's] last words. And so [the plaintiff] didn't know that the money

ment wouldn't allow it. The claim is that the trustee must prevail in order to get fees; is that correct?" The plaintiff's counsel responded in the affirmative.

[12] During trial, the plaintiff testified that, in February, 2019, in response to discovery requests, the defendant delivered to the plaintiff an electronic disc with thousands of "trust documents." The electronic disc was entered into the record as a full exhibit.

[13] During trial, the defendant testified that, shortly before the trustee's death on May 1, 2016, the trustee instructed him not to inform the plaintiff of her death. The plaintiff testified that he did not learn of the trustee's death until August, 2016, in connection with the civil action that he had filed against the trustee in July, 2016. See footnote 2 of this opinion.

was there. He didn't know that he was supposed to be the trustee until the money was already gone.[14] And then after that they refused the records. They refused the accountings. We asked for checks. We asked for the invoices. There were 4000 pages on [an] . . . electronic disc and that's when all the answers were provided and that's when we pared down our argument to the few that we've made right now.

"Had we received that [electronic] disc, had we received those materials back in April, [2016], when I initially demanded them, nicely demanded them, none of my fees would have been incurred. We would have had some of that [$50,000 litigation reserve] sent back. None of this would have happened." (Footnotes added.)

In its memorandum of decision, the court stated that the 2017 probate appeal and the 2018 action "reflect [the plaintiff's] complaints against [the trustee's] handling of the trust. Lest there be confusion, the plaintiff . . . asks for four things and four things only: [1] $50,000 [that] the trust put aside anticipating litigation and has fully spent; [2] $9225 in legal fees [the plaintiff] spent developing his half of the [Vermont property] . . . left to [the plaintiff and the trustee] equally; [3] $11,907 in condo fees [the plaintiff] says should have been avoided; [and (4) the plaintiff's] attorney's fees in this litigation." As to the plaintiff's claim concerning the $50,000 litigation reserve, the court concluded that the claim failed because the defendant was the prevailing party. With respect to the plaintiff's claim seeking $9225 as reimbursement for his legal fees in relation to the Vermont property, the court concluded, inter alia, that the plaintiff's request for reimbursement was untimely.

[14] Section 4.1 of the trust provided in relevant part that, if the trustee failed "to qualify, [was] unable to act or cease[d] to serve for any reason," then the plaintiff would be appointed as the successor trustee. During trial, the plaintiff testified that he had filed an application with the Probate Court to be appointed as the successor trustee, but he elected not to pursue the application.

As to the plaintiff's claim seeking $11,907 in fees relating to the Simsbury condominium unit, the court concluded that (1) the terms of the trust limited the trustee's liability to wilful misconduct and (2) the trustee made an unassailable "judgment call" to attempt diligently to sell the Simsbury condominium unit, but ultimately was unsuccessful.[15] With respect to the plaintiff's final claim seeking punitive damages, the court concluded that "[the plaintiff] made clear on the record that his only claim for attorney's fees was based upon a claim that they should be awarded as punitive damages. [The trustee] did nothing wrong. There is no basis for [the plaintiff] to recover his [attorney's] fees." The court then rendered judgment for the defendant without reference to any specific counts of the plaintiff's amended complaint.

In his ensuing combined motion to open the judgments and to reargue, the plaintiff contended in relevant part that the court's memorandum of decision disposed of count five, asserting an objection to the 2018 accounting, but failed to address counts two, three, four, or six, which, according to the plaintiff, contained allegations that the defendant "wilfully, wantonly and recklessly withheld trust information from the plaintiff that, had it been presented when originally requested, would have avoided litigation altogether." The plaintiff further asserted that the court focused its analysis on the trustee's conduct while ignoring the plaintiff's allegations against the defendant, notwithstanding that "this action is against the defendant . . . and the causes of action against him . . . should be adjudicated . . . ." In denying the plaintiff's motion, the court stated in relevant part that "the court was not required to make fact findings with respect to matters immaterial to the relief

[15] As the court found, "[a]fter eighteen months of trying [the trustee] gave up and turned the [Simsbury condominium unit] in for nothing to the condo association."

sought. The other matters raised in the motion were immaterial in that regard."

Following the filing of these consolidated appeals, pursuant to Practice Book § 66-5, the plaintiff filed a motion seeking an articulation of the court's disposition of counts two, three, four, and six. The plaintiff contended that the memorandum of decision did not address any of the alleged actions committed by the defendant following the trustee's death, which formed the crux of counts two, three, four, and six.

On August 23, 2019, the court issued an articulation stating that the memorandum of decision "does not address the conduct of the defendant . . . because at trial the plaintiff . . . chose to limit the relief he claimed to matters that turned only on alleged wrongdoing by [the trustee]. The only relief item that affected [the defendant] at all was a claim that [the defendant] shouldn't have used [the $50,000 litigation reserve] for fees in this litigation. About this, [the plaintiff] conceded that he would have to win his claims of wrongdoing by [the trustee] to win his claim that this money shouldn't have been used. And [the plaintiff] didn't win. So by [the plaintiff's] own admission, he couldn't win his claim about the fees either."

The court further stated that, "[e]ven if findings should be made regarding conduct not at issue in this case, having considered all of the evidence, it is plain that [the defendant] committed no breach of any duty as [the plaintiff] may have alleged it. The evidence as it relates to [the defendant] revealed in substance only quibbles over the timing and the completeness of documents provided during the course of the dispute. No evidence supported claims concerning [the defendant] breaching a legally recognized duty. Instead, the evidence at trial focused on the matters related to the [trustee's] decisions and actions before [the defendant] assumed her duties upon her death. [The plaintiff's]

only other complaint about [the defendant] appeared to be his failure promptly to inform [the plaintiff] that [the trustee] had died. But [the plaintiff] never connected this claim to a duty owed that was breached, and which, by virtue of being breached, merited any of the relief [the plaintiff] chose to seek at trial."

In summary, the court stated that "[the defendant's] actions were not in issue at the trial because they were unrelated to the claims [the plaintiff] chose to press. But even if they were, [the defendant] breached no duty, and his actions were disconnected to the actual wrongs and relief [the plaintiff] claimed."

The dispositive claim raised by the plaintiff is that the court improperly concluded that, on the basis of his counsel's statements during closing argument, he had abandoned counts two, three, four, and six at trial. The plaintiff maintains that the record reflects that he preserved those counts for adjudication by the court.[16] The defendant argues that the court correctly concluded that the plaintiff had abandoned counts two, three, four, and six. We agree with the plaintiff.

The following standard of review and legal principles are applicable here. "Because . . . the idea of abandonment involves both a factual finding by the trial court and a legal determination that an issue is no longer before the court, we will treat this claim as one of both law and fact. Accordingly, we will accord it plenary review." *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 479, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

Pursuant to Practice Book § 5-2, "[a]ny party intending to raise any question of law which may be the subject of an appeal must either state the question distinctly to the judicial authority in a written trial brief under

[16] The plaintiff is not appealing from the portion of the judgment disposing of count five in the defendant's favor.

Section 5-1 or state the question distinctly to the judicial authority on the record before such party's closing argument and within sufficient time to give the opposing counsel an opportunity to discuss the question. If the party fails to do this, the judicial authority will be under no obligation to decide the question." Additionally, Practice Book § 64-1 (a) provides in relevant part that "[t]he trial court shall state its decision either orally or in writing . . . in rendering judgments in trials to the court in civil and criminal matters . . . . The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. . . ." "The responsibility of a court is to respond to those claims fairly advanced." (Internal quotation marks omitted.) *Auerbach* v. *Auerbach*, 113 Conn. App. 318, 334, 966 A.2d 292, cert. denied, 292 Conn. 902, 971 A.2d 40 (2009). "The mere recital of . . . claims in a [complaint], without supporting oral or written argument, does not adequately place those claims before the court for its consideration. This is particularly true when counsel has been warned by the court . . . that it would consider abandoned any claims not advanced by counsel in closing argument." *Solek* v. *Commissioner of Correction*, supra, 107 Conn. App. 480–81.

After a careful review of the record, we conclude that the plaintiff adequately advanced counts two, three, four, and six at trial for the court's consideration. During closing argument, the plaintiff's counsel identified punitive damages in the form of attorney's fees as one of the plaintiff's requests for relief predicated on the defendant's alleged "wilful, wanton conduct . . . ." Counts two, three, four, and six were supported by allegations that the defendant had engaged in "wilful, wanton" conduct. Additionally, at the end of his closing argument, the plaintiff's counsel argued in relevant part that (1) at trial "all we talked about was we needed information about [the trust from] inception to death," (2) despite

the plaintiff's demands, the defendant refused to supply trust records and accountings, (3) the defendant delivered to the plaintiff the electronic disc containing trust documents in February, 2019; see footnote 12 of this opinion; and (4) had the plaintiff been provided with the information contained on the electronic disc sooner, "none of [counsel's] fees would have been incurred, [w]e would have had some of the [$50,000 litigation reserve] sent back, [and] [n]one of this would have happened." Collectively, counsel's statements implicate the allegations pleaded by the plaintiff in support of counts two, three, four, and six concerning conduct by the defendant.[17] Accordingly, we conclude that the court incorrectly concluded that the plaintiff had abandoned counts two, three, four, and six at trial.

At this juncture, we must address briefly the court's August 23, 2019 articulation. In the articulation, the court (1) reiterated that conduct by the defendant, which comprised the core of the allegations in counts two, three, four, and six, was not at issue at trial because it was "unrelated to the claims [the plaintiff] chose to press," and (2) "even if" the defendant's actions were at issue, the plaintiff failed to demonstrate that the defendant had breached any duty owed to the plaintiff. The court's memorandum of decision, its denial of the plaintiff's combined motion to open the judgments and to reargue, and its articulation, make apparent that the court originally disposed of counts two, three, four, and six *only* on the ground that the plaintiff had abandoned them. To the extent that the court, in its articulation, addressed the merits of any or all of counts two, three, four, and six, the articulation is inconsistent with the memorandum of decision and must be disregarded

[17] Additionally, we note that the evidence produced at trial was not limited to actions taken by the trustee prior to her death, but included the defendant's conduct following the trustee's death.

because "[a]n articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision." *Koper* v. *Koper*, 17 Conn. App. 480, 484, 553 A.2d 1162 (1989); see also *Sosin* v. *Sosin*, 300 Conn. 205, 240, 14 A.3d 307 (2011) (disregarding trial court's articulation and order that were inconsistent with court's original order, as subsequently clarified, regarding interest award); *Casiraghi* v. *Casiraghi*, 200 Conn. App. 771, 785 n.13, 241 A.3d 717 (2020) (trial court could not use articulation to set forth findings concerning plaintiff's ability to pay and status of his payment obligations regarding former marital home when court admitted that it did not make such findings in court's original contempt decision); *Pecan* v. *Madigan*, 97 Conn. App. 617, 623, 905 A.2d 710 (2006) (trial court could not use articulation to state that it had stricken counts as legally insufficient when court's original decision reflected that court had stricken counts on basis of prior pending action doctrine), cert. denied, 281 Conn. 919, 918 A.2d 271 (2007); *Kelly* v. *Kelly*, 54 Conn. App. 50, 54 n.3, 732 A.2d 808 (1999) (this court was "constrained to follow" trial court's original decision granting motions rather than court's inconsistent articulation denying motions).

In sum, we conclude that the court committed error in concluding that the plaintiff had abandoned counts two, three, four, and six at trial. Accordingly, we reverse the portion of the court's judgment rendered on those counts and remand the case for a new trial on those counts.

II

AC 42919

In AC 42919, the plaintiff appeals from the judgment rendered in the defendant's favor in the 2017 probate appeal. The plaintiff claims that the court improperly rendered judgment for the defendant notwithstanding

that the 2017 probate appeal became moot following (1) the plaintiff's receipt of the 2018 accounting and (2) the court's rejection of count five of his amended complaint filed in the 2018 action, in which he asserted an objection to the 2018 accounting. For the reasons that follow, we conclude that the 2017 probate appeal was rendered moot during its pendency in the trial court, thereby depriving the court of subject matter jurisdiction over it and necessitating its dismissal.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . 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. . . . A case is considered moot if [the trial] court cannot grant . . . any practical relief through its disposition of the merits . . . . [I]t is not the province of [the] courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . When . . . events have occurred that preclude [the] court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review is plenary." (Citations omitted; internal quotation marks omitted.) *Abel* v. *Johnson*, 194 Conn. App. 120, 149–50, 220 A.3d 843 (2019), cert. granted, 334 Conn. 917, 222 A.3d 104 (2020).

The following additional facts are relevant to our disposition of this appeal. In his revised complaint, the plaintiff alleged in relevant part that the 2016 accounting was incomplete, and, therefore, he was aggrieved by the Probate Court's order approving the 2016 accounting.[18] In August, 2018, while the 2017 probate appeal and the 2018 action were pending, the defendant delivered the 2018 accounting to the plaintiff. Subsequently, the question of whether the defendant's delivery of the 2018 accounting to the plaintiff rendered the 2017 probate appeal moot was raised before the trial court. In his answer to the plaintiff's revised complaint filed on February 25, 2019, in an introductory paragraph, the defendant represented that the "[p]laintiff's counsel has acknowledged that [the 2017 probate appeal] was moot in a prior status conference . . . and suggested that the plaintiff would be withdrawing the appeal. As such, the defendant asserts that the revised complaint . . . can and should be withdrawn."

Additionally, during closing argument, the following colloquy occurred:

"[The Plaintiff's Counsel]: So, when the 2018 account-[ing] was submitted you may recall that [the defendant's] counsel has throughout said the 2017 [probate] appeal is mooted by the 2018 account[ing] and I agree. But during the pendency of these proceedings I didn't know because you can't just say, yes, it's moot and then dismiss the case or withdraw the case. There has to be

[18] As relief, the plaintiff sought (1) "such relief as is proper," (2) "[a]n accounting of [t]rust activity, from its inception to date," (3) "[j]udgment for amounts found due under such accounting," (4) damages, (5) prejudgment and postjudgment interest, and (6) any other legal or equitable relief available. On August 2, 2017, the defendant filed a motion to strike the claims for relief numbered two through five, which the court, *Shapiro*, *J.*, granted on April 3, 2018. The granting of the defendant's motion to strike is not at issue on appeal.

some sort of pleading and then some sort of resolution from the court.

"The Court: Okay. But are you telling me now that you consider the [2017] probate appeal, there's [the 2017] probate appeal and [the 2018 action] here; are you saying now that that should be dismissed as moot?

"[The Plaintiff's Counsel]: I would rather have it remanded back to the [Probate Court] saying because the 2018 account[ing] was submitted that 2018 account[-ing] is controlling and as a result the [Probate] Court should enter as an order provisions in the 2018 account[-ing] as that will be handed down after this hearing.

"The Court: You're telling me though that you're not asking me to overturn the 2016 accounting; is that fair, because you consider it moot?

"[The Plaintiff's Counsel]: I just get nervous.

"The Court: Well, I'm not sure what you want me to do, so at the very least you should tell me, make it clear what you're asking the court to do.

"[The Plaintiff's Counsel]: I think the effect of these proceedings should serve to sustain the [2017 probate] appeal so that absolutely [the 2017 probate] appeal, the decree of the [Probate] Court is to no effect.

"The Court: And is that because you're asking me to find the 2018 accounting is improper?

"[The Plaintiff's Counsel]: It's supplanted.

"The Court: Because [the 2018 accounting] supplants the 2016 [accounting]?

"[The Plaintiff's Counsel]: Yes.

"The Court: And you're saying that by virtue of the—if I find that the 2018 accounting is wrong, then that

would automatically mean I should overturn the probate decision on the 2016 accounting; is that what you're saying and then send the whole thing back? . . .

"[The Plaintiff's Counsel]: I don't think the 2018 accounting is wrong. I think that there are a few things that need to be tweaked. There need to be things that are surcharged, but it complies with statutory requirements. . . . On the other hand, my appeal from the [Probate Court order] was [that] it was statutorily insufficient . . . ."

Following the statements made by the plaintiff's counsel, the defendant's counsel inquired whether the 2017 probate appeal had been withdrawn. The court responded that the 2017 probate appeal had not been withdrawn and that, "[d]epending on what [the court rules], it will have implications and [the court is] going to have to sort those out."

In the memorandum of decision, the court first rejected the plaintiff's claim raised in the 2018 action challenging the 2018 accounting. The court then stated that it was rendering judgment "for the defendant in both cases." The mootness issue was not addressed by the court in the memorandum of decision or in the court's postjudgment decisions.

The plaintiff claims that the court improperly rendered judgment in the defendant's favor because the 2017 probate appeal became moot following (1) the plaintiff's receipt of the 2018 accounting in August, 2018, and (2) the court's disposition of his objection to the 2018 accounting, as asserted in count five of his amended complaint filed in the 2018 action, on March 29, 2019. We agree with the plaintiff that the 2017 probate appeal was moot at the time of judgment; however, we disagree with the plaintiff insofar as he contends that the 2017 probate appeal was not moot until the resolution of the 2018 action on March 29, 2019. We

conclude, instead, that the 2017 probate appeal became moot during its pendency in August, 2018,[19] when the plaintiff received the 2018 accounting.[20]

During closing argument before the trial court, the plaintiff's counsel expressly represented that the plaintiff's receipt of the 2018 accounting mooted the 2017 probate appeal. The plaintiff repeated that representation in his combined motion to open the judgments and to reargue by asserting that, "[u]ltimately, [he] prevailed on appeal, when the full-term accounting was presented by the defendant . . . *in August, 2018*. . . . [The court's judgment in the 2017 probate appeal] overlooks that *midlitigation the plaintiff received what he'd sought on appeal*." (Emphasis added.) Moreover, in his principal appellate brief, the plaintiff acknowledges that the 2018 accounting satisfied the relief that he sought in the 2017 probate appeal, and in his reply brief, he represents that "the 2017 probate appeal was [filed] *for the sole purpose of compelling a full-term accounting* . . . ." (Emphasis added.)

In addition, during closing argument, the plaintiff requested that the trial court sustain the 2017 probate appeal and remand the matter to the Probate Court for additional proceedings. In his principal appellate brief, however, the plaintiff requests as relief that we reverse the judgment rendered in the 2017 probate appeal and remand the case to the trial court "with instruction that

[19] The 2018 accounting is dated August 6, 2018. An e-mail admitted into evidence at trial in conjunction with the 2018 accounting reflects that the 2018 accounting was delivered to the plaintiff's counsel via e-mail on August 9, 2018. During trial, the plaintiff testified that he received the 2018 accounting in August, 2018, without specifying a date. The precise date in August, 2018, on which the plaintiff received the 2018 accounting is not relevant to our analysis.

[20] The plaintiff also claims that, in rendering judgment for the defendant in the 2017 probate appeal, the court applied the wrong reasoning because it relied exclusively on its rationale disposing of the 2018 action in adjudicating the 2017 probate appeal. We need not address this additional claim in light of our conclusion that the 2017 probate appeal was rendered moot during its pendency.

the [2017 probate] appeal is no longer justiciable and is to be withdrawn or dismissed . . . .'' We construe the plaintiff's statements as abandoning any claim that the trial court could afford him practical relief in the form of sustaining the 2017 probate appeal in his favor and taking any additional action in conjunction therewith.

In light of the plaintiff's representations before the trial court, as maintained on appeal, we conclude that the plaintiff's receipt of the 2018 accounting in August, 2018, satisfied the relief that he was pursuing in the 2017 probate appeal. Following the plaintiff's receipt of the 2018 accounting, there was no practical relief that the court could have granted him, thereby depriving the court of subject matter jurisdiction over the 2017 probate appeal. We further conclude that the court's lack of subject matter jurisdiction necessitated a judgment of dismissal rather than a judgment on the merits for the defendant, and, therefore, the form of the judgment is improper.[21] See *Gershon* v. *Back*, 201 Conn. App. 225, 244, 242 A.3d 481 (2020) (''[w]henever a court finds that it has no jurisdiction, it must dismiss the case'' (internal quotation marks omitted)).

The judgment in Docket No. AC 42918 is reversed only as to counts two, three, four, and six of the plaintiff's amended complaint in the 2018 action and the case is remanded for a new trial on those counts; the judgment is affirmed in all other respects; the form of the judgment in Docket No. AC 42919 is improper, the judgment is reversed and the case is remanded with direction to render judgment dismissing the 2017 probate appeal for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

[21] In his appellate brief, the defendant argues that the court properly rendered judgment in his favor in the 2017 probate appeal; however, the defendant does not address the effect of the plaintiff's receipt of the 2018 accounting during the pendency of the 2017 probate appeal on the justiciability of that appeal.

MONTAVIOUS FINLEY *v.* WESTERN EXPRESS, INC., ET AL.
(AC 43361)

Alvord, Prescott and Suarez, Js.

Syllabus

The plaintiff, who suffered injuries when the tractor trailer he was operating was struck by an unavoidable object, sought to recover uninsured motorist benefits allegedly due under a policy of insurance issued by the defendant C Co. to the defendant W Co. At the time of the accident, the plaintiff was an agent or employee of W Co. and was operating a tractor trailer maintained by W Co. and covered by a fleet insurance policy issued by C Co. The trial court granted the defendants' motion for summary judgment on the ground that there was no genuine issue of material fact that the tractor trailer was not covered by uninsured motorist insurance. Specifically, the court concluded that Tennessee law governed the parties' dispute, that the plaintiff was not entitled to uninsured motorist benefits under Tennessee law because it did not require the defendants to provide such coverage, and that certain Connecticut statutes requiring uninsured motorist coverage did not apply because the tractor trailer was not registered or principally garaged in Connecticut. From the judgment rendered thereon, the plaintiff appealed to this court. On appeal, the plaintiff claimed that the court misinterpreted applicable Connecticut law and disregarded public policy in concluding as a matter of law that the insurance policy did not provide uninsured motorist coverage and relied solely on Connecticut law in arguing that uninsured motorist coverage was required. *Held* that the plaintiff's appeal was dismissed as moot, the plaintiff having failed to challenge all of the bases for the trial court's summary judgment ruling; the principal basis for the court's ruling was that Tennessee law applied to the action and that the plaintiff was not entitled to uninsured motorist benefits under Tennessee law, and, as the plaintiff failed to challenge this independent basis for the court's summary judgment ruling, this court could not afford any practical relief.

Argued March 9—officially released June 29, 2021

Procedural History

Acton to recover uninsured motorist benefits allegedly due under a policy of automobile insurance issued by the defendant National Casualty Company, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee,

granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed.*

Keith Currier, for the appellant (plaintiff).

Richard W. Bowerman, with whom was *Michael G. Caldwell*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Montavious Finley, brought the underlying action against the defendants, Western Express, Inc. (Western Express), and National Casualty Company (National Casualty), seeking to recover uninsured motorist benefits. The plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendants. The plaintiff claims that the court misinterpreted applicable Connecticut law and disregarded public policy in concluding as a matter of law that the automobile insurance policy under which he sought to recover did not provide uninsured motorist coverage to him. Because the plaintiff has failed to challenge an independent basis for the court's ruling, we conclude that the appeal is moot. Accordingly, we dismiss the appeal.

In his complaint, the plaintiff alleged in relevant part that, prior to October 17, 2017, the defendants were in the business of writing automobile liability insurance policies and had "issued" an automobile insurance policy to him and that it included coverage for uninsured motorist benefits.[1] The premiums on the policy had been paid by Western Express. On or about October 17, 2017, the plaintiff, while operating a tractor trailer maintained by Western Express on Interstate 84 in West

[1] At the outset, we note that the undisputed evidence presented to the court by the defendants reflects that Western Express is not an insurer, but that it maintains a fleet of tractor trailers, and National Casualty had issued a commercial fleet insurance policy to Western Express.

Hartford, sustained various physical injuries when the tractor trailer was struck by an unavoidable object. He alleged that his resulting injuries were caused by the negligence of an unidentified and uninsured tortfeasor and that "[t]he injuries and losses sustained by [him] are the legal responsibility of the [defendants] pursuant to the terms of its contract of insurance with [him] and in accordance with [General Statutes] § 38a-336[2] . . . ." (Footnote added.) The plaintiff alleged that he had satisfied all of the conditions required under the policy, which he maintained entitled him to uninsured and underinsured motorist coverage.

In their answer, the defendants, with respect to most of the allegations of the complaint, either denied the allegations or left the plaintiff to his proof. The defendants, however, alleged in relevant part that, although the policy on which the plaintiff relied, which had been issued to Western Express by National Casualty, was "in full force and effect" at the time of the accident, the policy did not obligate them to pay uninsured motorist benefits to a covered person under the policy.

The defendants raised five special defenses. In relevant part, they alleged that at the time of the alleged accident the plaintiff was operating the tractor trailer at issue as an agent or employee of Western Express, and the tractor trailer was "covered under a fleet insurance policy with National Casualty . . . that covered a fleet of commercial tractor trailers maintained by

[2] General Statutes § 38a-336 provides in relevant part: "(a) (1) (A) Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334 . . . ."

General Statutes § 38a-334 provides in relevant part: "(a) The Insurance Commissioner shall adopt regulations with respect to minimum provisions to be included in automobile liability insurance policies . . . covering private passenger motor vehicles . . . motor vehicles with a commercial registration . . . and vanpool vehicles . . . registered or principally garaged in this state."

Western Express . . . .'' The defendants alleged that the insurance policy at issue expressly stated that it did not provide uninsured motorist coverage, and Connecticut law requiring such coverage did not apply to the policy at issue because the policy insured a tractor trailer that was not registered or principally garaged in Connecticut.

The defendants moved for summary judgment on the grounds that the policy at issue did not contain a provision for uninsured motorist benefits, the tractor trailer that the plaintiff allegedly was operating at the time of the accident was not registered or principally garaged in Connecticut, and Connecticut law requiring uninsured motorist coverage did not apply to the tractor trailer. In support of the motion for summary judgment, the defendants filed a memorandum of law and an affidavit of Ron Lowell, General Counsel to Western Express, in which he averred that the subject tractor trailer was not registered in Connecticut, the tractor trailer was principally garaged in Tennessee, and the policy under which the tractor trailer was insured did not provide for uninsured motorist benefits.[3]

On February 11, 2019, the plaintiff filed an objection to the motion for summary judgment. The plaintiff did not attempt to contradict the material facts for which proof was submitted by the defendants, but argued that the defendants' motion for summary judgment should be denied. The plaintiff stated that ''[t]he tractor trailer the plaintiff was driving was owned and self-insured by the defendant Western Express.'' The plaintiff did not state that the policy on which he relied contained a provision for uninsured motorist benefits, but argued

[3] Attached to Lowell's affidavit were copies of the Connecticut Uniform Police Crash Report for the October 17, 2017 accident, the subject tractor trailer's registration, and the tractor trailer's insurance policy issued by National Casualty.

that, pursuant to General Statutes §§ 38a-371 (a) (2)[4] and 38a-336 (a) (1), "[t]he defendant was required to maintain uninsured motorist coverage while operating in Connecticut." On February 22, 2019, the defendants filed a reply to the plaintiff's objection.

On May 6, 2019, the court heard oral argument from the parties on the motion and objection. On August 30, 2019, the court issued a memorandum of decision rendering summary judgment in favor of the defendants. The court engaged in a choice of law analysis and concluded that, in light of the undisputed facts before it, Tennessee law governed the parties' dispute and that the plaintiff was not entitled to uninsured motorist benefits under Tennessee law, which did not require the defendants to provide such coverage. The court noted that, "[a]lthough public policy in Connecticut favors uninsured motorist coverage . . . it cannot be said that it would violate a fundamental public policy or be offensive to our sense of justice to apply Tennessee law and thereby allow an out of state vehicle to operate without such coverage." (Emphasis omitted.)

The court also addressed the plaintiff's argument that, under Connecticut law, §§ 38a-371 and 38a-336 (a) (1) required the defendants to carry uninsured motorist coverage. The court concluded that "[a]pplying these statutes . . . would not change the outcome" it had reached in applying Tennessee law because "it ha[d] been established that the defendants' vehicle was neither registered nor principally garaged in [Connecticut] . . . ."

[4] General Statutes § 38a-371 provides in relevant part: "(a) (2) The owner of a private passenger motor vehicle not required to be registered in this state shall maintain security in accordance with this section . . . .

"(b) The security required by this section, may be provided by a policy of insurance complying with this section issued by or on behalf of an insurer licensed to transact business in this state or, if the vehicle is registered in another state, by a policy of insurance issued by or on behalf of an insurer licensed to transact business in either this state or the state in which the vehicle is registered. . . ."

Ultimately, the court concluded that "[t]he defendants were not required to purchase uninsured motorist coverage for their vehicle, and the uncontested sworn copy of the defendants' insurance policy indicates that their vehicle did not carry such coverage. . . . Therefore, there is no genuine issue of material fact that the defendants' vehicle was not covered by uninsured motorist insurance." From that judgment, the plaintiff now appeals. Additional facts and procedural history will be set forth as necessary.

On appeal, the plaintiff claims that the court misinterpreted applicable Connecticut law and disregarded public policy in concluding as a matter of law that the automobile insurance policy under which the plaintiff sought to recover did not provide uninsured motorist coverage to him. The plaintiff, relying solely on Connecticut law, reiterates in substance the arguments advanced before the trial court, arguing that the court erred in its determination that the defendants were entitled to judgment as a matter of law. The plaintiff argues that the court erred because Connecticut law "mandates that all vehicles operating on Connecticut roadways maintain uninsured motorist coverage" and that Connecticut "has consistently maintained a strong public policy favoring uninsured motorist coverage." The plaintiff does not, however, challenge the principal basis for the court's summary judgment ruling, that Tennessee law applies to the action and that he was not entitled to uninsured motorist benefits under Tennessee law.[5] Because the plaintiff has failed to challenge that

[5] We note that, during oral argument before this court, the plaintiff's appellate counsel agreed that the principal basis for the court's ruling resulted from its reliance on and application of Tennessee law, and he acknowledged that, in his appellate brief, he did not challenge this aspect of the court's ruling. Following oral argument before this court, we ordered the parties "to file simultaneous supplemental briefs addressing the issue of why the appeal should not be dismissed as moot in light of the fact that the [plaintiff] has failed to raise a claim of error with respect to one of the independent bases upon which the trial court's summary judgment may be sustained, namely, the trial court's determination that Tennessee law governs

independent basis for the court's ruling, his appeal is moot.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve." (Internal quotation marks omitted.) *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018). "Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Internal quotation marks omitted.) *Jacques* v. *Jacques*, 195 Conn. App. 59, 61–62, 223 A.3d 90 (2019); see also *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 379 n.23, 119 A.3d 462 (2015) ("where alternative grounds found by the reviewing court and unchallenged on appeal would support the trial court's judgment, independent of some challenged ground, the challenged ground that forms the basis of the appeal is moot because the court on appeal could grant no practical relief to the complainant" (internal quotation marks omitted)); see also *Hartford* v. *CBV Parking Hartford, LLC*, supra, 210.

As we have explained, in the present case, the court engaged in a choice of law analysis. It then concluded that Tennessee law applied to the plaintiff's cause of action and that the plaintiff was not entitled to uninsured motorist benefits under Tennessee law. This conclusion was the principal basis for the court's ruling.

the parties' dispute and that as a matter of law the [plaintiff] is not entitled to judgment in his favor under Tennessee law." The parties have filed supplemental briefs, and we have reviewed them in our consideration of the appeal.

As an alternative basis for its ruling, the court concluded that, even if Connecticut law applied, the plaintiff still could not prevail. Thus, even if we agreed with the plaintiff's argument under Connecticut law, we would be unable to provide him any relief in connection with this appeal because he failed to challenge both independent bases for the court's summary judgment ruling. Relying on the authorities set forth previously, we conclude that the appeal is moot.

The appeal is dismissed.

BENJAMIN BOSQUE *v.* COMMISSIONER OF CORRECTION
(AC 43188)

Cradle, Alexander and Suarez, Js.

Syllabus

The petitioner, who had been convicted of the crimes of conspiracy to commit robbery in the first degree, burglary in the first degree, sexual assault in the first degree and robbery in the first degree, sought a third petition for a writ of habeas corpus. The respondent Commissioner of Correction filed a request for an order to show cause why the petition should be permitted to proceed. Following an evidentiary hearing, at which the petitioner declined the opportunity to present evidence, the habeas court dismissed the petition as untimely pursuant to the applicable statute (§ 52-470 (d) and (e)), concluding that the petitioner failed to establish good cause for the delay in filing the petition nearly three years after the deadline for filing a subsequent petition challenging his conviction. Thereafter, the habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held* that this court declined to review the petitioner's unpreserved claims that the habeas court abused its discretion in denying his petition for certification to appeal because his habeas counsel provided ineffective assistance and he was denied his constitutional right to counsel because the habeas court failed to intervene when counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his petition; contrary to the petitioner's contention, the petitioner was not entitled to appellate review of his claims under *State* v. *Golding* (213 Conn. 233) or for plain error, the petitioner having failed to raise them as grounds for appeal in his petition for certification to appeal as required by § 52-470 (g).

Argued March 15—officially released June 29, 2021

Procedural History

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

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Emily Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Benjamin Bosque, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (d) and (e).[1] The petitioner claims that the habeas court abused

[1] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require. . . .

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in

its discretion in denying his petition for certification to appeal because (1) it should have been obvious to the court that his habeas counsel had provided constitutionally ineffective assistance and (2) he was denied his constitutional right to counsel because the court had failed to intervene when his counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his petition. We dismiss the appeal.

The following facts and procedural history, as set forth by the habeas court, are relevant to the petitioner's claims on appeal. "The petitioner was convicted of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (4), burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and four counts of robbery in the first degree in violation of . . . § 53a-134 (a) (4). After unsuccessfully appealing his conviction . . . the petitioner filed his first habeas . . . petition, which was denied following a trial. . . . The petitioner did take an appeal from [the] habeas court's decision, but . . . the appeal was dismissed on February 20, 2013." (Citations omitted.)

On November 3, 2014, the petitioner filed a second habeas petition, which was subsequently withdrawn on

this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section. . . ."

January 29, 2018. On February 26, 2018, the petitioner initiated the underlying action by filing a third habeas petition. "The respondent, [the Commissioner of Correction] filed [a] request for an order to show cause [why the petition should be permitted to proceed] on December 6, 2018, asserting that the petitioner had failed to file the present petition within two years of when the [judgment] on his prior habeas [petition] became final. An evidentiary hearing was held on March 8, 2019. Although present, the petitioner declined the opportunity to present testimony or evidence." (Footnote omitted).

In a memorandum of decision dated May 21, 2019, the court, *Newson*, *J.*, dismissed the habeas petition as untimely under § 52-470 (d) and (e), concluding that the petitioner failed to establish good cause for the delay in filing the petition beyond the statutory deadline. The court found that the petitioner had until March 12, 2015, to file a subsequent habeas petition challenging his conviction and that the petitioner did not present any evidence explaining why his petition was not filed until nearly three years after the deadline. The court denied the petition, noting that "[o]nce the rebuttable presumption [that no good cause existed for the delay] arose, the petitioner was obligated to provide *some* evidence of the reason for the delay in filing this petition, which he declined to do." (Emphasis in original.) The court thereafter denied the petition for certification to appeal, and this appeal followed.

Section 52-470 (g) provides in relevant part: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried . . . to certify that a question is involved in the decision which ought

to be reviewed by the court having jurisdiction and the judge so certifies."

"As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was to limit the number of appeals filed in criminal cases and [to] hasten the final conclusion of the criminal justice process . . . . [T]he legislature intended to discourage frivolous habeas appeals." (Internal quotation marks omitted.) *Stephenson* v. *Commissioner of Correction*, 203 Conn. App. 314, 322, 248 A.3d 34, cert. denied, 336 Conn. 944, A.3d (2021).

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for [a writ of] habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification [to appeal] constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks

omitted.) *Haywood* v. *Commissioner of Correction*, 194 Conn. App. 757, 763–64, 222 A.3d 545 (2019), cert. denied, 335 Conn. 914, 229 A.3d 729 (2020). "In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition or certification [to appeal]." (Internal quotation marks omitted.) *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 573, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

On appeal, the petitioner does not challenge the habeas court's decision on the merits—he does not claim that the court erred in dismissing his habeas petition as untimely. Rather, he claims that the habeas court abused its discretion in denying his petition for certification to appeal because (1) his habeas counsel obviously provided constitutionally ineffective assistance and (2) he was denied his constitutional right to counsel because the court failed to intervene when his counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his petition. The respondent argues, inter alia, that, because the petitioner failed to raise these issues as grounds for appeal in his petition for certification to appeal, he is unable to claim on appeal that the court abused its discretion in denying his petition for certification to appeal on these grounds. We agree with the respondent.

It is well established that a petitioner cannot demonstrate that a habeas court abused its discretion in denying a petition for certification to appeal on the basis of claims that were not raised distinctly before the habeas court at the time that it considered the petition for certification to appeal. See *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216–17, 72 A.3d 1162,

cert. denied, 310 Conn. 928, 78 A.3d 145 (2013), and cases cited therein.

In the present case, the petitioner's petition for certification to appeal stated only the following ground for appeal: "Whether the habeas court erred in finding that there was not good cause to allow the petitioner's petition for [a writ of] habeas corpus to proceed on the grounds that he filed [it] outside the applicable time limits." The petition for certification to appeal did not include grounds related to any claims regarding ineffective assistance of habeas counsel or the habeas court's alleged duty to intervene in the face of the alleged ineffective assistance. In fact, the petitioner concedes that he failed to preserve those claims by stating them in his petition for certification to appeal.

Notwithstanding these failings, the petitioner argues that his failure to list the aforementioned grounds in his petition for certification to appeal, as required by § 52-470 (g), does not preclude this court from reviewing his claims 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), or for plain error. This court previously has addressed and rejected similar requests for extraordinary review, such as *Golding* and plain error review, of claims not raised in petitions for certification to appeal.

With respect to the petitioner's argument that he is entitled to *Golding* review of his claims, this court has stated: "Section 52-470 (g) conscribes our appellate review to the issues presented in the petition for certification to appeal . . . . Permitting a habeas petitioner, in an appeal from a habeas judgment following the denial of a petition for certification to appeal, to seek *Golding* review of a claim that was not raised in, or incorporated into, the petition for certification to appeal would circumvent the requirements of § 52-470 (g) and undermine the goals that the legislature sought to

achieve in enacting § 52-470 (g)." (Internal quotation marks omitted.) *Solek* v. *Commissioner of Correction*, 203 Conn. App. 289, 299, 248 A.3d 69, cert. denied, 336 Conn. 935, 248 A.3d 709 (2021); see also *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 418–19, 236 A.3d 276 (noting that review pursuant to *Golding* was not available for claim raised for first time on appeal and not raised in or incorporated into petition for certification to appeal), cert. denied, 335 Conn. 969, 240 A.3d 286 (2020). Accordingly, the petitioner is not entitled to *Golding* review of his claims.

This court likewise has rejected the argument that claims not set forth in a petition for certification to appeal may be reviewed for plain error.[2] See *Villafane* v. *Commissioner of Correction*, supra, 190 Conn. App. 577–78; *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 818 n.2, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017). In declining to afford plain error review to a claim not set forth in a petition for certification to appeal, this court has reasoned that "[t]he [habeas] court could not abuse its discretion in denying the petition for certification about matters that the petitioner never raised." *Mercado* v. *Commissioner of Correction*, 85 Conn. App. 869, 872, 860 A.2d 270 (2004), cert. denied, 273 Conn. 908, 870 A.2d 1079 (2005).

In support of his argument that he is entitled to plain error review, the petitioner relies on this court's opinion in *Foote* v. *Commissioner of Correction*, 151 Conn. App. 559, 96 A.3d 587, cert. denied, 314 Conn. 929, 102 A.3d

[2] The plain error doctrine, codified in Practice Book § 60-5, "is not . . . a rule of reviewability . . . [but] a rule of reversibility. That is, it is a doctrine that [appellate courts invoke] in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy." *State* v. *Cobb*, 251 Conn. 285, 343 n.34, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

709 (2014), and cert. dismissed, 314 Conn. 929, 206 A.3d 764 (2014), in which this court afforded the petitioner plain error review of a claim not listed in his petition for certification to appeal without articulating its reason for doing so. The majority in *Foote* cited, without analysis, to our Supreme Court's decision in *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 526, 911 A.2d 712 (2006).[3] *Foote* v. *Commissioner of Correction*, supra, 566–67. *Ajadi* involved a claim of plain error that called into question the fairness and impartiality of the entire habeas trial.[4] *Ajadi* v. *Commissioner of Correction*, supra, 525. In *Ajadi*, the petitioner did not become aware of the issue underlying the claim of plain error until after the habeas proceedings had concluded. Id., 522. In other words, because this issue did not come to the attention of the parties, counsel for the parties, or the habeas court until sometime after the petitioner brought the appeal in that case, he could not have included it in his petition for certification to appeal. The petitioner in *Ajadi*, therefore, sought, and was afforded, plain error review of his claim.[5] Id., 525–30.

In the present case, the claim of plain error is based on events that occurred during the petitioner's habeas trial and, therefore, could have been raised in his petition for certification to appeal. The scope of appellate review is restricted to an examination of the court's

[3] The majority in *Foote* also cited, without analysis, to *Melendez* v. *Commissioner of Correction*, 141 Conn. App. 836, 62 A.3d 629, cert. denied, 310 Conn. 921, 77 A.3d 143 (2013). *Foote* v. *Commissioner of Correction*, supra, 151 Conn. App. 567. In *Melendez*, the court afforded plain error review of the petitioner's unpreserved claim with no discussion as to why it was doing so. *Melendez* v. *Commissioner of Correction*, supra, 841.

[4] In *Ajadi*, the petitioner argued that the habeas judge who presided over his habeas trial and denied his petition for certification to appeal should have disqualified himself based on the judge's prior representation of the petitioner. *Ajadi* v. *Commissioner of Correction*, 280 Conn. 525–29.

[5] The holding in *Ajadi*, in our view, is best limited to the unique facts of that case. Because the majority in *Foote* did not provide a reason for departing from the settled jurisprudence, we likewise limit the holding in *Foote* to its facts.

denial of the petition for certification to appeal. A plain error analysis of claims never raised in connection with a petition for certification to appeal expands the scope of review and undermines the goals that the legislature sought to achieve by enacting § 52-470 (g). If this court were to engage in plain error review, it would invite petitioners, who have been denied certification to appeal, to circumvent the bounds of limited review simply by couching wholly unpreserved claims in terms of plain error.

On the basis of the foregoing, we conclude that, if the petitioner desired appellate review of his claims of ineffective assistance of habeas counsel and/or whether the habeas court had a duty to address counsel's deficient performance to prevent prejudice to the petitioner, he was required to include those issues as grounds for appeal in his petition for certification to appeal. See *Villafane* v. *Commissioner of Correction*, supra, 190 Conn. App. 577–78. Because he failed to do so, we decline to review the petitioner's claims.

The appeal is dismissed.

In this opinion the other judges concurred.

MARIA MOULTHROP *v.* CONNECTICUT STATE BOARD OF EDUCATION
(AC 43781)

Suarez, Clark and DiPentima, Js.

Syllabus

The plaintiff, a former elementary school principal, appealed to the trial court from the decision by the defendant, pursuant to statute (§ 10-145b (i) (2)), revoking her initial educator and professional educator certificates after an investigation determined that she was involved in and responsible for cheating that occurred on a schoolwide basis during the administration of the Connecticut Mastery Test. The trial court found that the record contained substantial evidence that the plaintiff directly participated in a portion of the cheating, and knew that cheating was taking place during the administration of the test and did not stop it.

The court rendered judgment dismissing the appeal, and the plaintiff appealed to this court, claiming, inter alia, that there was no substantial evidence to support the finding that she was directly involved in or was responsible for the cheating. *Held* that, upon this court's plenary review of the record, the briefs and the arguments of the parties, the judgment of the trial court was affirmed, and this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues.

Argued May 19—officially released June 29, 2021

Procedural History

Appeal from the decision by the defendant revoking the plaintiff's initial educator and professional educator certificates, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani, J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

John M. Gesmonde, for the appellant (plaintiff).

Kerry Anne Colson, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Maria Moulthrop, appeals from the judgment of the trial court dismissing her administrative appeal from the decision of the defendant, the Connecticut State Board of Education (board), revoking her initial educator and professional educator certificates.[1] On appeal, the plaintiff claims that the court erred by concluding that she failed to establish that the board's decision (1) was predicated on constitutional and statutory violations, and (2) was clearly erroneous

[1] The plaintiff held an initial educator certificate that permitted her to teach prekindergarten through twelfth grade. She also held a professional educator certificate that permitted her to be an administrator in a school. See General Statutes § 10-145b (governing issuance and revocation of teaching certificates).

in view of the reliable, probative and substantial evidence in the whole record. We affirm the judgment of the trial court.

The record discloses the following relevant facts. The plaintiff was employed by the Waterbury Board of Education as the principal of Hopeville Elementary School (Hopeville) from 1996 until she resigned in December, 2011. The issues in the present appeal center on the Connecticut Mastery Test[2] (mastery test) that was administered at Hopeville in the spring of 2011. The performance of the Hopeville students on the mastery test prior to 2011 could best be characterized as struggling, with fluctuating failing and nonfailing results. The test scores for the Hopeville students in the spring of 2011, however, were higher than those of any other public school in Waterbury, higher than the statewide averages for all students, and substantially higher than the scores for Hopeville students in prior years. The unusual change in the test scores of Hopeville students prompted an investigation by the state Department of Education (department) that led to the determination that cheating had occurred in the administration of the mastery test at Hopeville in the spring of 2011. Data analysis revealed that the 2011 test scores were the result of adult interference with the test on a schoolwide scale. Evidence that cheating occurred during the administration of the spring, 2011 mastery test at Hopeville is overwhelming; the plaintiff does not challenge that determination. The plaintiff, however, challenges the board's determination that she was involved in, and was responsible for, the cheating that occurred.

On the basis of the department's investigation and pursuant to General Statutes § 10-145b (i) (2), the board issued an administrative complaint seeking to revoke

[2] The Connecticut Mastery Test is a statutorily mandated, statewide, standardized test used for the purpose of measuring student achievement in reading, language arts, and mathematics. See General Statutes § 10-14n.

the plaintiff's initial educator certificate and professional educator certificate. A hearing officer conducted an evidentiary hearing over nine days from 2016 through 2018 and issued a proposed decision in October, 2018. The hearing officer found that the plaintiff was responsible for personally committing sundry breaches of security in connection with the administration of the 2011 mastery test at Hopeville or knowingly allowing others in her school to do so. The hearing officer submitted a report to the board recommending that the plaintiff's professional educator's certificate be revoked and that her initial educator's certificate be placed on probation with special conditions. On February 6, 2019, the board adopted the decision of the hearing officer in all respects, except that it revoked both of the plaintiff's educator certificates.

The plaintiff appealed to the Superior Court, claiming that there was no substantial evidence to support the finding that she was directly involved in the cheating on the spring, 2011 mastery test or that she was responsible for the schoolwide cheating on that test. She also claimed that she was denied her constitutional and statutory rights during the investigation and hearing. The court found that the record contains substantial evidence that the plaintiff directly participated in a portion of the cheating and that she knew that cheating was taking place during the administration of the mastery test and did not stop it. The court also concluded that the plaintiff failed to establish that the board's decision (1) violated any constitutional or statutory provision, (2) was in excess of its statutory authority, (3) was made upon unlawful procedure, (4) was affected by other error of law, (5) was clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record, or (6) was arbitrary or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise

of discretion. See General Statutes § 4-183 (j). The court dismissed the plaintiff's appeal.

Our plenary review of the record and the proceedings in the trial court, as well as the briefs and arguments of the parties on appeal, persuades us that the judgment of the trial court should be affirmed. We, therefore, adopt the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues. See *Moulthrop* v. *Connecticut State Board of Education*, Superior Court, judicial district of New Britain, Docket No. CV-19-6051413-S (December 18, 2019) (reprinted at 205 Conn. App. 493, A.3d). Any further discussion of the issues by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Pellecchia* v. *Killingly*, 147 Conn. App. 299, 302, 80 A.3d 931 (2013).

The judgment is affirmed.

APPENDIX

MARIA MOULTHROP *v.* CONNECTICUT STATE BOARD OF EDUCATION*

Superior Court, Judicial District of New Britain
File No. CV-19-6051413-S

Memorandum filed December 18, 2019

Proceedings

Memorandum of decision in appeal from revocation of plaintiff's professional educator and initial educator certificates. *Appeal dismissed.*

John M. Gesmonde and *Nancy E. Valentino*, for the plaintiff.

Kerry Anne Colson, assistant attorney general, and *William Tong*, attorney general, for the defendant.

* Affirmed. *Moulthrop* v. *Connecticut State Board of Education*, 205 Conn. App. 489, A.3d (2021).

Opinion

CORDANI, J.

INTRODUCTION

The plaintiff, Maria Moulthrop (plaintiff), appeals from a final decision by the defendant, the Connecticut State Board of Education (board), revoking her initial educator and professional educator certificates. This appeal is taken pursuant to General Statutes § 4-183. The board issued a complaint seeking revocation of the plaintiff's certifications as provided for in General Statutes § 10-145b. A hearing officer held a hearing over the course of nine days from 2016 through 2018. The hearing officer issued his proposed decision on October 9, 2018, recommending that the plaintiff's professional educator's certificate be revoked and that her initial educator's certificate be put on probation with specified conditions. The board issued its final decision on February 6, 2019, adopting the proposed decision of the hearing officer as the board's final decision, with only one change —revoking both of the plaintiff's certifications. The plaintiff has appealed the board's final decision to this court.

FACTS

The plaintiff was the principal of Hopeville Elementary School in Waterbury (Hopeville) from 1996 until she resigned in December, 2011. The issues in this matter revolve around the administration of the Connecticut Mastery Test (CMT) in the spring of 2011 at Hopeville. The plaintiff was the principal of Hopeville during the administration of the 2011 CMT. The CMT is a statutorily mandated, statewide, standardized test used for the purpose of measuring achievement in reading, language arts, and mathematics. Hopeville students' performance on the CMT prior to 2011 could best be characterized as struggling, with fluctuating failing and nonfailing results. The spring 2011 CMT scores for Hopeville, however, were higher than those of any other public school

in Waterbury, higher than the statewide averages for all students, and substantially higher than Hopeville's previous year's scores. This unusual change in Hopeville's CMT scores prompted an investigation. That investigation determined that cheating occurred in the administration of the spring 2011 CMT at Hopeville.

There is no dispute that cheating did indeed occur with respect to the spring 2011 CMT at Hopeville. Even the plaintiff admits that cheating appears to have occurred; she does, however, dispute her involvement in and responsibility for the cheating. The investigation relied on various evidence to conclude that cheating occurred. First, the CMT was readministered at Hopeville in September, 2011, and the results were much lower than the spring 2011 results. On the basis of an analysis of the results data, Stephen Martin determined, and testified as an expert, that the spring 2011 CMT results at Hopeville were the result of adult interference with the test on a schoolwide scale. Second, a company called Measurement Incorporated conducted an erasure analysis to determine statistical anomalies in the erasure data for the spring 2011 CMT at Hopeville. The average number of erasures and the number of answers changed from "wrong" to "right" at Hopeville significantly exceeded the statewide results. Gilbert Andrada, a psychometrician, testified as an expert on this issue. Dr. Andrada testified that the difference between the erasures at Hopeville and the statewide results was highly unlikely to have occurred naturally. Even the plaintiff's expert testified that the answer changes at Hopeville did not occur naturally but were the product of cheating by adults. Finally, Frederick L. Dorsey, an attorney, conducted an investigation at Hopeville, primarily interviewing teachers and students as well as collecting evidence, which produced direct evidence of cheating on a schoolwide scale. Thus, the evidence that cheating occurred on a schoolwide scale at Hopeville in the administration of the spring 2011 CMT is over-

whelming, and the plaintiff does not challenge the determination that cheating occurred.

The plaintiff's challenge in this appeal is directed at the board's determination that she was involved in, and responsible for, the cheating that occurred. The hearing officer made 179 specific findings of fact. The hearing officer found that the plaintiff was personally involved in and responsible for the cheating based in part on, inter alia, the following findings of fact:

1. As principal, the plaintiff was responsible for the overall operation of Hopeville,[1] including having the ultimate responsibility for the administration of the CMT in the spring of 2011. The plaintiff was a hands-on principal who was directly involved in most of what went on at Hopeville.

2. The Waterbury school district had assigned the ultimate responsibility for the proper administration of the CMT to the principal in each school.[2]

3. During the administration of the CMT, the test booklets were stored in the plaintiff's locked office.

4. The plaintiff was trained in the proper administration of the CMT.[3]

5. Margaret Perugini, a Hopeville teacher and friend of the plaintiff, had the office next door to the plaintiff and had access to the plaintiff's office.

[1] See testimony of plaintiff, administrative hearing transcript, dated January 16, 2018, pp. 84–89 (record, vol. IV, item 12).

[2] See board's exhibit 34, letter, dated April 10, 2012, from Tara Battistoni to Steve Martin (record, vol. V, item 34, p. 1069) (describing the policy of the Waterbury school district on this point); see also testimony of Battistoni, administrative hearing transcript, dated November 4, 2016, pp. 605–606 (record, vol. IV, item 6); testimony of Dr. Ronald K. Hambleton, the plaintiff's expert, administrative hearing transcript, dated December 1, 2016 (record, vol. IV, item 10).

[3] Prior to the administration of the CMT, the plaintiff attended training sessions for the administration of the CMT. The training included a review of test security, including the relevant instructions in the Test Coordinator's Manual and Examiner's Manual. The foregoing manuals contain specific

6. At a meeting at which the plaintiff was present, Mrs. Perugini passed out a list of questions derived from the 2011 CMT and requested that teachers review them with their classes.[4]

7. At a meeting at which the plaintiff was present, Mrs. Perugini distributed a list of vocabulary words that were derived from the 2011 CMT test and requested that teachers review them with their classes.[5]

8. The plaintiff instructed teachers to assist students by changing words used on the CMT to synonyms that the students could more easily understand.[6]

9. The plaintiff instructed teachers to review the test in advance and to advise students to "check your work" while pointing to specific answers that the teachers knew were incorrect.[7] The students understood this to be an instruction to change an incorrect answer.

instructions concerning test security and validity. The manuals specify that breaches in test security include copying of test materials, failing to return test materials, coaching students, giving students answers, and/or changing students' answers.

[4] See respondent's exhibit PP, Attorney Dorsey's interview transcripts of Cara Munro, Mark Esposito, Yenny Villar and Amanda Koestner (record, vol. VI, item PP), and board's exhibit 23, Attorney Dorsey's investigative report (record, vol. V, item 23); see also board's exhibits 15 and 19 (record, vol. V, items 15, 19); testimony of Stephen Martin, administrative hearing transcript, dated October 25, 2016, pp. 180–81 (record, vol. IV, item 3); testimony of Deirdre Ducharme, administrative hearing transcript, dated October 27, 2016, pp. 389–94 (record, vol. IV, item 4). It should be noted that, at the time that these questions and vocabulary words, which were derived from the 2011 CMT, were distributed, the 2011 CMT tests were secured in the plaintiff's office.

[5] See footnote 4 of this opinion.

[6] See respondent's exhibit PP, Attorney Dorsey's interview transcripts of Amanda Koestner and Stacey Tomasko (record, vol. VI, item PP); see also board's exhibit 23, Attorney Dorsey's investigative report (record, vol. V, item 23).

[7] See respondent's exhibit PP, Attorney Dorsey's interview transcripts of Cara Munro, Stacey Tomasko, Mark Esposito and Kelley Brooks (record, vol. VI, item PP); see also board's exhibit 23, Attorney Dorsey's investigative report (record, vol. V, item 23, p. 962) (on the two students he interviewed).

10. There was evidence that the improper changing of answers from incorrect to correct by adults occurred while the test booklets were stored in the plaintiff's office.

The findings of fact include direct evidence of the plaintiff's direct involvement in the cheating, indirect and circumstantial evidence of the plaintiff's direct involvement in the cheating, from which the hearing officer drew inferences, and direct evidence that the plaintiff was generally responsible for the cheating as a result of her position as principal, her responsibility for test security, and her failure to maintain proper test security.

The CMT is a standardized mastery test that is federally mandated and serves several purposes. First, the CMT measures the proficiency of students' understanding and skills in the areas tested. Second, it provides data to the school district to assist in refining areas of teaching in general and in focusing on areas of need for particular students and/or schools. Third, it provides data such that schools and school districts may be evaluated and compared in decisions of resource allocation. Last, it provides some measurement of the effectiveness of teaching. All of the foregoing goals can be undermined if the results are artificially skewed by cheating.

The plaintiff is classically aggrieved by the board's final decision because the board's final decision strips the plaintiff of her certifications as a teacher and as a school administrator.

STANDARD OF REVIEW

This appeal is brought pursuant to § 4-183 of the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq.[8] Judicial review of an admin-

[8] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing

istrative decision in an appeal under the UAPA is limited. See, e.g., *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [our Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . [The court's] ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

Although the courts ordinarily afford "deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes . . . [c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. . . ."

ANALYSIS

The plaintiff challenges the board's final decision on several grounds, both factually and procedurally.[9] The plaintiff also challenges the validity and enforceability of the applicable statute. As this court will soon discuss further, this court finds that the plaintiff has not established that the board's decision was defective in view of the standard of review on appeal.

A

Record Contains Substantial Evidence to Conclude Both That Plaintiff Was Directly Involved In Cheating and Was Responsible For Cheating Schoolwide

The record contains substantial evidence that the plaintiff was directly involved in the cheating. First, the record contains evidence, and the hearing officer found, that the plaintiff personally instructed Hopeville teachers to review the test in advance and to move around the classroom, observe students' answers to various questions, and specifically instruct students to "check your work" in relation to particular questions that teachers observed particular students had answered incorrectly. Students indicated that they understood the "check your work" prompt to be a signal that a particular answer they had was incorrect and that they should go back and correct it. Second, the plaintiff was present at meetings where Mrs. Perugini distributed questions

[9] To the extent that the plaintiff, in her reply brief, attempts to incorporate by reference briefs and other filings which were not filed with this court, the court has not considered such attempted incorporations by reference. The plaintiff's attempt to incorporate by reference briefs and documents not filed with this court is an inappropriate attempt to circumvent the briefing page limits set and to confuse the issues presented to this court for review. The briefs filed with this court must, in accordance with the applicable rules, contain and brief the issues sought to be reviewed by this court. Attempts to circumvent the rules by incorporating arguments by reference is inappropriate and is rejected.

and vocabulary words that were taken from the 2011 CMT[10] and instructed teachers to review them with their classes. Last, the record contains evidence that the plaintiff instructed teachers to provide the students with synonyms for words on the CMT that they might not readily understand. In each of the foregoing three cases, the plaintiff directly participated in, and even instructed, the cheating. As is readily apparent, each of the foregoing issues amounted to an improper breach of security of the CMT. Further, the record contains substantial evidence that the plaintiff understood, as would any reasonable person, that the foregoing activities would be cheating and would amount to a breach of the security of the test.

The record contains substantial indirect and circumstantial evidence that the plaintiff knew of, allowed, and likely encouraged a group of teachers to erase and change answers from incorrect to correct. First, it is undisputed that adults erased answers in the students' test booklets and changed answers from incorrect to correct. While the tests were not actively in use, they were locked up in the plaintiff's office, which was secure except for a door from Mrs. Perugini's office. The record contains evidence indicating that teachers observed the test booklets spread out in the plaintiff's office on a table and chair on at least two occasions and were suspicious about why they were spread out in that fashion instead of boxed up. The hearing officer found that the evidence that adults actively changed the answers on the tests was overwhelming. The hearing officer found it improbable that all of the breaches of security that were found to have occurred could have

[10] As is readily apparent, undermining the confidentiality of the test, as with any test of this type, undermines the accuracy and comparability of the results, and produces results that are not fairly indicative of the proficiency of the students being tested. Further, at the time that these questions and vocabulary words, which were derived from the 2011 CMT, were distributed, the 2011 CMT tests were secured in the plaintiff's office.

been carried out without the plaintiff's knowledge and participation. Further, the hearing officer specifically found that the plaintiff's testimony and explanation for the breaches were not credible. Because it is undisputed that answers were inappropriately changed, because the plaintiff had control of the test booklets when not in use, because of evidence suggesting that operations on the test booklets were occurring in the plaintiff's office, and because the hearing officer specifically found that the plaintiff's explanation was not credible, it was not unreasonable for the hearing officer to conclude that the plaintiff was at least aware that answers were being inappropriately changed.[11]

Last, the plaintiff was the principal of the school. As such, she was in charge of the overall operations of the school, including the administration of tests therein. The hearing officer found that the plaintiff was a hands-on principal and was involved in most of what went on at Hopeville. Further, the record contains substantial evidence that the school district had specifically designated the principal in each school as being ultimately responsible for the administration of the CMT. Given the foregoing, it was not unreasonable for the hearing officer to conclude that the plaintiff failed to maintain appropriate security and was responsible for the CMT security breaches that occurred.

Accordingly, the record contains substantial evidence, direct and circumstantial, that the plaintiff directly participated in a portion of the cheating. The record also contains substantial evidence, direct and circumstantial, that the plaintiff knew the cheating was going on and did not stop it. Last, the record contains substantial evidence, direct and circumstantial, that the plaintiff, as principal, had responsibility for the cheating.

[11] The hearing officer, as the finder of fact, had the ability and responsibility to draw reasonable inferences from the evidence, both direct evidence and circumstantial evidence.

B

Attorney Dorsey's Report and Associated Interview Transcripts Were Properly Admitted into Evidence And Plaintiff Was Not Denied Opportunity To Cross-Examine Witnesses

The board retained Attorney Dorsey to conduct an investigation into the situation. Attorney Dorsey visited Hopeville, interviewed teachers and students, and collected evidence. His interviews were recorded and the recordings were transcribed. Attorney Dorsey wrote a report that summarized his findings. The board introduced Attorney Dorsey's report as evidence at the hearing through the testimony of Attorney Dorsey, who was examined and cross-examined at the hearing.

The plaintiff asserts that it was erroneous to admit the report. Administrative hearings, such as this hearing before the board, are not governed by strict application of the rules of evidence, such as the hearsay rule. See, e.g., *South Windsor* v. *South Windsor Police Union Local 1480, Council 15, AFSCME, AFL-CIO*, 57 Conn. App. 490, 505, 750 A.2d 465 (2000), rev'd on other grounds, 255 Conn. 800, 770 A.2d 14 (2001). In administrative hearings, hearsay evidence may be admitted if it is reasonably found to be reliable and trustworthy. See *Cassella* v. *Civil Service Commission*, 4 Conn. App. 359, 362, 494 A.2d 909 (1985), aff'd, 202 Conn. 28, 519 A.2d 67 (1987); see also *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 712, 692 A.2d 834 (1997). In the present case, a neutral investigator hired by the board prepared the report. The investigator testified at the hearing and was cross-examined. The investigator's interviews with students and teachers were recorded and later transcribed. The plaintiff was provided with the transcriptions and had access to the recordings. Further, the plaintiff was free to subpoena any witness interviewed or referenced in the report.

Although the plaintiff objected to the entry of the report into evidence, the plaintiff did not properly preserve an objection to Attorney Dorsey's testimony at the hearing. The plaintiff further affirmatively introduced the transcripts of Attorney Dorsey's interviews into evidence as the plaintiff's evidentiary exhibits. In view of the foregoing, the court finds that the report had sufficient indicia of reliability and trustworthiness, and its introduction into evidence in the administrative hearing was not error.

In a related objection, the plaintiff asserts that the introduction of the report into evidence deprived the plaintiff of the ability to cross-examine witnesses referenced in the report. The court finds that this objection is misplaced. This administrative proceeding was not a criminal proceeding, and, as such, the constitutional right to confront and cross-examine witnesses does not apply. What does apply is the requirement that the hearing be fair and that appropriate due process be afforded the plaintiff.[12] As noted previously, the hearsay nature of the report did not make it error to admit the report into evidence. The interviews conducted by the investigator were recorded and later transcribed. The transcripts were provided to the plaintiff, and the plaintiff had access to the recordings. The plaintiff was free to independently interview any witness referenced in the report. The plaintiff also had the ability to subpoena any witness referenced in the report to testify at the hearing. Further, the plaintiff herself moved interview transcripts into evidence. Accordingly, to the extent that the plaintiff wished to examine any of the witnesses referenced in the report, or other witnesses, process

[12] The complaint initiating this process was detailed and provided the plaintiff with specific notice of the issues to be adjudicated. The plaintiff answered the complaint without further pleadings requesting revisions to or clarifications of the allegations of the complaint. Further, Attorney Dorsey's report was also detailed and thorough in describing the issues and the expected evidence.

was available to the plaintiff to compel such testimony. The plaintiff did not take advantage of such process available to her. As such, the plaintiff's after-the-fact complaint that she was not able to cross-examine witnesses is unavailing.

Thus, the court finds that admission of the Dorsey report into evidence was not error, and, further, that the plaintiff has not properly preserved her objection to the admission of the report and related testimony. The court also finds that the process provided to the plaintiff was sufficient for the conduct of a fair administrative hearing and that the plaintiff could have resolved her desire to cross-examine witnesses that were not called by the board by issuing subpoenas for such witnesses to testify at the hearing. The plaintiff's failure to do so precludes her ability to complain about a lack of ability to examine such witnesses at the hearing.

C

Section 10-145b (i) (2) is Not Invalid or Unenforceable

The plaintiff challenges the validity and enforceability of § 10-145b (i) (2). This particular statute authorizes the board to revoke certifications previously issued by it under circumstances specified in the statute. Section 10-145b (i) (2) provides in relevant part: "The State Board of Education may take any of the actions described in subparagraphs (A) to (C), inclusive, of subdivision (1) of this subsection with respect to a holder's certificate, permit or authorization issued pursuant to sections 10-144o to 10-149, inclusive, for any of the following reasons . . . (C) the holder is professionally unfit to perform the duties for which the certificate, permit or authorization was granted . . . or (E) *other due and sufficient cause*. The State Board of Education may revoke any certificate, permit or authorization issued pursuant to said sections if the holder is found to have

intentionally disclosed specific questions or answers to students or *otherwise improperly breached the security of any administration of a mastery examination*, pursuant to section 10-14n. . . .'' (Emphasis added.)

The plaintiff challenges the foregoing statute on several fronts. First, the plaintiff asserts that the statute is penal in nature and must be strictly construed. Second, the plaintiff claims that references in the statute to ''other due and sufficient cause'' and ''otherwise improperly breached the security'' are vague, such that the statute is either invalid or not appropriately applied to the plaintiff. Third, the plaintiff asserts that her conduct did not meet the conditions of the statute. Last, the plaintiff contends that the statute is invalid because it does not give necessary guidance to the board as to how to arrive at an appropriate remedy for a violation.

Legislative enactments carry with them a presumption of validity and enforceability. ''[A] party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the statute unconstitutional . . . .'' (Internal quotation marks omitted.) *State* v. *Wilchinski*, 242 Conn. 211, 217–18, 700 A.2d 1 (1997). If the meaning of a statute can be fairly ascertained, the statute is not void for vagueness. To consider the plaintiff's claim of vagueness, first, the nature of the statute must be ascertained.

The statute is clearly not a penal statute. No imprisonment, fine, or other penal punishment is authorized. Instead, the statute authorizes the board to properly administer the certificates, permits, and authorizations issued by it. Sections of the statute that precede § 10-145b (i) (2) provide the board with authorization to issue such certificates, permits, and authorizations under appropriate conditions. In rounding out the board's authority then, § 10-145b (i) (2) authorizes the board to suspend, place on probation, or revoke such certificates, permits, and authorizations that it had previously

granted. Thus, the statute unsurprisingly allows the board to administer the certificates, permits, and authorizations that it issues. The purpose of the statute is to ensure that only worthy persons have and maintain certifications to teach students in the state's public schools. The statute is clearly a civil statute, not penal in nature, directed to administering certifications issued by the board. As such, the canon of strict construction does not apply.

The reference to "(E) other due and sufficient cause" does not render the statute impermissibly vague. The statute specifies reasons (A) through (E), with (A) through (D) being specific and (E) being more general. The use of the word "other" in "other due and sufficient cause" refers back to (A) through (D) and, thus, requires (E) to be a reason of the type and importance of (A) through (D). Therefore, with the foregoing in mind, "(E) other due and sufficient cause" means a reason, of the type and importance of (A) through (D), judged by the board in good faith and rationality to satisfy the statute. This provision is not impermissibly vague. See *Hanes* v. *Board of Education*, 65 Conn. App. 224, 232, 783 A.2d 1 (2001); see also *diLeo* v. *Greenfield*, 541 F.2d 949, 954 (2d Cir. 1976); *Tucker* v. *Board of Education*, 177 Conn. 572, 578, 418 A.2d 933 (1979).

The reference to "otherwise improperly breached the security of any administration of a mastery examination"[13] also does not render the statute impermissibly vague. The phrase preceding this gives an example of improperly breaching security. The word, "otherwise," indicates that actions, other than intentionally disclosing specific questions or answers to students, taken to improperly breach the security of the test can satisfy

[13] The court finds that the word "intentionally" that appears prior to this phrase in the sentence does not modify this phrase. Thus, this phrase in the statute is satisfied if the security of the administration of a mastery examination is improperly breached.

the statutory requirement. The statutory reference is clearly to the CMT, the Connecticut Mastery Test. The ''security of any administration'' of the test noted therein refers to the propriety of the means by which the test is handled and processed by the teachers and administrators who administer the test. Security, as with any test, includes maintaining the confidentiality of the test and not affirmatively taking steps to undermine the fair and accurate results of the test. "Improperly" means inappropriate action that exceeds mere negligence. Improperly requires some level of fault beyond honest mistake. Thus, the statute has a reasonably ascertainable meaning, and is, therefore, not impermissibly vague.

The plaintiff's conduct meets the requirements of the statute. In its final decision, the board found as follows: "[T]he conduct of [the plaintiff], as found in the proposed decision, is serious and warrants the imposition of such revocation. This conduct constitutes a breach of faith with her students, their parents, her teachers and the [s]tate that renders her unfit to teach." Thus, the board specifically found that the conduct determined by the hearing officer in the proposed decision was such as to convince the board that the plaintiff was professionally unfit to perform the duties of a teacher, as specified in § 10-145b (i) (2) (C). There is substantial evidence in the record to support this determination, and the determination was not unreasonable, given the record. The hearing officer focused more on the "other due and sufficient cause"[14] and "otherwise improperly breached the security of any administration of a mastery examination" aspects of the statute. The record also contains substantial evidence that the plaintiff's conduct satisfied the foregoing prongs of the statute as well. In analyzing any of the three relevant portions of the statute, the plaintiff's conduct, as found by the

[14] Certainly, if the plaintiff has taken actions that cause her to be unfit to teach, due and sufficient cause exists.

hearing officer, would be sufficient to revoke her certificates.

Once again, the record contains substantial evidence that the plaintiff was directly involved in fostering cheating on the CMT. First, the record contains evidence, and the hearing officer found, that the plaintiff personally instructed Hopeville teachers to review the test in advance and to move around the classroom, observe students' answers to various questions, and specifically instruct students to "check your work" in relation to particular questions that teachers observed particular students had answered incorrectly. Students indicated that they understood the "check your work" prompt to be a signal that a particular answer they had was incorrect and that they should go back and correct it. Second, the plaintiff was present at meetings where Mrs. Perugini distributed questions and vocabulary words that were taken from the 2011 CMT and instructed teachers to review them with their classes. Last, the record contains evidence that the plaintiff instructed teachers to provide the students with synonyms for words on the CMT that they might not readily understand. In each of the foregoing three cases, the plaintiff directly participated in, and even instructed, the cheating. Each of the foregoing issues amounted to an improper breach of security of the CMT—the purposeful failure to maintain the confidentiality of the test and purposeful action to undermine the fair and accurate results of the test. Further, the record contains substantial evidence that the plaintiff understood, as would any reasonable person, that the foregoing activities would be cheating and would amount to a breach of the security of the test. Given the fostering of this cheating, on a schoolwide basis, by a principal, the evidence clearly also meets the "other due and sufficient cause" requirement of the statute because the commission of cheating by a

principal clearly undermines the fitness of the plaintiff to teach and to be an appropriate example for the students and teachers under her purview.

The plaintiff takes the board to task for the hearing officer's reference to the Code of Professional Responsibility for School Administrators and the Code of Professional Responsibility for Teachers. Neither of these codes are necessary for the decision that was made in this matter. Both of the codes, however, are appropriate and useful in gauging whether a person is fit to act as a teacher or an administrator, and in determining "other due and sufficient cause." It must be noted that teachers and school administrators are professionals licensed by the state through the board to practice their professions. These codes establish a norm or expectation for the conduct of teachers and school administrators. As such, they are an appropriate yardstick or guide in judging the plaintiff's fitness to practice and maintain her licensure.

As for the penalty, the board determined that the plaintiff was unfit to teach and, thus, revoked the plaintiff's certificates. This determination was not unreasonable. The conduct of the plaintiff, as found by the hearing officer, caused the Waterbury school district to have to expend serious resources in investigating this situation, disregarding the initial results of the test, and readministering the test. This also unnecessarily used time that could have been devoted to teaching. The conduct caused both the board and the Waterbury school district to lose faith in the plaintiff. Most importantly, the plaintiff set a poor example for her students and teachers. The most vital thing, and the very minimum, that we expect from teachers and school administrators is to set a good example for their students. Given the facilitation of schoolwide cheating, the plaintiff's conduct constituted "a breach of faith with her students, their parents, her teachers and the [s]tate that

renders her unfit to teach," as found by the board.[15] The board's decision to revoke the plaintiff's certificates was not unreasonable. The statute, as is not untypical, authorizes remedies up to and including revocation of certificates. The choice on the spectrum is left to the good faith discretion of the board. This does not render the statute impermissibly vague, either generally or as applied to the plaintiff.

CONCLUSION

The plaintiff has appealed in her complaint for each of the statutory reasons specified in § 4-183 (j). This court determines that the plaintiff has failed to establish on appeal that the board's decision was (1) in violation of constitutional or statutory provisions, (2) in excess of the statutory authority of the agency, (3) made upon unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. As such, the court dismisses the appeal.

ORDER

The appeal is dismissed.

ALFREDO GONZALEZ *v.* COMMISSIONER OF CORRECTION (AC 43815)

Alvord, Prescott and Suarez, Js.

Syllabus

The petitioner, who had been convicted of several crimes in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel rendered ineffective assistance for having followed a strategy that was based on an inaccurate statement

[15] This finding also satisfies the "other due and sufficient cause" specified in the statute. As noted, the record evidence also supports the finding that the plaintiff improperly breached the security of the 2011 CMT.

of the law. The petitioner specifically asserted that his right to due process was violated because the statutory (§§ 53a-8 and 53a-55a) scheme underlying his conviction of manslaughter in the first degree with a firearm as an accessory does not require the state to prove, as an essential element of accessorial liability, that he intended the principal's use of a firearm. The habeas court concluded that the petitioner failed to show how §§ 53a-8 and 53a-55a violated due process by shifting to the defense the burden of proving an essential element of accessorial liability, and, thus, that the petitioner had failed to prove that his counsel rendered ineffective assistance. The court denied the petitioner's habeas petition, and, on the granting of certification, he appealed to this court. On appeal, the respondent Commissioner of Correction contended that the petitioner's claim was procedurally barred pursuant to *Teague* v. *Lane* (489 U.S. 288), which precludes a court on collateral review from declaring a new constitutional rule after a conviction has become final. *Held* that the habeas court properly denied the petitioner's habeas petition, as state and federal precedent at the time his conviction became final made clear that no constitutional rule existed then that required the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of the firearm; moreover, the rule the petitioner sought to establish was not, as he claimed, an application of existing constitutional principles, as the United States Supreme Court in *Patterson* v. *New York* (432 U.S. 197) had held prior to his conviction that it was constitutionally permissible to require criminal defendants to prove affirmative defenses that relate to culpability, which the legislature has required pursuant to statute (§ 53a-16b); furthermore, the rule the petitioner sought to establish was procedural in nature pursuant to *Teague* because it focused on the manner by which an accessory can be deemed culpable for the use of a firearm by others and, thus, contrary to his assertion, did not place a category of private conduct beyond the power of the state to punish so as to satisfy that exception in *Teague* to the prohibition against establishing new constitutional rules of criminal procedure in collateral proceedings, as the rule the petitioner sought would invalidate the provisions in §§ 53a-16b and 53a-55a that make a criminal defendant's lack of knowledge of the firearm an affirmative defense, rather than an element of the offense.

Argued March 9—officially released June 29, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Alfredo Gonzalez, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The habeas court granted his petition for certification to appeal. On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to due process under the federal and state constitutions was violated because General Statutes §§ 53a-8[1] and 53a-55a[2] do not require the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that he intended the principal's use, carrying or threatened use of a firearm. We affirm the judgment of the habeas court.

Our Supreme Court on direct appeal summarized the underlying facts as reasonably found by the jury.[3] "The

[1] General Statutes § 53a-8 provides in relevant part: "(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. . . ."

[2] General Statutes § 53a-55a provides in relevant part: "(a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. No person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information. . . ."

[3] The petitioner appealed from the judgment of the trial court to this court, and the appeal was transferred to our Supreme Court pursuant to General

[petitioner] had engaged in an ongoing feud with the victim, Samuel Tirado.[4] On the evening of May 5, 2006, the [petitioner] and three friends, Anthony Furs, Christian Rodriguez and Melvin Laguna, went out for the evening in Rodriguez' red GMC Yukon. They stopped briefly at one bar, and then decided to go to a bar named Bobby Allen's in Waterbury because they knew that the victim went there frequently, and they wanted to start a fight with him. En route to Bobby Allen's, the [petitioner] observed that there were two guns in the Yukon, in addition to a razor blade that he intended to use in that fight, and remarked that, if he had the money, he would give it to Furs to 'clap,' or shoot, the victim. Rodriguez, who also disliked the victim, then offered to pay Furs $1000 to shoot the victim, which Furs accepted.

"When they arrived at Bobby Allen's, the [petitioner] left the group briefly to urinate behind a nearby funeral home. When he rejoined the group, Furs gave the [petitioner] the keys to the Yukon and told him to go get the truck because the victim was nearby speaking with Rodriguez. The [petitioner] and Furs then drove a short distance toward Bobby Allen's in the Yukon, and Furs, upon spotting the victim and Rodriguez outside the bar, jumped out of the Yukon and shot the victim in the chest with a black handgun, mortally wounding him. Rodriguez and Laguna then fled the scene on foot, while

Statutes § 51-199 (c) and Practice Book § 65-1. *State* v. *Gonzalez*, 300 Conn. 490, 492 n.3, 15 A.3d 1049 (2011).

[4] "The victim was the best friend of Michael Borelli, who was convicted of manslaughter charges after he fatally stabbed Jose Gonzalez, the [petitioner's] brother, during a melee at a Waterbury gas station. At one of the court hearings in that case, the victim chanted, 'free Mike Borelli, fuck Peach,' in reference to the [petitioner], whose nickname is 'Peachy.' Thereafter, the [petitioner] often stated that he blamed the victim for his brother's death and wanted revenge. The victim further antagonized the [petitioner] one night in April, 2006, at [a bar named] Bobby Allen's [in Waterbury], when the victim snubbed the [petitioner's] offer to shake his hand. The [petitioner] then told the victim that he and his friends were 'going down.' " *State* v. *Gonzalez*, 300 Conn. 490, 492 n.4, 15 A.3d 1049 (2011).

Furs and the [petitioner] drove off in the Yukon to a friend's nearby apartment on South Main Street. Thereafter, with the assistance of friends, Furs[5] and the [petitioner] fled separately from the apartment, and the [petitioner] subsequently disposed of the gun, first by hiding it in a woodpile at his mother's home, and later by throwing it into Pritchard's Pond (pond) in Waterbury.

"Thereafter, Waterbury police officers investigating the shooting questioned the [petitioner] after arresting him on an outstanding motor vehicle warrant on May 6, 2006. The [petitioner] initially gave a statement denying any involvement in the incident. Subsequently, on May 15, 2006, the Waterbury police reinterviewed the [petitioner], at which time he admitted disposing of the gun by throwing it into the pond. The [petitioner] then accompanied the officers to the pond and showed them where he had thrown the gun, which enabled a dive team to recover it several days later.[6] After they returned to the police station, the [petitioner] gave the police a second statement admitting that he had lied in his initial

[5] "Prior to trial in this case, Furs pleaded guilty to murder and was sentenced to forty-seven years imprisonment. See *Furs* v. *Superior Court*, 298 Conn. 404, 407, 3 A.3d 912 (2010). As is detailed in the record of the trial in the present case, as well as our [Supreme Court's] opinion in *Furs*, although the state subpoenaed Furs to testify at the [petitioner's] trial, he refused to testify on the ground that to do so would violate his privilege against self-incrimination given a pending habeas corpus proceeding in his case, notwithstanding the state's offer of use immunity. Id., 407–409. The trial court held Furs in summary criminal contempt and sentenced him to six months imprisonment consecutive to his murder sentence as a consequence of his failure to testify, concluding that the prosecutor's offer of use immunity was sufficient to protect Furs' fifth amendment rights. Id., 409–10. [Our Supreme Court] subsequently granted Furs' writ of error from that contempt finding, concluding that he was entitled to full transactional immunity under General Statutes § 54-47a. Id., 406, 411–12." *State* v. *Gonzalez*, 300 Conn. 493 n.5, 15 A.3d 1049 (2011).

[6] "Investigators subsequently determined that this gun had fired the bullet that was recovered from the victim's chest and had ejected a shell casing that was found at the scene." *State* v. *Gonzalez*, 300 Conn. 494 n.6, 15 A.3d 1049 (2011).

statement and explaining his role in the events leading to and following the shooting.

"The state charged the [petitioner] in a six count substitute information with murder as an accessory in violation of § 53a-8 and General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, manslaughter in the first degree with a firearm as an accessory in violation of §§ 53a-8 and 53a-55a, conspiracy to commit assault in the first degree in violation of § 53a-48 and General Statutes § 53a-59 (a) (5), hindering prosecution in the second degree in violation of General Statutes § 53a-166, and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The [petitioner] elected a jury trial. After evidence, the trial court denied the [petitioner's] motion for acquittal. The jury returned a verdict finding him not guilty of accessory to murder and conspiracy to commit murder, but guilty on all other counts. The trial court [*Miano, J.*] rendered a judgment of conviction in accordance with the jury's verdict and sentenced the [petitioner] to a total effective sentence of thirty-eight years imprisonment, with ten years of special parole." (Footnote in original; footnote omitted.) *State* v. *Gonzalez*, 300 Conn. 490, 492–95, 15 A.3d 1049 (2011).

The petitioner's sole claim on direct appeal to our Supreme Court was that "the trial court improperly instructed the jury regarding the elements of the offense of manslaughter in the first degree with a firearm as an accessory.[7] Specifically, the [petitioner] claim[ed]

[7] "After explaining the principles of accessorial liability generally in the context of the murder charge, the trial court instructed the jury in relevant part that, [u]nder the accessorial theory of liability, as I've defined it, in order for the state to prove the offense of accessory to manslaughter in the first degree with a firearm, the following elements each must be proved beyond a reasonable doubt: Number one, that the [petitioner] . . . had the specific intent to cause serious physical injury to [the victim]. Two: That the [petitioner] solicits, requests or intentionally aids the principal, the shooter, who causes the death of such person, [the victim]. And three: In

that accessorial liability under § 53a-8 encompasses both the specific intent to cause a result, in this case, to cause the victim serious physical injury, as well as the general intent to perform the physical acts that constitute the offense of manslaughter in the first degree with a firearm, including the use, carrying or threatened use of a firearm." (Footnote added; internal quotation marks omitted.) Id., 495.

Our Supreme Court rejected the petitioner's claim that the trial court improperly instructed the jury. Specifically, our Supreme Court concluded that the trial court's instruction conformed with *State* v. *Miller*, 95 Conn. App. 362, 896 A.2d 844, cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006), which "properly articulated the elements of accessorial liability under § 53a-8 for manslaughter in the first degree with a firearm in violation of § 53a-55a," and declined the petitioner's "invitation to overrule that decision." *State* v. *Gonzalez*, supra,

the commission of such offense the principal, the shooter, uses a firearm. After explaining each of the three elements individually, including that the jury had to find that the [petitioner] had the specific intent to cause serious physical injury to [the victim], and that the state must prove beyond a reasonable doubt . . . that the [petitioner] did solicit, request or intentionally aid another person, the principal, to engage in conduct which constitutes [the] crime of manslaughter in the first degree, the trial court noted that the third element is that the state must prove beyond a reasonable doubt that in the commission of this offense the principal, [Furs], uses a firearm, defined as any pistol, revolver or other weapon, whether loaded or unloaded, from which a shot may be discharged. You must find that the firearm was operable at the time of the offense.

"The [petitioner] subsequently took an exception to this portion of the charge, seeking reinstruction on this point. The trial court denied that request, rejecting the [petitioner's] argument that the accessory must have the intention that a firearm be used, not only the principal have the intent to use a firearm and use a firearm, but that the accessory must have the intention. That court agreed with the state's position that the firearm element was an aggravant and that the only mental state that the state was required to prove under §§ 53a-8 and 53a-55a was intent to cause serious physical injury." (Footnote omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 496–99.

300 Conn. 509–10. Moreover, our Supreme Court adopted the conclusion set forth in *Miller* that, "[w]hen a defendant is charged with a violation of § 53a-55a as an accessory, the state need not prove that the defendant intended the use, carrying or threatened use of the firearm."[8] Id., 510; *State* v. *Miller*, supra, 362. Accordingly, our Supreme Court affirmed the petitioner's conviction. *State* v. *Gonzalez*, supra, 510.

Thereafter, the self-represented petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 2254. In his one count habeas petition, the petitioner alleged that "Connecticut's statutory scheme of manslaughter in the [first] [d]egree with a [f]irearm violates the [d]ue [p]rocess [c]lause of the [fifth] and [fourteenth] amend[ments] [t]o [the] [United States constitution]. . . . In the facts supporting this ground, the petitioner contend[ed] that . . . § 53a-55a is violative of the United States [c]onstitution in that it does not require the state to prove an essential element of the substantial crime charged: the intent to use a firearm. . . . The respondents move[d] to dismiss the petition on the ground that the petitioner ha[d] not exhausted his state court remedies as to the sole ground in the petition. The respondents argue[d] that the petitioner did not fairly present the federal constitutional challenge raised in ground one of the . . . petition in his direct appeal to [our] Supreme Court. Thus, [the respondents argued that] the claim has not been exhausted." (Citation omitted; internal quotation marks omitted.) *Gonzalez* v. *Commissioner*, United States

[8] Our Supreme Court concluded that, "to establish accessorial liability under § 53a-8 for manslaughter in the first degree with a firearm in violation of § 53a-55a, the state must prove that the defendant, acting with the intent to cause serious physical injury to another person, intentionally aided a principal offender in causing the death of such person or of a third person, and that the principal, in committing the act, used, carried or threatened to use a firearm." *State* v. *Gonzalez*, supra, 300 Conn. 496.

District Court, Docket No. 3:11cv1012 (VLB) (D. Conn. July 20, 2012). The federal District Court, Bryant, J., dismissed his petition for a writ of habeas corpus without prejudice for failure to exhaust state court remedies. Id.

The petitioner then filed a petition for a writ of habeas corpus in our Superior Court. In his amended habeas petition, the petitioner alleged that his "trial counsel was ineffective for following a strategy that was based on an inaccurate statement of the law, i.e., that the state was required to prove specific intent that a firearm be used." The habeas court, *Cobb*, *J.*, denied his amended petition for a writ of habeas corpus; *Gonzalez* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-11-4004210-S (March 17, 2014); and this court dismissed his appeal therefrom. *Gonzalez* v. *Commissioner of Correction*, 160 Conn. App. 902, 125 A.3d 296 (2015).

On February 13, 2015, the petitioner filed the present petition for a writ of habeas corpus. In his third amended habeas petition, the petitioner set forth the following four counts, in which he alleged (1) that "§§ 53a-8 and 53a-55a—accessory to commit manslaughter in the first degree with a firearm—combine in a way that violates the due process clause of the [fifth] and [fourteenth] amend[ments] to the [United States constitution] as well as article first, § [8], of the Connecticut constitution in that they do not require the state to prove an essential element of the substantial crime charged: the intent to use a firearm" (due process claim), (2) ineffective assistance of trial counsel,[9] (3) ineffective assistance of appellate counsel,[10] and (4)

[9] Specifically, the petitioner alleged that the performance of his trial counsel, Attorney Lawrence S. Hopkins, was deficient because "he failed properly to preserve the [due process] claim . . . ."

[10] Specifically, the petitioner alleged that the performance of his appellate counsel, Attorney Raymond L. Durelli, was deficient because "he failed to raise the [due process] issue . . . ."

ineffective assistance of prior state habeas counsel.[11] In his return, with respect to each of the substantive grounds set forth in the third amended habeas petition, the respondent, the Commissioner of Correction, left the petitioner to his proof.

Following a trial, the habeas court, *Bhatt*, *J.*, first determined that the "resolution of the petitioner's claim in count one [is] dispositive of the claims in the remaining counts . . . ." Thus, the court "focuse[d] its discussion on the question of whether there is a . . . due process violation in our statutory scheme for accessory to manslaughter in the first degree with a firearm." Ultimately, the court concluded that "the petitioner has not shown how our statutory scheme violates the due process clause by impermissibly shifting the burden of an essential element to the defense and has failed in his burden of proving ineffective assistance of counsel." Accordingly, the court rendered judgment denying his amended petition for a writ of habeas corpus. Thereafter, the petitioner filed a petition for certification to appeal from the judgment of the habeas court, which was granted. This appeal followed.[12]

On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to due process under the federal and state constitutions was violated because §§ 53a-8 and 53a-55a do not require the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that he intended the principal's use, carrying or

[11] Specifically, the petitioner alleged that the performance of his prior state habeas counsel, Attorney Joseph A. Jaumann, was deficient because he failed to raise (1) the due process claim, (2) "the issue of ineffective assistance of trial counsel," and (3) "the issue of ineffective assistance of appellate counsel . . . ."

[12] The petitioner does not challenge on appeal the habeas court's determination with respect to his claims of ineffective assistance of trial, appellate, and habeas counsel.

threatened use of a firearm. Specifically, the petitioner maintains that, "[t]o convict an individual of the offense of accessory to manslaughter in the first degree with a firearm, in violation of . . . §§ 53a-8 [and] 53a-55a, in accord with due process as guaranteed by the state and federal constitutions, the state must prove that (1) with the intent to cause serious physical injury to another person, the principal causes the death of such person, (2) in the commission of such offense, the principal uses a firearm, and (3) *the accessory intends that the principal use a firearm*." (Emphasis added.)

The respondent contends that the principles enunciated in *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), preclude this court from establishing the new constitutional rule of criminal procedure proposed by the petitioner in a collateral habeas action. Specifically, the respondent argues that the petitioner "continues to seek . . . to have a new constitutional right declared that requires, as a matter of due process, the engrafting of a requirement that the state prove that an accessory possess the intent that a firearm be used in order to be convicted of the crime of manslaughter in the first degree with a firearm. While a court may declare new constitutional rules in a direct appeal from a criminal conviction, it lacks such authority to do so once a conviction becomes final." In reply to the respondent's contention, the petitioner maintains that "*Teague* is inapplicable" because "existing precedent dictated the result [he] seeks; therefore, it is not a new rule . . . ." Alternatively, the petitioner argues that the rule he seeks satisfies the first exception to the general prohibition against establishing new constitutional rules of criminal procedure in collateral proceedings as set forth in *Teague* v. *Lane*, supra, 311, because it "places a category of private conduct beyond the power of the state to punish." We agree with the

respondent and conclude that the petitioner's due process claim is procedurally barred by *Teague*.[13]

"When considering the potential retroactive application of a new rule of constitutional criminal procedure, we apply the rule of *Teague* v. *Lane*, supra, 489 U.S. 288. . . . In *Teague*, the United States Supreme Court held that new constitutional rules of criminal procedure should not be established in or applied to collateral proceedings, including habeas corpus proceedings. [Id.], 315–16. A rule is considered to be new when it breaks new ground or imposes a new obligation on the

[13] The petitioner argues that this court "should not undertake the [respondent's] proposed *Teague* analysis now because the [respondent] did not assert it in the habeas court, the habeas court did not employ it, and the petitioner can only respond . . . in [his] limited reply brief." We reject the petitioner's contention that we should not consider this issue because the respondent failed to raise it as a defense before the habeas court. See *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 58 n.5, 115 A.3d 1031 (2015) (exercising discretion to consider issue of retroactivity under *Teague* notwithstanding respondent's failure to raise it as defense before habeas court), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

"[A] reviewing court has discretion to consider an unpreserved claim if exceptional circumstances exist that would justify review of such an issue if raised by a party . . . the parties are given an opportunity to be heard on the issue, and . . . there is no unfair prejudice to the party against whom the issue is to be decided." (Internal quotation marks omitted.) Id. Exceptional circumstances exist that militate in favor of reviewing unpreserved claims, even over the objection of a party, "when review of the claim would obviate the need to address a constitutional question . . . ." (Citations omitted; footnote omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 159, 84 A.3d 840 (2014); see also *Neese* v. *Southern Railway Co.*, 350 U.S. 77, 78, 76 S. Ct. 131, 100 L. Ed. 60 (1955) ("we follow the traditional practice of this [c]ourt of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised . . . by the parties"). We are also mindful that "[t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *State* v. *Washington*, 39 Conn. App. 175, 176–77 n.3, 664 A.2d 1153 (1995). Furthermore, the petitioner had the opportunity to address the issue of retroactivity under *Teague* in his reply brief and at oral argument before this court, and did so. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 58 n.5.

[s]tates or the [f]ederal [g]overnment. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. . . . Id., 301. Further, a holding is not so dictated . . . unless it would have been apparent to all reasonable jurists. . . . On the other hand, *Teague* also made clear that a case does *not* announce a new rule, [when] it [is] merely an application of the principle that governed a prior decision to a different set of facts." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Dyous* v. *Commissioner of Mental Health & Addiction Services*, 324 Conn. 163, 173–74, 151 A.3d 1247 (2016).

"With two exceptions, a new rule will not apply retroactively to cases on collateral review. *Teague* v. *Lane*, supra, 489 U.S. 311–13. First, if the new rule is substantive, that is, if the rule places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe . . . it must apply retroactively. Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him. . . .

"Second, if the new rule is procedural, it applies retroactively if it is a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . meaning that it implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding. . . . Watershed rules of criminal procedure include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." (Citations omitted; internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 62–63, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

The first step in our *Teague* analysis is to determine whether the habeas court in the present case could have afforded the petitioner relief on the basis of established jurisprudence governing his claim or whether affording such relief would have required the habeas court to establish a new constitutional rule of criminal procedure. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 174–75. An analysis of the precedent existing at the time the petitioner's conviction became final in 2011 makes clear that no constitutional rule existed at that time that required the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of a firearm.

We begin with an analysis of our state precedent existing at the time the petitioner's conviction became final. In the petitioner's direct appeal, our Supreme Court adopted the conclusion initially set forth in *State* v. *Miller*, supra, 95 Conn. App. 362, that "the state need not prove that the [petitioner] intended the [principal's] use, carrying or threatened use of the firearm." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 510. Our Supreme Court noted the affirmative defense provided by General Statutes § 53a-16b, which provides in relevant part that, "[i]n any prosecution for an offense under § 53a-55a . . . in which the defendant was not the only participant, it shall be an affirmative defense that the defendant: (1) Was not armed with a pistol, revolver, machine gun, shotgun, rifle or other firearm, and (2) had no reasonable ground to believe that any other participant was armed with such a weapon. Section 53a-16b is consistent with other areas wherein the legislature has provided that the state must prove the essential elements of the crime, and has left it to the defendant to mitigate[14] his criminal culpability

[14] We note that, in the petitioner's case, in which the state charged him with manslaughter in the first degree with a firearm as an accessory in

or sentencing exposure via an affirmative defense, particularly with respect to areas that uniquely are within the defendant's knowledge." Id., 508. This precedent remains binding on this court today.[15] Accordingly, our review of state precedent existing at the time the petitioner's conviction became final reveals that the constitutional rule the petitioner seeks would not have been apparent to all reasonable jurists and, as such, was not dictated by established precedent. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 173–74.

We next consider the landscape of federal precedent existing at the time the petitioner's conviction became final. The petitioner maintains that United States Supreme Court precedent existing at the time his conviction became final dictated the result he seeks. Specifically, he argues that his conviction became final "after *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, [44 L. Ed. 2d 508] (1975), and *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, [147 L. Ed. 2d 435] (2000), were well established," and that "[t]he rationale of these two cases alone implores the review that reveals the due process violation." We conclude that the petitioner's reliance on these cases is misplaced.

In *Mullaney*, the United States Supreme Court declared a Maine statutory scheme unconstitutional.[16]

violation of §§ 53a-8 and 53a-55a but not with the lesser included offense of manslaughter in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-55 (a) (1), his proof of the affirmative defense set forth in § 53a-16b would serve to relieve him of any criminal culpability associated with the charge of manslaughter in the first degree with a firearm as an accessory.

[15] In his principal appellate brief, the petitioner acknowledges *State* v. *Miller*, supra, 95 Conn. App. 362, as binding precedent and argues that *Miller* "should be overruled."

[16] "The Maine murder statute, Me. Rev. Stat. Ann., [t]it. 17, § 2651 (1964), provides: 'Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.'

"The manslaughter statute, Me. Rev. Stat. Ann., [t]it. 17, § 2551 (1964), in relevant part provides: 'Whoever unlawfully kills a human being in the

The Maine Supreme Judicial Court had held that, in prosecuting a charge of murder, "the prosecution could rest on a presumption of implied malice aforethought and require the defendant to prove that he had acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." *Mullaney* v. *Wilbur*, supra, 421 U.S. 688. The issue before the court was "whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." Id., 692. The United States Supreme Court held that this statutory scheme improperly shifted the burden of persuasion from the prosecutor to the defendant and was therefore a violation of the requirement of due process that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged, as stated in *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *Mullaney* v. *Wilbur*, supra, 701.

In *Apprendi*, the United States Supreme Court declared a New Jersey statutory scheme unconstitutional.[17] The New Jersey statutory scheme "allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that

heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . .' " *Mullaney* v. *Wilbur*, supra, 421 U.S. 686 n.3.

[17] The United States Supreme Court articulated the New Jersey statutory scheme as follows: "A New Jersey statute classifies the possession of a firearm for an unlawful purpose as a 'second-degree' offense. N.J. Stat. Ann. § 2C:39-4 (a) (West 1995). Such an offense is punishable by imprisonment for 'between five years and 10 years.' § 2C:43-6 (a) (2). A separate statute, described by [New Jersey's] Supreme Court as a 'hate crime' law, provides for an 'extended term' of imprisonment if the trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' N.J. Stat. Ann. § 2C:44-3 (e) (West Supp. 1999–2000). The extended term authorized by the hate crime law for second-degree offenses is imprisonment for 'between 10 and 20 years.' § 2C:43-7 (a) (3)." *Apprendi* v. *New Jersey*, supra, 530 U.S. 468–69.

he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree, N.J. Stat. Ann. § 2C:43-6 (a) (1) (West 1999), based upon the judge's finding, by a preponderance of the evidence, that the defendant's purpose for unlawfully possessing the weapon was to intimidate his victim on the basis of a particular characteristic the victim possessed." (Internal quotation marks omitted.) *Apprendi* v. *New Jersey*, supra, 530 U.S. 491. The issue before the court was "whether the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from [ten] to [twenty] years be made by a jury on the basis of proof beyond a reasonable doubt." Id., 469. The United States Supreme Court held that, in accordance with due process, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., 490. The court reasoned that the New Jersey statutory scheme was unconstitutional because it "runs directly into our warning in *Mullaney* that [*In re*] *Winship* is concerned as much with the category of substantive offense as with the degree of criminal culpability assessed." (Internal quotation marks omitted.) Id., 494–95.

The respondent cites *Patterson* v. *New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) for the proposition that "due process does not mandate that the state prove that an accessory to a crime intend that every aggravating element be committed by the principal." In *Patterson*, the United States Supreme Court declined to declare a New York statute unconstitutional.[18] The New York statute provides that a defendant charged with murder can prove as "an affirmative defense . . . that the defendant acted under the influ-

[18] Section 125.25 of New York's Penal Law (McKinney 1975) provides in relevant part: "A person is guilty of murder in the second degree when:

ence of extreme emotional disturbance for which there was a reasonable explanation—which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter . . . .'' Id., 206. The issue before the court was ''the constitutionality under the [f]ourteenth [a]mendment's [d]ue [p]rocess [c]lause of burdening the defendant in a New York [s]tate murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law.'' Id., 198. The United States Supreme Court recognized that ''the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant''; id., 211; and ''decline[d] to adopt as a constitutional imperative, operative countrywide, that a [s]tate must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.'' Id., 210. The court reasoned that the New York statute was constitutional because it ''does not serve to negat[e] any facts of the crime which the [s]tate is to prove in order to convict [a defendant] of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion.'' Id., 206–207.

The court in *Patterson* distinguished its holding from *Mullaney*, stating that ''[t]here is some language in *Mullaney* that has been understood as perhaps construing the [d]ue [p]rocess [c]lause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' . . . It is said that

''1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

''(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.'' *Patterson* v. *New York*, supra, 432 U.S. 198–99 n.2.

such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof . . . . The [c]ourt did not intend *Mullaney* to have such far-reaching effect." (Citations omitted.) Id., 214–15 n.15. The court clarified that, under *Mullaney*, "a [s]tate must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the [s]tate deems so important that it must be either proved or presumed is impermissible under the [d]ue [p]rocess [c]lause." Id., 215.

Our review of the United States precedent existing at the time the petitioner's conviction became final reveals that the rule the petitioner seeks would not have been apparent to all reasonable jurists and, as such, was not dictated by established precedent. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 173–74. First, the functioning of the statutes at issue in *Mullaney* and *Apprendi* are distinguishable from that of the statutes at issue in the present case. The statutes at issue in the present case function to omit proof of any particular mental state of the principal or accomplice with respect to the use, carrying or threatened use of a firearm. See *State* v. *Miller*, supra, 95 Conn. App. 375 (proof of use, carrying or threatened use of firearm "is not encompassed within the dual intent requirement of § 53a-8, but rather is merely an aggravating circumstance that does not require proof of any particular mental state"). Unlike the statutes at issue in *Mullaney* and *Apprendi*, the statutes at issue here do not provide that "the prosecution could rest on a presumption"; *Mullaney* v. *Wilbur*, supra, 421 U.S. 688; or that "a judge [could] impose [a heightened] punishment . . . based upon the judge's [independent factual] finding . . . ." (Citation omitted.) *Apprendi* v. *New Jersey*, supra, 530 U.S. 491. Second, at the time the

petitioner's conviction became final, the United States Supreme Court in *Patterson* had avowed "the long-accepted rule . . . that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant." *Patterson* v. *New York*, supra, 432 U.S. 211. Our legislature did so in enacting § 53a-16b, which allows an accomplice to offer proof of his or her mental state as an affirmative defense with respect to the aggravating circumstance of using, carrying or threatening the use of a firearm. Given the United States Supreme Court's holding in *Patterson* that the state need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused"; id., 210; and for the aforementioned reasons, we cannot conclude that the rule the petitioner seeks is merely an application of established constitutional principles.

In light of our thorough review of the relevant federal and state precedent, we conclude that, in the present case, no grounds for relief for the petitioner's due process claim were clearly established at the time his conviction became final in 2011. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 177. Accordingly, we conclude that for the habeas court to afford the petitioner relief on his due process claim, it would have had to establish a new constitutional rule that, to comport with due process, the state must prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of a firearm.

Having concluded that the habeas court would have had to depart from prior constitutional jurisprudence to afford relief to the petitioner, we now address his claim that the new constitutional rule he seeks falls within the first *Teague* exception.[19] The petitioner

[19] The petitioner does not claim that this rule would fall within the second exception in *Teague*, which is for watershed constitutional rules of criminal

claims that "the rule places a category of private conduct beyond the power of the state to punish" and, therefore, satisfies the first *Teague* exception. We disagree.

The first *Teague* exception "permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the [s]tate to proscribe . . . or addresses a substantive categorical guarante[e] accorded by the [c]onstitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." (Citation omitted; internal quotation marks omitted.) *Saffle* v. *Parks*, 494 U.S. 484, 494, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990); *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 181 n.11.

In *Teague* v. *Lane*, supra, 489 U.S. 288, the United States Supreme Court determined that "[t]he first exception . . . is not relevant . . . [where the new constitutional rule] would not accord constitutional protection to any primary activity . . . ." (Citation omitted.) Id., 311. Rather, "rules that regulate only the manner of determining the defendant's culpability are procedural." (Emphasis omitted.) *Schriro* v. *Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004); *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 68. "[A] rule that alters the manner of determining culpability merely raise[s] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. . . . Applying this understanding to new rules governing sentences and punishments, a new procedural rule creates the possibility that the defendant would have received a less severe punishment but does not necessitate such a result. Accordingly, a rule is procedural when it affects how and under what framework a punishment may be imposed but leaves intact the state's

procedure. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 181. As such, our analysis is limited to the first *Teague* exception.

fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 68.

The new constitutional rule that the petitioner seeks in the present case would require the state, in accordance with due process, to prove as an essential element of accessorial liability for manslaughter in the first degree with a firearm that the accessory intended the principal's use of a firearm. The petitioner argues that "the proposed rule broadens protections against punishment by the state" by requiring the state to "prove to a jury that an accessory intended a principal's use of a firearm" before the accessory can "be exposed to the severely increased penalties to which [the] principal (who obviously intended the use of a firearm) is exposed." (Footnote omitted.) In effect, this rule would alter the manner of determining an accessory's culpability for manslaughter in the first degree with a firearm by invalidating the provisions set forth in §§ 53a-55a and 53a-16b, which make a defendant's lack of knowledge of the firearm an affirmative defense rather than make his knowledge of the firearm an element of the offense. Because the petitioner's proposed rule focuses on the manner by which an accessory can be deemed culpable for the use, carrying or threatened use of a firearm by others in the commission of manslaughter in the first degree, we conclude that the new constitutional rule the petitioner seeks is procedural in nature. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 68.

Accordingly, we conclude that the new constitutional rule of criminal procedure that the petitioner seeks does not satisfy the first *Teague* exception. Thus, we conclude that the habeas court properly denied the petitioner relief with respect to his due process claim.

The judgment is affirmed.

In this opinion the other judges concurred.