**CASES ARGUED AND DETERMINED**

IN THE

# APPELLATE COURT

OF THE

# STATE OF CONNECTICUT

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## STATE OF CONNECTICUT *v.* AHMAAD JAMAL LANE (AC 40185)

Elgo, Cradle and DiPentima, Js.

*Syllabus*

Convicted of the crime of assault in the first degree in connection with an incident in which he struck the victim in the head with a chair during a confrontation, the defendant appealed to this court. Before the start of trial, the trial court denied the defendant's motion to disqualify the judicial authority on the basis that the trial judge, while serving as a prosecutor, might have been involved with pretrial proceedings in one of his prior criminal cases and, thus, appeared to lack impartiality. The court also denied in part the defendant's motion to exclude from evidence certain photographs of the victim's injuries on the basis that they were irrelevant and unduly prejudicial. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion to disqualify the trial judge: the defendant made no claim of actual bias, and his claim that a reasonable person would question the impartiality of the judge because she had served as a supervising prosecutor in the Office of the State's Attorney in the judicial district of Waterbury at the time of pretrial criminal proceedings that were conducted there against him was unavailing, as the judge had a limited role, if any, in the previous criminal proceedings and was not working in her supervisory prosecutorial role when the defendant was convicted in the previous case, twelve years had elapsed between the previous proceedings and the current criminal case, and knowledge of the defendant's conviction in the previous case was available to any trial judge; moreover, this court declined to establish a bright-line rule requiring recusal of a judicial authority when there is an appearance of partiality

but an absence of actual partiality, as our Supreme Court already established a rule in *State* v. *Milner* (325 Conn. 1) requiring recusal in cases in which a reasonable person would question a judge's impartiality on the basis of all of the circumstances.

2. The trial court did not abuse its discretion in denying the defendant's motion to exclude from evidence certain challenged photographs, which showed sutured wounds to the victim's face and head: the photographs indicated the severity of the injuries and, thus, were relevant to the state's burden of proof of establishing that the defendant intended to cause serious physical injury, and they corroborated testimony from witnesses regarding the underlying confrontation and the victim's injuries; moreover, although the photographs depicted graphic injuries, the surgical site shown was clean rather than unnecessarily gory, and the court properly determined that the probative value of the depiction of serious injuries outweighed the prejudicial impact caused by the number of stitches shown.

Argued May 17—officially released July 20, 2021

*Procedural History*

Substitute two part information charging the defendant, in the first part, with the crime of assault in the first degree, and, in the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the court, *Keegan*, *J.*, denied in part the defendant's motion to exclude certain evidence; thereafter, the court, *D'Addabbo*, *J.*, denied the defendant's motion to disqualify the judicial authority; subsequently, the first part of the information was tried to the jury before *Keegan*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court, *Keegan*, *J.*, on a plea of guilty to the second part of the information, and the court rendered judgment in accordance with the verdict and the plea, from which the defendant appealed to this court. *Affirmed.*

*Robert L. O'Brien*, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

*Samantha Oden*, deputy assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's

attorney, *Thadius L. Bochain*, deputy assistant state's attorney, and *David Clifton*, assistant state's attorney, for the appellee (state).

*Opinion*

DiPENTIMA, J. The defendant, Ahmaad Jamal Lane, appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). On appeal, the defendant claims that the court abused its discretion by (1) denying his motion for disqualification of the trial court judge and (2) admitting into evidence two photographs of the victim's injuries. We disagree, and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On September 4, 2014, at approximately 3 a.m., the defendant arrived at the home of John Fusco in New Britain. Fusco was playing cards with his daughter, Tessa Fusco, and the victim, Keven Tischofer. Tischofer was seated at the kitchen table, and when the defendant arrived, Tischofer asked the defendant for money for work he had performed on the defendant's vehicle. The defendant complained about Tischofer's work, to which Tischofer responded: "At least you have brakes. The car did not have any brakes when I got it." The defendant then picked up a chair and struck the right side of Tischofer's head.[1] The defendant then hit Tischofer at least one more time with the chair. Tischofer sustained injuries to his arm, two skull fractures, and an epidural hematoma, and he subsequently underwent emergency neurosurgery at the Hospital of Central Connecticut. Immediately after the incident, the defendant left the house and drove away. Twenty minutes later, he

[1] At trial, the defendant raised a claim of self-defense. More specifically, he alleged that Tischofer raised a knife during the verbal confrontation and that he struck Tischofer with the chair in self-defense.

attempted to return to the house but left after seeing the street blocked by first responders, including police officers.

The defendant then fled to Vermont. On January 26, 2015, the defendant was arrested in Vermont and extradited to Connecticut. On November 8, 2016, by way of a substitute long form information, he was charged with one count of assault in the first degree in violation of § 53a-59 (a) (1). On October 25, 2016, in a part B information, he was charged with being a persistent dangerous felony offender pursuant to General Statutes § 53a-40 (a).

The defendant made two motions that are the subjects of this appeal. First, just as the trial judge, *Keegan*, *J.*, commenced the first day of trial, the defendant moved to disqualify her due to his concern that she may have been involved in pretrial discovery or motions in one of his prior criminal cases while she was a state's attorney in the Office of the State's Attorney for the judicial district of Waterbury. Judge Keegan referred the motion to disqualify to another trial court judge, *D'Addabbo*, *J.*, who conducted a hearing and thereafter denied the motion. Judge Keegan then presided at the defendant's trial.

In the second motion at issue in this appeal, the defendant sought to exclude from evidence three photographs of Tischofer's injuries, arguing that they were irrelevant and unduly prejudicial. After a hearing, the court admitted two of the three photographs into evidence.

Following a jury trial, the defendant was convicted of assault in the first degree. He subsequently pleaded guilty to the part B information, which charged him

with being a persistent dangerous felony offender pursuant to § 53a-40 (a), resulting in a sentence enhancement.[2] The defendant was sentenced to a term of twenty-five years of incarceration, ten of which are a mandatory minimum. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion in denying his motion for disqualification of the trial judge because there was an appearance of a lack of impartiality. We disagree.

The following additional facts are relevant to this claim. Judge Keegan was a supervisory assistant state's attorney in the judicial district of Waterbury between 1989 and 2004. Just prior to calling in the jury on the first day of trial, the defendant represented to the court that Judge Keegan "may have been involved" in a Waterbury case involving the defendant—specifically, a bond argument and "pretrial motion in regards to discovery and stuff like that." The defendant represented to Judge Keegan that he was "very fearing that because you do—your offer made with me. . . . I remember that argument that you and [my] attorney had, it was really intense. I never forget you, and when I first was seen, I said wait a minute, I recognize her now . . . so I'm worried about that, so I want the record to reflect that that's the issue. . . . And I remember it to this very day so I figured that's kind of a conflict and I'm afraid of that."

The defendant's conviction in the Waterbury case formed the basis for the part B information in the present case.[3] The defendant contends that the Waterbury

[2] The part B information was based on a conviction of assault in the first degree, in violation of § 53a-59 (a) (1), entered on September 15, 2005 in the judicial district of Waterbury.

[3] We refer to the pretrial motions and discovery in the defendant's Waterbury case, which led to the conviction that formed the basis for the part B information in the present case, as the "Waterbury proceedings."

proceedings that Judge Keegan may have been involved with occurred in 2003. The defendant was tried and convicted in 2005. Notably, Judge Keegan transferred from the judicial district of Waterbury to the Office of the Chief State's Attorney in 2004, and thus was no longer serving in Waterbury at the time of the defendant's trial and conviction in 2005. She did not remember anything about the defendant or his case, although his name was "familiar" to her. It is undisputed that a different assistant state's attorney handled the trial of the Waterbury case.[4]

In response to the defendant's concerns raised on the day of trial, the following colloquy occurred:

"[The Defendant]: I'm just . . . counsel to make sure, as much as I can with my limited understanding, that I get a fair shake in this courtroom today. You understand?

"[Judge Keegan]: I can assure you that you are going to have a fair shake every day that you are in front of me.

"[The Defendant]: Thank you for the assurance, Your Honor.

"[Judge Keegan]: You are. There is no doubt that you are . . . going to get a fair shake. . . .

* * *

"[Judge Keegan]: All right? So you tell me, do you want to go forward with me today or not?

"[The Defendant]: (indiscernible) of course, yes, (indiscernible)."

[4] During the hearing on the defendant's motion for disqualification, the following colloquy occurred:

"[Judge D'Addabbo]: And the state's attorney that was prosecuting that trial was not then State's Attorney Keegan.

"[Defense Counsel]: Was not."

Judge Keegan referred the motion to disqualify to Judge D'Addabbo.[5] During the hearing, the defendant further clarified his concern regarding Judge Keegan's impartiality. The following colloquy took place:

"[Defense Counsel]: My client feels that Judge Keegan cannot be fair in this trial because he remembers her as a prosecutor in Waterbury back in 2004, 2003, and that she as the prosecutor *may have been involved* with his discovery on his case and with motions, perhaps the arraignment, bond agreement. He feels that she is too close to that case to be able to be fair to him today in this trial.

* * *

"[Judge D'Addabbo]: So the issue that is being presented is that that case was pending in Waterbury . . . and since it was being prosecuted by the Waterbury [Office of the State's Attorney] . . . and since at that time State's Attorney Keegan was a member of that office she may have had some involvement whether it's arraignment or a bond argument and discovery.

"[Defense Counsel]: Correct, at pretrial motions." (Emphasis added.)

In denying the defendant's motion for disqualification, Judge D'Addabbo determined that the defendant had failed to present any evidence that would reasonably call Judge Keegan's impartiality into question. He noted that "Judge Keegan doesn't even recall this case and it is a very speculative argument being made by the defendant . . . . And the issue that the defendant

[5] During the defendant's colloquy with Judge Keegan regarding his concern about her impartiality, the following occurred:

"[Judge Keegan]: Do you want another judge to hear this and decide whether or not there's a conflict of interest?

"[The Defendant]: Yes.

"[Judge Keegan]: You do. Okay, because, I can get another judge in here . . . to hear this and make a decision as to whether or not there's a conflict."

seems to be concerned [with] is the conviction which is a record that is—by certified copy—that, I guess, he was convicted so Judge Keegan's knowledge if there even was knowledge doesn't go to anything more than that there was a conviction." Judge D'Addabbo further concluded that, "after listening to this I just don't believe, and I'm following the rules established by the Practice Book, that there is anything in front of this court now to make a determination that Judge Keegan's impartiality would be questioned concerning this case, and so for that reason the defendant's request to have Judge Keegan recuse herself from this matter or be disqualified from this case is denied."

On appeal, the defendant claims that the court erred by denying his motion for disqualification. Specifically, he argues that Judge Keegan should have been disqualified because her impartiality might reasonably be questioned as a result of her involvement in the Waterbury proceedings. The defendant "remembers her being present and that she was involved in pretrial motions. . . . [T]he 2005 conviction makes this case a part B case. So he feels that there is a strong connection between what could happen here on sentencing and . . . her participation in the 2003–2004 time period." Other than representing to the court Judge Keegan's alleged involvement in pretrial proceedings, the defendant offered nothing further to support his motion.[6]

[6] We briefly address the reviewability of this claim. The defendant failed to comply with Practice Book § 1-23, which requires that a motion to disqualify a judge be written and filed within ten days before trial and be accompanied by an affidavit of facts and certification by counsel. However, as our Supreme Court has noted, "[a] number of Appellate Court cases have reviewed claims of judicial bias despite acknowledging that the moving party had failed to comply with the written procedures required in . . . § 1-23." *State* v. *Milner*, 325 Conn. 1, 8, 155 A.3d 730 (2017). The court declined to adopt a broad proposition that noncompliance with § 1-23 acts as a per se preclusion to review of a denial of an oral motion for disqualification. See id., 7–8. Accordingly, the defendant's failure to comply with the procedures required by § 1-23 does not preclude our review of this matter.

"Appellate review of the trial court's denial of a defendant's motion for judicial disqualification is subject to the abuse of discretion standard. . . . That standard requires us to indulge every reasonable presumption in favor of the correctness of the court's determination." (Internal quotation marks omitted.) *State* v. *Crespo*, 190 Conn. App. 639, 656, 211 A.3d 1027 (2019).

Our analysis begins with Practice Book § 1-22 (a), which provides in relevant part that "[a] judicial authority shall . . . be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct . . . ." Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including, but not limited to, the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . . (5) The judge . . . (A) served as a lawyer in the matter in controversy or was associated with a lawyer who *participated substantially as a lawyer* in the matter during such association; (B) served in governmental employment and in such capacity participated *personally and substantially as a lawyer or public official* concerning the proceeding or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy . . . ." (Emphasis added.)

As our Supreme Court has observed, "[i]n applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his

impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted." (Internal quotation marks omitted.) *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017).

In the present case, the defendant makes no claim of actual bias. Rather, he claims that Judge Keegan should have been disqualified because a reasonable person would question her impartiality because she was a supervising attorney with the Office of the State's Attorney in Waterbury at the time of the Waterbury proceedings. In *State* v. *Bunker*, 89 Conn. App. 605, 612, 874 A.2d 301 (2005), appeal dismissed, 280 Conn. 512, 909 A.2d 521 (2006), the defendant raised a similar claim that the trial judge should have been recused "because her impartiality might reasonably be questioned as a result of having served as a supervisor in the [Office of the State's Attorney] . . . when he was convicted in 1989 and as head of the [O]ffice of the [S]tate's [A]ttorney . . . when he was convicted in 1996—the same convictions that comprised the second part of the state's information." On appeal, this court concluded "that the defendant has failed to demonstrate a factual basis sufficient to support his claim of judicial disqualification on the basis of the judge's former role as a supervisory prosecutor." Id., 621. In so concluding, we found it significant that the judge, as a supervising attorney, had a limited role in the prior case, and that ten years had elapsed between the judge's prior involvement and the case at hand. Id.

As in *Bunker*, Judge Keegan had a limited role, if any, in the Waterbury proceedings, and twelve years elapsed

between the time Judge Keegan left the judicial district of Waterbury in 2004—the last point in time she may have been involved in the Waterbury proceedings—and the defendant's trial in the present case in 2016. Moreover, Judge Keegan was no longer working in the judicial district of Waterbury when the Waterbury case went to trial in 2005. The defendant argues that Judge Keegan should have been disqualified on the basis of the appearance of partiality alone, because she *may have been* involved in the Waterbury proceedings. Judge Keegan's limited role, if any, in those proceedings compels our conclusion that the trial court did not abuse its discretion in denying the motion for disqualification. See id., 621–22. Furthermore, as Judge D'Addabbo noted, the part B information in the present case is based solely on the defendant's conviction in the Waterbury case, and any judge in Judge Keegan's position in the present case would have knowledge of that record. Accordingly, the defendant did not meet his burden to show that disqualification was warranted.

In addition, the defendant asks this court to establish a bright-line rule requiring recusal when there is an appearance of partiality, in the absence of any actual partiality, on the basis of policy interests in maintaining the appearance of judicial impartiality. Our rules of practice, however, plainly require judges to recuse themselves whenever a person, under the totality of the circumstances, might reasonably question a judge's impartiality. Our Supreme Court articulated such a rule in *State* v. *Milner*, supra, 325 Conn. 12, requiring recusal in cases in which no actual partiality exists, but where "a reasonable person would question the judge's impartiality on the basis of all the circumstances." (Internal quotation marks omitted.) That rule sufficiently addresses the defendant's policy concerns. Furthermore, our Supreme Court has noted, and consistently applied, the standard that "each case of alleged judicial

impropriety must be evaluated on its own facts . . . .'' *Abington Ltd. Partnership* v. *Heublein*, 246 Conn. 815, 826, 717 A.2d 1232 (1998). Finally, the court in *Bunker* considered the ''practical realities of prosecutors in busy . . . courts'' when concluding that the impartiality of the judge could not reasonably be questioned on the basis of her prior role as a prosecutor. *State* v. *Bunker*, supra, 89 Conn. App. 621. Accordingly, we decline to revisit the precedent set by our Supreme Court in *Milner*.

On our review of the record before us, we conclude that Judge D'Addabbo did not abuse his discretion in denying the motion to disqualify Judge Keegan. Accordingly, the defendant's first claim fails.

II

The defendant next claims that the court abused its discretion in admitting into evidence two photographs of Tischofer's injuries. Specifically, the defendant claims that the photographs were (1) irrelevant and (2) unduly prejudicial. We disagree.

The following additional facts are relevant to this claim. On November 21, 2016, the court held a pretrial hearing, during which the defendant objected to three photographs of Tischofer's injuries that the state intended to proffer at trial. The first photograph depicted Tischofer's face with a black eye and a small portion of a surgical wound. The second photograph depicted Tischofer's forehead, which included part of a surgical wound. The third photograph depicted a full surgical wound on Tischofer's head. The defendant argued that the photographs should be excluded because ''the injury was severe, but these fifty-six or fifty-eight stitches are really gory. They don't depict the injury that he received. That it's just showing the surgery that was necessary to repair the internal hemorrhaging. . . . [I]f the jury saw this they would immediately be impacted . . . . I mean it's

really serious looking . . . . This would be highly prejudicial I believe." The state contended that the photographs were admissible to show "how extensive this injury was . . . ." Furthermore, the state argued that "the photos, because it's after the procedure, are . . . less gory . . . you got a clean photo of someone in the stages of recovery rather than some blood and gore . . . ."

After hearing from the parties, the court concluded that the first and third photographs were admissible, but it excluded the second photograph in order to limit "repetitiveness." As the court explained: "You know you have to weigh the state's burden of proof and their right to present their evidence versus unnecessarily gory photos or cumulative evidence. I think, number one, clearly that is admissible, and your objection to the head . . . picture is overruled. It does show evidence of what the state alleges is the result of the assault. With respect to number two and number three, the court finds them somewhat . . . I think number two I'm going to grant the motion on number [two], however, as to number three, your motion is overruled and that will be admissible. The state does have to prove serious physical injury, and this photograph is demonstrative of what the witness' testimony is going to be. It will aid the jury in understanding what that doctor had to do, which goes to serious physical injury, and the court does not find it unnecessarily gory, it is rather clean, so I'm going to keep two out just for its repetitive nature, numbers one and three will be permitted to be shown to the jury during the state's [case-in-chief]."

During trial, the first and third photographs were entered into evidence through the direct examination of Tischofer. He explained that the photographs were taken approximately one week after he was released from the hospital, and he described what the photographs

depicted. Ahmed Kahn, Chief of the Division of Neurosurgery at the Hospital of Central Connecticut, who performed emergency surgery on Tischofer, also testified about the injuries and surgical procedures performed.

As a preliminary matter, we set forth the applicable standard of review. "Our standard of review for evidentiary matters allows the trial court great leeway in deciding the admissibility of evidence. The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done. . . . The exercise of such discretion is not to be disturbed unless it has been abused or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *State* v. *Osbourne*, 162 Conn. App. 364, 369–70, 131 A.3d 277 (2016). In addition, "[e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) Id., 370.

The defendant first claims that the photographs were irrelevant. Section 4-1 of the Connecticut Code of Evidence provides that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." This court has noted that "[e]vidence is relevant if it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not

rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial . . . .'' (Internal quotation marks omitted.) *State* v. *Osbourne*, supra, 162 Conn. App. 370. ''In determining whether photographic evidence is admissible, the appropriate test is relevancy, not necessity.'' *State* v. *Kelly*, 256 Conn. 23, 65, 770 A.2d 908 (2001).

At trial, the state bore the burden of proving beyond a reasonable doubt that the defendant intended to cause serious physical injury in violation of § 53a-59 (a) (1). '' 'Serious physical injury' '' is defined as that which ''creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . .'' General Statutes § 53a-3 (4). The two photographs that were admitted into evidence show a black eye and extensive surgical wounds, which are indicative of the severity of the injuries. Those photographs, and in particular the photograph of the surgical wounds showing the necessity of invasive neurosurgery, have a tendency to prove that the injuries were severe enough to constitute a serious physical injury. The photographs also would have probative value to show intent, another element of the state's burden. ''Intent to cause death or serious physical injury may be inferred from the . . . type of wound inflicted . . . . The extent and severity of injuries often are used as indirect proof of intent.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Best*, Conn. , , A.3d (2020). Lastly, the photographs were relevant, as they corroborated the testimony of the witnesses about the events that transpired and Tischofer's subsequent injuries. The challenged photographs tend to make the existence of multiple material facts, including serious physical injury and the intent of the defendant, more probable. Accordingly, we conclude that the trial court did not abuse its discretion in finding the photographs to be relevant.

We next address whether the trial court properly concluded that the photographs were not unduly prejudicial. Section 4-3 of the Connecticut Code of Evidence precludes evidence if its probative value is outweighed by the danger of unfair prejudice. As our Supreme Court has observed, "[a] potentially inflammatory photograph may be admitted if the court, in its discretion, determines that the probative value of the photograph outweighs the prejudicial effect it might have on the jury." (Internal quotation marks omitted.) *State* v. *Best*, supra, Conn. . "[P]hotographs [that] have a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry are not rendered inadmissible simply because they may be characterized as gruesome." (Internal quotation marks omitted.) Id., . "The question is not solely whether the evidence is gruesome, disturbing or otherwise inherently prejudicial but whether its prejudicial nature is undue or unfair, a question that requires the trial court to undertake the relativistic assessment of probative value versus prejudicial effect . . . ." (Internal quotation marks omitted.) Id., .

The defendant contends that the photographs of the injuries are unduly prejudicial because they are "gory" and would "really impact the jury." As the court noted in *Best*, even gruesome photographs are admissible if they tend to prove or disprove a material fact. The trial court in the present case noted that it did "not find [the photograph of the surgical wound] unnecessarily gory, it is rather clean . . . ." The photographs depict clean surgical wounds one week after Tischofer was released from the hospital, as opposed to fresh, uncleaned, and untreated wounds.

The defendant pointed to the number of stitches as evidence of the photographs' "gory" characteristics. The sheer number of stitches alone, however, is not enough to render the photographs unduly prejudicial.

The photographs are not rendered inadmissible simply because they may be characterized as gruesome. Whether any resulting prejudice was undue or unfair was appropriately considered by the trial court. Here, the court determined that the probative value of the photographs, depicting the seriousness of the injuries sustained by the victim, outweighed the prejudicial impact. Accordingly, we conclude that the court did not abuse its discretion in denying, in part, the motion to exclude the challenged photographs.

The judgment is affirmed.

In this opinion the other judges concurred.

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## JOSHUA CRUZ *v.* COMMISSIONER OF CORRECTION
## (AC 43961)

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

*Syllabus*

The petitioner, who had been convicted on a plea of guilty to the crime of murder, sought a writ of habeas corpus, claiming that his counsel provided ineffective assistance. At the time of his plea, the trial court found that it was made voluntarily and informed the petitioner that, pursuant to his agreement with the state, he would be sentenced to a period of twenty-five to forty-two years of incarceration. Prior to his sentencing hearing, the petitioner filed a letter with the trial court seeking to withdraw his guilty plea, indicating that his attorney, G, had coerced him into pleading guilty and that he thought he was doing so to a charge of manslaughter rather than to murder. The trial court then appointed a new attorney, P, to represent the petitioner and P filed a motion to withdraw the petitioner's guilty plea. The petitioner withdrew that motion at his sentencing hearing and the trial court sentenced him to thirty-eight years of incarceration. The petitioner subsequently filed a petition for a writ of habeas corpus, claiming that, during plea negotiations, G misadvised him as to the negotiated plea agreement and his sentence exposure, failed to make a thorough investigation of the facts, failed to consult with him adequately before his guilty plea, and failed to present favorable information to the trial court. Additionally, the petitioner claimed that, during his sentencing hearing, P failed to present mitigating evidence and failed to advocate zealously to secure the lowest

sentence contemplated by the plea agreement. Following an evidentiary hearing, the habeas court rendered judgment denying the habeas petition, and the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court did not err in concluding that the petitioner had failed to prove that he was prejudiced by G's allegedly inadequate representation during plea negotiations because the petitioner did not demonstrate that there was a reasonable probability that he would not have pleaded guilty and, instead, would have gone to trial but for G's allegedly deficient performance: the petitioner's ability to prove prejudice was undermined by the fact that he was appointed alternate counsel, P, who, after reviewing his entire file with him, advised the petitioner to accept the plea bargain and forgo trial, and, as a result, the petitioner decided to withdraw his motion to withdraw his plea and proceeded with his guilty plea; moreover, the probability of the petitioner's conviction at trial was high, as the state's case against him was unusually strong and included video surveillance of the incident, the statements of multiple eyewitnesses, and evidence of the petitioner's DNA on the murder weapon; furthermore, no evidence was presented that indicated that a lesser sentence would have been available, but for G's allegedly deficient performance.
2. The habeas court did not err in concluding that the petitioner failed to prove his claim of ineffective assistance with respect to P's representation during the sentencing proceedings: the petitioner was not entitled to a presumption of prejudice pursuant to *United States* v. *Cronic* (466 U.S. 648) and *Davis* v. *Commissioner of Correction* (319 Conn. 548) because P advocated on his behalf at the sentencing hearing by presenting mitigation evidence, including the petitioner's remorse, his difficult upbringing, his positive work history, and his lack of prior involvement with the criminal justice system, and by requesting a sentence that was less than the petitioner's maximum exposure, even though he did not request the minimum sentence for strategic purposes; moreover, the petitioner failed to prove that he was prejudiced by P's allegedly inadequate representation because he failed to present any evidence indicating that the trial court would have given him a lesser sentence if mitigation evidence relating to the petitioner's mental health or other additional evidence was presented at the sentencing hearing and, given the strength of the state's case, the seriousness of the crime, and the trial court's awareness of the pertinent mitigation evidence, there was not a reasonable probability that, but for any deficient performance by P, the petitioner would have received a lesser sentence.

Argued April 8—officially released July 20, 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.*

*Deborah G. Stevenson*, assigned counsel, for the appellant (petitioner).

*Erika L. Brookman*, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Craig Nowak*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

LAVINE, J. The petitioner, Joshua Cruz, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court erred by concluding that (1) Attorney William Gerace's allegedly deficient representation during plea negotiations was not prejudicial, and (2) Attorney Dean Popkin did not render ineffective assistance with respect to the petitioner's sentencing proceeding. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's claims. On December 18, 2012, the petitioner pleaded guilty before the court, *Clifford*, *J.*, to murder in violation of General Statutes § 53a-54a (a).[1] The charge stemmed from an incident that occurred in New Haven on August 14, 2010, during which the petitioner shot and killed the victim, Javier Cosme, in a parking lot following an altercation at a nightclub. The court canvassed the petitioner

[1] The state also charged the petitioner with carrying a pistol without a permit in violation of General Statutes § 29-35 and possession of a controlled substance in violation of General Statutes (Rev. to 2009) § 21a-279 (c). Following the petitioner's plea of guilty, the state entered a nolle prosequi as to these charges.

and found that his plea was made voluntarily and "understandably" with the assistance of competent counsel. In exchange for his plea of guilty, the court, pursuant to an agreement between the state and the petitioner, informed the petitioner that it would sentence him to between twenty-five and forty-two years of incarceration, with the opportunity to argue for less than the maximum of forty-two years.

Prior to the sentencing hearing, the petitioner filed a letter with the court seeking to withdraw his guilty plea. In his letter, the petitioner alleged that Attorney Gerace had coerced him to plead guilty and that he had been under the impression that he was pleading guilty to manslaughter rather than to murder. On February 22, 2013, the court held a hearing at which it continued the petitioner's sentencing until the petitioner secured a new attorney to represent him. Subsequently, Attorney Popkin was appointed to represent the petitioner. On April 11, 2013, Attorney Popkin filed a motion to withdraw the petitioner's guilty plea.

On May 30, 2013, the court held the sentencing hearing. During the hearing, the petitioner withdrew his motion to withdraw his guilty plea. The court then sentenced the petitioner to thirty-eight years of incarceration.

The petitioner subsequently filed a petition for a writ of habeas corpus. In his amended petition, the petitioner alleged that Attorney Gerace provided ineffective assistance during the plea negotiations by (1) misadvising him as to the negotiated plea agreement and his sentence exposure, (2) failing to make a thorough investigation of the facts, (3) failing to consult adequately with him prior to his guilty plea, and (4) failing to present favorable information to the state and the court. The petitioner further alleged that Attorney Popkin provided him with ineffective assistance during sentencing by

(1) failing to present any mitigating evidence to the court prior to sentencing and (2) failing to advocate zealously for him to secure the lowest sentence contemplated by the plea agreement. The habeas court, *Bhatt*, *J.*, denied the habeas petition. The court concluded that the petitioner had failed to prove that he was prejudiced by Attorney Gerace's performance and that he had failed to prove both deficient performance and prejudice regarding Attorney Popkin's representation. The petitioner filed a petition for certification to appeal, which the court granted, and this appeal followed. Additional facts will be set forth as necessary.

I

The petitioner's first claim is that the habeas court erred in concluding that he was not prejudiced by Attorney Gerace's allegedly inadequate representation of him during plea negotiations. We disagree.

The following additional procedural history is relevant to our review. During the habeas trial, the petitioner testified as to the following. On December 5, 2012, Attorney Gerace told him that the state had offered the petitioner a plea bargain for forty-five years, and he advised the petitioner not to take it because "it was too much time . . . ." Two individuals from Attorney Gerace's office subsequently visited the petitioner in prison and indicated that there was an offer to resolve the case with a plea for manslaughter for a term of forty years of incarceration. They did not, however, review police reports with the petitioner or discuss any defenses with him. Attorney Gerace later spoke with the petitioner over the phone and told him that he needed to make a decision with respect to the offer before the December 18, 2013 court date and that the state had reduced his charge to manslaughter. On December 18, 2013, the petitioner met with Attorney Gerace at the courthouse. During the meeting, Attorney Gerace was "aggressive"

with the petitioner, yelled at him, "you did it; they've got you on video; you have to plead guilty," and stated that the only way forward was to "take the charges away from the prosecutor and put it in the hands of the judge and just say yes to all the questions." Following his guilty plea, the petitioner tried to contact Attorney Gerace a number of times to discuss his plea because he thought that he would be pleading guilty to manslaughter rather than murder. After he failed to reach Attorney Gerace, the petitioner wrote a letter to the court asking to withdraw his plea and filed a grievance complaint against Attorney Gerace.

Thereafter, Attorney Popkin was appointed to represent the petitioner. He visited the petitioner several times to discuss his motion to withdraw his guilty plea. Attorney Popkin told him that he was "not going to win the motion because [the petitioner] had answered yes to all of the judge's questions." He also told the petitioner that he would lose if he went to trial. As a result, the petitioner agreed to withdraw his motion to withdraw his plea.

At the habeas trial, Attorney Popkin testified that he had advised the petitioner that the charge of murder carried a mandatory minimum sentence of twenty-five years of incarceration and that he also had discussed the petitioner's case with him generally, including possible defenses. He further testified that he told the petitioner that, if he withdrew his guilty plea, the petitioner would be facing a murder charge and a trial and that Attorney Popkin "thought it highly likely that he would be found guilty, and that he would receive a sentence of significantly longer than what he would get in pursuing the plea bargain." As a result, Attorney Popkin recommended that the petitioner withdraw his motion to withdraw his guilty plea.

The prosecutor, Michael Pepper, also testified at the petitioner's habeas trial. He testified that he decided to charge the petitioner with murder after reviewing videos

of the incident, police reports, and statements from a number of witnesses. He never contemplated reducing the charge to manslaughter because the state's case "was remarkably strong" and the probability of conviction was "pretty high . . . ." As a result of the nature of the charges against the petitioner, he faced up to seventy years of incarceration if found guilty.

On January 6, 2020, the habeas court issued its memorandum of decision. With respect to the petitioner's ineffective assistance of counsel claim against Attorney Gerace, the court addressed only the prejudice prong of the test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and assumed, without deciding, that the deficient performance prong had been satisfied. The court concluded that the petitioner had failed to prove that he was prejudiced by any claimed deficient performance because he could not prove that, but for Attorney Gerace's allegedly deficient performance, he would have rejected the plea bargain and proceeded to trial. The court reasoned that the petitioner's ability to prove prejudice was "critically undermined by the fact that he did seek to withdraw his plea, was appointed alternate counsel who reviewed the entire file with the petitioner and provided him with the same advice—that he should accept the offer and not risk a trial—and then, based on that advice, the petitioner did indeed continue with his plea of guilty and eschewed a trial." The habeas court further noted that the evidence against the petitioner was overwhelming, as "at least three witnesses [had] identified him as the shooter, his DNA was on the murder weapon and the victim was shot five times at close range."[2] Moreover, as to the petitioner's allegation that Attorney Gerace failed to present favorable information to the state and the court during plea negotiations in an effort to obtain a lesser charge or sentence, the court found that

[2] We note also that grainy videos of the incident, which indistinctly show the shooting, were entered into evidence.

the petitioner could not prove prejudice. The court found that it was clear that the state was never going to reduce the charge to manslaughter and that the petitioner had failed to prove that a lesser sentence for the murder charge would have been available. Accordingly, the court concluded that the petitioner had failed to prove that he was prejudiced by any allegedly deficient performance of Attorney Gerace.

"[T]he governing legal principles in cases involving claims of ineffective assistance of counsel arising in connection with guilty pleas are set forth in *Strickland* [v. *Washington*, supra, 466 U.S. 668] and *Hill* [v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. [According to] *Strickland*, [an ineffective assistance of counsel] claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, *and* (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Under . . . *Hill* . . . which . . . modified the prejudice prong of the *Strickland* test for claims of ineffective assistance when the conviction resulted from a guilty plea, the evidence must demonstrate that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Emphasis in original; internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 35–36, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018).

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . [T]his court cannot disturb the

underlying facts found by the habeas court unless they are clearly erroneous . . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"In evaluating the prejudice prong and the credibility of the petitioner's assertion that he would have insisted on going to trial but for [counsel's] deficient performance, it is appropriate for the habeas court to consider whether a decision to reject a plea offer, under the circumstances presented, would have been rational. . . . Additionally, a petitioner's assertion after he has accepted a plea that he would have insisted on going to trial suffers from obvious credibility problems . . . . In evaluating the credibility of such an assertion, the strength of the state's case is often the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial . . . . Likewise, the credibility of the petitioner's after the fact insistence that he would have gone to trial should be assessed in light of the likely risks that pursuing that course would have entailed." (Citations omitted; internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, 204 Conn. App. 44, 51–52, 250 A.3d 44, cert. denied, 336 Conn. 948, 250 A.3d 695 (2021).

As a preliminary matter, although the court assumed that Attorney Gerace performed deficiently for purposes of its analysis, it never suggested, much less concluded, that he performed deficiently. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland* v. *Washington*, supra, 466 U.S. 697. It is apparent that this is the course the habeas court followed. Thus, to the extent that the

petitioner asserts that the court actually *found* that Attorney Gerace's performance was deficient, he is simply wrong.

We conclude that the habeas court's finding that the petitioner had failed to prove that there was a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial but for Attorney Gerace's allegedly deficient performance was not clearly erroneous. Although the petitioner testified that he would have gone to trial but for Attorney Gerace's advice, the habeas court, as the sole arbiter of the credibility of witnesses and the weight to be given to their testimony, was entitled to reject his testimony in light of the other evidence presented during trial. See *Lebron* v. *Commissioner of Correction*, supra, 204 Conn. App. 51. As the court observed in its memorandum of decision, the petitioner's ability to prove prejudice was critically undermined by the facts that he was appointed alternate counsel, he reviewed his entire file with his new counsel, his new counsel advised him to accept the plea bargain and forgo a trial, and, as a result of this advice, the petitioner decided to withdraw his motion to withdraw his plea and proceeded with his guilty plea. The state also had an unusually strong case against the petitioner. There was video surveillance footage depicting both the incident itself and the fight at the nightclub that preceded the incident, witnesses gave statements indicating that they saw the petitioner shoot the victim, and the petitioner's DNA was found on the murder weapon. The petitioner himself did not even dispute that he shot the victim; he asserted only that he did not intend to kill him. Consequently, there was sufficient reason for the court not to credit the petitioner's testimony that he would not have pleaded guilty and, instead, would have gone to trial if properly advised by Attorney Gerace. As a result, the court's finding that

the petitioner failed to prove prejudice was not clearly erroneous.

Moreover, to the extent that the petitioner claims that he was prejudiced by Attorney Gerace's failure to present favorable information to the state and the court during plea negotiations, we are unpersuaded. Apart from the petitioner's own testimony at the habeas trial that Attorney Gerace and representatives from his office had told him that the state had reduced the charge to manslaughter, no other evidence was presented during trial that demonstrated, or even suggested, that a lesser sentence would have been available but for Attorney Gerace's deficient performance. The prosecutor testified that he never would have considered reducing the charge to manslaughter as a result of the strength of the state's case and that the petitioner faced up to seventy years of incarceration. Attorney Popkin also testified that the court had indicated that the petitioner's sentence was "probably going to be in the high [thirties]" and that the state asked for forty-two years at the sentencing hearing. The habeas court was entitled to credit the testimony of the prosecutor and Attorney Popkin and to reject that of the petitioner. See *Lebron* v. *Commissioner of Correction*, supra, 204 Conn. App. 51. The court's finding that a lesser sentence could not have been obtained through more effective plea bargaining, thus, was not clearly erroneous. Accordingly, we conclude that the court properly determined that the petitioner had not proven his claims of ineffective assistance of counsel as to Attorney Gerace.

II

The petitioner next claims that the court erred in concluding that Attorney Popkin effectively represented him during sentencing. The petitioner also argues that the court erred by applying the *Strickland* prejudice standard, which requires the petitioner to prove that

there is a reasonable probability that the outcome of the proceeding would have been different; see *Strickland* v. *Washington*, supra, 466 U.S. 694; instead of presuming prejudice pursuant to the standard set forth in *United States* v. *Cronic*, 466 U.S. 648, 659–60, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 555, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). We disagree with both assertions.

The following additional facts and procedural history are relevant. The petitioner's sentencing hearing occurred on May 30, 2013. During the hearing, Attorney Popkin presented mitigation evidence on the petitioner's behalf. Attorney Popkin told the court that the petitioner "understands and . . . accepts that he is guilty of murder" and that the petitioner did not dispute that he shot the victim, causing his death. Attorney Popkin further stated that the petitioner was extremely remorseful for causing the death of the victim and that "he never intended in a moral sense" for the victim to pass away. Attorney Popkin then argued that the petitioner may have acted in a manner that he otherwise would not have on the night of the incident because he was under the influence of alcohol and drugs. He stated that the petitioner would not have acted this way normally because "his life experience up until that one night shows that he had no previous contact with the criminal justice system." Attorney Popkin then highlighted the facts that the petitioner had a difficult upbringing, including that his family often struggled to put food on the table and that his stepfather was abusive to his mother, and that the presentence investigation report (PSI) showed that he had been a consistent and dedicated worker throughout the years. Finally, Attorney Popkin told the court that he had spoken with the petitioner's father and that his father wanted the court to

know that the petitioner was not a violent person, that he was generally humble and timid, and that, "while this happened and he understands this is what has happened, that really is not who his son is." Attorney Popkin asked the court to consider sentencing the petitioner to thirty-two years of incarceration. Although Attorney Popkin conceded that the minimum sentence of twenty-five years was not an appropriate sentence, he argued that a sentence of thirty-two years would be appropriate because "there are certain factors that I think do mitigate towards my client's benefit, including never having had any contact with the criminal justice system, being a productive member of society, [and] his honest and true remorse . . . ." The court, while acknowledging the presence of these mitigating factors, ultimately sentenced the petitioner to thirty-eight years of incarceration.

During the habeas trial, the petitioner testified that Attorney Popkin did not speak with his family members, have a psychologist or social worker interview him, or mention how many years of incarceration he would ask of the court. Andrew Meisler, a clinical and forensic psychologist who had evaluated the petitioner prior to the habeas trial, testified that he had diagnosed the petitioner with an "other specified trauma and stressor related disorder," which was similar to post-traumatic stress disorder. Meisler stated that this disorder, which had been caused by the petitioner's trauma history, may have impacted his behavior on the night of the shooting and that additional information about his diagnosis would have been relevant to his mental state for purposes of sentencing. He further opined that "the underlying post-traumatic stress symptoms, [the petitioner's] trauma history, social forces at play, a dangerous and fearful environment, [and] the added impact of substances all combined to diminish his capacity." Meisler admitted, however, that these factors did not diminish

the petitioner's capacity to "form intent per se, but to manage his behaviors and control his emotional reactions in an appropriate way."

Attorney Popkin testified about his preparation for and strategy at the sentencing hearing. He testified that he spoke with the petitioner's father a couple of times before the petitioner was sentenced but that he was unable to call the father as a witness because he was out of town. He further testified that he did not have a psychological evaluation performed to explore the petitioner's mental state because it "didn't seem necessary. He seemed to be very cognizant of what was going on. He seemed to have a very good understanding of everything. He didn't present with any . . . issues in regards to that, so it didn't seem necessary." In regard to his decision to ask the court to sentence the petitioner to thirty-two years instead of the minimum of twenty-five, Attorney Popkin explained that it "was a significant crime, no question. The court had sort of indicated that it was going to be in the . . . high [thirties], so I wanted to have some credibility with the court and I indicated a number that I was hoping would . . . express the credibility and hopefully the judge would adopt it. I knew if I came in at [twenty-five] it was not really going to be helpful. So I was trying to mitigate or lessen the sentence as much as I could."

The habeas court concluded that Attorney Popkin did not render deficient performance and that, even if he did, the petitioner had failed to prove prejudice. First, the court found that Attorney Popkin was not deficient because he presented mitigating evidence by reiterating the petitioner's lack of involvement with the criminal justice system, his trauma from observing domestic violence, his strong work history, and his remorse. As a result, the court concluded that the procedure outlined in *Strickland*, rather than *Cronic*, applied. Second, the

court found that, even assuming Attorney Popkin performed deficiently, the petitioner could not prove that he was prejudiced. Specifically, the court held that "all of the information presented to this court during the habeas trial was presented in sum and substance to Judge Clifford, either through the comments of Attorney Popkin, the petitioner or the PSI. Judge Clifford was aware of all the relevant circumstances of the petitioner, his upbringing, his trauma, his lack of criminal record, his genuine remorse and his acceptance of responsibility." Accordingly, the habeas court concluded that the petitioner had failed to prove prejudice because he had failed to present new, substantial, noncumulative mitigation evidence that was available at the time of sentencing but not presented to the sentencing court.

We are guided by the following legal principles. "Criminal defendants have a constitutional right to effective assistance of counsel during the sentencing stage. . . . To establish prejudice, [i]t is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . A claimant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 161 Conn. App. 58, 77, 127 A.3d 1011 (2015), cert. denied, 320 Conn. 921, 132 A.3d 1095 (2016).

As a threshold issue, we address the petitioner's claim that the court erred in failing to presume prejudice pursuant to *Cronic* and *Davis*. We conclude that the petitioner's claims relating to Attorney Popkin's representation are governed by *Strickland*, rather than *Cronic* and *Davis*, and that he was not entitled to any presumption of prejudice.

"In *United States* v. *Cronic*, supra, 466 U.S. 659–60, which was decided on the same day as *Strickland*, the

United States Supreme Court elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a defendant at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called upon to render assistance in a situation in which no competent attorney could do so. Notably, the second scenario constitutes an actual breakdown of the adversarial process, which occurs when counsel completely fails to advocate on a defendant's behalf." (Internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, supra, 319 Conn. 555; see also *United States* v. *Cronic*, supra, 659–60. "Counsel's complete failure to advocate for a defendant . . . such that no explanation could possibly justify such conduct, warrants the application of *Cronic*." *Davis* v. *Commissioner of Correction*, supra, 556.

In *Davis*, our Supreme Court concluded that prejudice was presumed when the petitioner's counsel "entirely [had] fail[ed] to subject the prosecution's case to meaningful adversarial testing . . . ." (Internal quotation marks omitted.) Id., 568. During the sentencing hearing, the court recited the plea agreement's twenty year floor and twenty-five year cap and iterated that defense counsel had a right to argue for the appropriate sentence. Id., 551. After the court made preliminary remarks about how "it was the 'saddest thing' to sentence someone for killing another human being because 'that person's life is ruined' and no number of years will satisfy the victim's family," the prosecutor introduced the victim's family members, who described their loss. Id. The state then asked the court to sentence the petitioner to the maximum twenty-five year sentence. Id. Thereafter, defense counsel responded, "*I agree with everything that everybody said so far, and I don't think there's*

*anything left to say from my part.*" (Emphasis in original; internal quotation marks omitted.) Id. Defense counsel said nothing else on the petitioner's behalf, and the court sentenced the petitioner to twenty-five years of imprisonment. Id.

Our Supreme Court concluded that "defense counsel's agreement with the prosecutor cannot realistically be characterized as a strategic decision properly analyzed under *Strickland*. Rather, defense counsel's conduct resembles the complete breakdown in the adversarial process that *Cronic* envisions. The petitioner's sentence was already capped at twenty-five years pursuant to the plea agreement and, thus, assenting to that sentence did nothing to advance the petitioner's interests." Id., 564. Accordingly, the court held that prejudice would be presumed and that the petitioner had asserted a valid claim of ineffective assistance of counsel. Id., 568.

In the present case, Attorney Popkin presented mitigation evidence at the petitioner's sentencing hearing. He highlighted the petitioner's remorse, his difficult upbringing, his positive work history, and his prior lack of involvement with the criminal justice system. Although Attorney Popkin did not ask for the twenty-five year minimum sentence for the strategic purpose of maintaining credibility with the court, he asked the court to consider sentencing the petitioner to thirty-two years of incarceration, which was less than the petitioner's maximum exposure, in light of the mitigating factors. See *James* v. *Commissioner of Correction*, 170 Conn. App. 800, 812, 156 A.3d 89 ("[O]ur review of an attorney's performance is especially deferential when his or her decisions are the result of relevant strategic analysis. . . . Thus, [a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the

course taken." (Internal quotation marks omitted.)), cert. denied, 325 Conn. 926, 168 A.3d 494 (2017). Attorney Popkin, therefore, did advocate on the petitioner's behalf during the sentencing hearing. Accordingly, the habeas court correctly concluded that no presumption of prejudice was justified and that *Strickland*, rather than *Cronic*, controls.

We now turn to the petitioner's claim that the court improperly concluded that he had failed to prove he was prejudiced by Attorney Popkin's performance. After a careful review of the record, we conclude that the habeas court did not err in finding that the petitioner has failed to prove prejudice.[3] As the habeas court observed, "all of the information presented to this court during the habeas trial, was presented in sum and substance to Judge Clifford, either through the comments of Attorney Popkin, the petitioner or the PSI."[4] The trial court, after referencing these mitigating factors, sentenced the petitioner to thirty-eight years of incarceration, stating

[3] The habeas court also concluded that Attorney Popkin did not render deficient performance when representing the petitioner during the sentencing hearing. In light of our conclusion that the habeas court did not err in concluding that the petitioner failed to prove prejudice, we need not address whether Attorney Popkin's performance was deficient. See *Strickland* v. *Washington*, supra, 466 U.S. 697 ("[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed").

[4] The PSI contained information concerning (1) the petitioner's upbringing, including that he had been significantly impacted by the domestic violence that he witnessed and that his family had struggled financially, (2) his positive education and work records, (3) his feelings of depression, (4) his casual drug and alcohol use, including the facts that he had smoked marijuana, used ecstasy, and was intoxicated on the night of the incident, (5) his lack of prior involvement with the criminal justice system, and (6) his family members' statements that he had never been a violent person. The PSI also noted that the victim's mother had asked that the court sentence the petitioner to the maximum penalty allowed under the plea agreement. The PSI recommended that the petitioner be sentenced to a period of incarceration but did not provide a recommendation for the number of years of incarceration to which he should be sentenced.

that it had "come up with a number . . . that . . . is appropriate under all the circumstances here, the seriousness of this, the loss to the victims, looking at the background of this defendant and he's going to spend, obviously, the majority of his life in prison . . . ." Although the petitioner argues that he was prejudiced by Attorney Popkin's failure to introduce additional mitigation evidence concerning his mental health, there simply is no evidence in the record indicating that the court would have given the petitioner a lesser sentence if such additional evidence, or other mitigation evidence that supplemented what was in the PSI, had been presented.[5] In light of the strength of the state's case, the seriousness of the crime, and the court's awareness of the pertinent mitigation evidence, there was not a reasonable probability that the petitioner would have received a lesser sentence but for any deficient performance by Attorney Popkin. See *Hilton* v. *Commissioner of Correction*, supra, 161 Conn. App. 77. Accordingly, we conclude that the habeas court properly

[5] In support of this argument, the petitioner highlights the fact that Meisler had diagnosed him with several mental health conditions as a result of the traumas he experienced during his childhood. Meisler had opined that these traumas, along with his post-traumatic stress symptoms, explained the petitioner's "exaggerated response to fear" and helped "shed a light on his behavior in a way that had not been done so previously." We disagree with the petitioner that such additional mitigation evidence would have enabled him to demonstrate a reasonable probability that, but for Attorney Popkin's alleged unprofessional errors, the result of the proceeding would have been different. As the habeas court observed, the trial court was aware of the petitioner's recitation of his trauma history from the PSI, and any additional trauma history that the petitioner introduced during the habeas trial would have been evidence that "merely supplements or is cumulative to that which was presented to the sentencing judge." Moreover, although Meisler stated that the petitioner's post-traumatic stress symptoms and trauma history diminished his capacity, Meisler opined that they diminished the petitioner's capacity with respect to only his ability to manage his behaviors and control his emotional reactions in an appropriate way; they did not diminish his capacity to form the intent to kill. Accordingly, we are unpersuaded that additional mitigation evidence concerning the petitioner's mental health would have caused the trial court to give the petitioner a lesser sentence.

concluded that his ineffective assistance of counsel claim regarding Attorney Popkin's representation fails.

The judgment is affirmed.

In this opinion the other judges concurred.

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## JAVIER VILLANUEVA *v.* RAFAEL VILLANUEVA (AC 43619)

Moll, Cradle and Clark, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant, his brother, for breach of an implied in fact contract. The plaintiff started a landscaping company and, although the defendant started working for the plaintiff as an employee, they eventually became de facto equal partners, sharing the profits and management of the business. No written partnership agreement was ever entered into by the parties. At one point, the defendant formed a limited liability company with himself as the sole member because the plaintiff lacked a tax identification number, but the business of the LLC was a continuation of the landscape company started by the plaintiff and the parties remained partners. The defendant later locked the plaintiff out of the landscaping business, taking all the customers, crew, tools, vehicles, and equipment along with all the cash in two bank accounts, leaving behind certain masonry/tree equipment and vehicles. At that time, landscaping represented 90 percent of the business income and the portion left to the plaintiff represented only 10 percent of the revenue. The trial court found that an implied partnership existed between the parties and that the defendant breached the terms of the partnership agreement, and it rejected the defendant's special defenses. From the judgment rendered for the plaintiff, the defendant appealed to this court. *Held*:

1. The trial court's finding that there was an implied partnership agreement between the parties was not clearly erroneous; the court's finding was supported by ample evidence in the record that the parties regarded each other as partners, including evidence that both the plaintiff and the defendant were compensated by withdrawals from the business account for personal expenses, they jointly managed the business and shared its profits, and they jointly purchased real estate using corporate funds.
2. The trial court did not err in concluding that the plaintiff provided credible evidence of his damages; the court had broad discretion in determining its award of damages and, although the plaintiff's testimony was less than certain at times, the court was entitled to weigh that testimony,

assess its reliability and credibility, and afford it whatever weight it deemed appropriate in concluding that the testimony, including testimony that when the defendant locked the plaintiff out of the business he took control of eighty-five customer accounts, including two condominium accounts worth $20,000, and took possession of several trucks and large pieces of landscaping equipment, provided sufficient evidence to enable the court to make a fair and reasonable determination as to the amount of damages.

3. The trial court properly concluded that the plaintiff's action was governed by the six year statute of limitations (§ 52-576 (a)); the plaintiff's one count complaint sounded in breach of an implied contract and did not assert a claim sounding in tort.

Argued April 22—officially released July 20, 2021

*Procedural History*

Action to recover damages for breach of contract, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the matter was tried to the court, *Krumeich, J.*; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

*John R. Hall*, for the appellant (defendant).

*Mark M. Kratter*, for the appellee (plaintiff).

*Opinion*

CRADLE, J. In this case arising from a dispute between two brothers who operated a landscaping business together, the defendant, Rafael Villanueva, appeals from the judgment of the trial court, rendered after a court trial, in favor of the plaintiff, Javier Villanueva, and awarding the plaintiff damages in the amount of one half of the value of the business assets that the defendant maintained following the dissolution of that business. On appeal, the defendant claims that the court erred in finding that (1) an implied partnership existed between the parties, (2) the plaintiff provided credible evidence of his damages, and (3) the plaintiff's action

was not barred by the statute of limitations. We affirm the judgment of the trial court.[1]

The trial court set forth the following relevant facts. "In 2005, [the plaintiff] started a small landscaping company, known as Villanueva Landscaping, that mowed lawns and did some patching and sealing pavement driveways. [The defendant] started working for [the plaintiff] in 2007; [the defendant] worked for him initially as an employee, but as the business grew the brothers became de facto equal partners, sharing the profits, and the management of the business. No written partnership agreement was ever entered into by the brothers. The brothers split their duties, as over time, one crew did landscaping and the other did masonry and tree work. [The plaintiff] worked on increasing the customer base and supervised a masonry/tree crew in the field; [the defendant] took over as bookkeeper and was responsible for paperwork, but also supervised the landscaping crew. The business grew from approximately twelve to fifteen customers during the first years, to approximately fifty customers in 2009, when they purchased a customer list from another landscaper, to approximately eighty-five customers in 2014. The number of workers grew from [the plaintiff] in 2005, to the original crew of two, [the defendant] and [the plaintiff], in 2007, to seven workers divided into two crews of four and three by 2014.

"Although initially [the plaintiff] received customer payments, [the defendant] took over the back-office

[1] The defendant also claims that the court erred in finding that the plaintiff's claim was not barred by the doctrine of laches. The trial court summarily rejected the defendant's laches argument in a footnote, in which it stated: "The doctrine of laches is not applicable to this action and is not warranted under the facts found by the court, including lack of material prejudice to the defendant from the delay." On appeal, the defendant's claim that he was prejudiced by the plaintiff's delay in commencing this action appears to be limited to his argument that the plaintiff's testimony was riddled by his "fallible memory." This claim is unavailing.

work, including all billing and banking. The business deposited revenues into two bank accounts at Webster Bank and Bank of America, controlled by [the defendant]. [The plaintiff] did not have a tax [identification] number so the business accounts were opened by [the defendant] and he was in charge of deposits and withdrawals. Funds were withdrawn from the accounts by both brothers as needed to pay their personal expenses rather than drawing a salary.[2] On May 24, 2011, [the defendant] formed Villanueva Landscaping, LLC, with himself as sole member. The reason [the plaintiff] was not made a member was that he lacked a tax [identification] number, but the business of the LLC was the continuation of Villanueva Landscaping and the brothers remained partners.

"Sometime in 2014, [the plaintiff] found himself locked out of the landscaping business as [the defendant], without warning, took all the customers, crew, tools, vehicles and equipment used in the landscaping side of the business, together with all [of] the cash in the accounts.[3] [The defendant] left behind the masonry/tree equipment and vehicles. In 2014, landscaping fees represented 90 [percent] of the business income. The portion left to [the plaintiff], the masonry and tree work, represented 10 [percent] of revenues. Although [the defendant] referred to the business being 'divided' in early 2014, the credible evidence is that there was no discussion or agreement about splitting the business, but, rather [the defendant] imposed the division on [the plaintiff] when he took over the landscaping portion of the business as his own, along with the funds in the accounts."

[2] "They also withdrew funds from the business accounts in 2014 to jointly purchase a house for $150,000, the title to which was in both their names, which they owned 50/50."

[3] "[The plaintiff] testified that [the defendant] had emptied out the garage where the landscaping equipment was stored and called the police on [the plaintiff] when he tried to reclaim one of the vehicles."

By way of a one count complaint dated June 19, 2018, the plaintiff commenced this action alleging the breach of an "unwritten and unspoken implied contract" between the parties. In response, the defendant filed an answer and three special defenses. By way of special defense, the defendant alleged that the plaintiff's claim was barred by the three year statute of limitations for an oral contract pursuant to General Statutes § 52-581 and/or the three year statute of limitations for conversion pursuant to General Statutes § 52-577. The defendant also alleged that the plaintiff's claim was barred by the doctrine of laches and that he was entitled to a setoff by the plaintiff's "retention of certain of the business assets in which both parties had an interest."

On October 30, 2019, following a brief court trial at which both parties testified, the court filed a memorandum of decision, wherein it found that an implied partnership existed between the parties and that the defendant breached the terms of the implied partnership agreement. The court rejected the defendant's special defenses, and awarded damages to the plaintiff in the amount of $86,500, representing one half of the value of the partnership property that had been taken by the defendant. This appeal followed.

I

The defendant first contends that the court erred in finding an implied partnership agreement between the parties. We disagree.

"It is well settled that the existence of an implied in fact contract is a question of fact for the trier. . . . Accordingly, our review is limited to a determination of whether the decision of the trial court is clearly erroneous. A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the

definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling. . . .

"With respect to implied in fact contracts, we have recognized that [w]hether [a] contract is styled express or implied involves no difference in legal effect, but lies merely in the mode of manifesting assent. . . . A true implied [in fact] contract can only exist [however] where there is no express one. It is one which is inferred from the conduct of the parties though not expressed in words." (Citations omitted; internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 258–59, 152 A.3d 470 (2016).

Here, the court found that "there is strong evidence the parties were *de facto* partners." The court reasoned: "Although perhaps [the] plaintiff initially hired [the] defendant as an employee, the credible evidence is that, in later years, they regarded each other as partners compensated by withdrawals from the business accounts for personal expenses, which may be characterized as draws and distributions; not salary." The court further explained: "Although they divided their responsibilities between front office and back office, and by areas of the business, landscaping and paving, they acted as mutual agents and jointly managed the business and shared its profits. The LLC was formed to facilitate the business' finances, banking and reporting but, as between themselves, the brothers remained general partners. Their joint purchase of real estate using corporate funds epitomized the informal understanding

between the brothers. The informal nature of distributions and draws, and the absence of contrary credible proof, suggests they were equal partners. The totality of evidence satisfied the test for formation of a partnership . . . .''

The defendant argues that, ''[w]hile the actions of the parties as found by the trial court in this matter would appear to provide a basis for finding an implied partnership agreement, such a finding cannot survive the plaintiff's own denial that any such agreement existed.'' Although the defendant accurately recounts the plaintiff's testimony denying the existence of a partnership agreement, the court's finding that, by his conduct, the plaintiff manifested an intent to operate the business alongside the defendant is amply supported by the record. We therefore conclude that the court's finding of an implied partnership was not clearly erroneous.

II

The defendant next claims that the court erred in concluding that the plaintiff provided credible evidence of his damages. We are not persuaded.

''Well established legal principles govern our review of damage awards. In an action for breach of contract, [t]he plaintiff has the burden of proving the extent of the damages suffered. . . . Although the plaintiff need not provide such proof with [m]athematical exactitude . . . the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate. . . . Our Supreme Court has held that [t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will

give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . In other words, we are constrained to accord substantial deference to the fact finder on the issue of damages. . . . Under the clearly erroneous standard, we will overturn a factual finding only if there is no evidence in the record to support it . . . or [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, 202 Conn. App. 315, 353, 245 A.3d 804, cert. denied, 336 Conn. 933, 248 A.3d 709 (2021).

In addressing damages here, the court reasoned: "The plaintiff here has not sought lost profits or an accounting, but rather has claimed damages based on the value of the assets taken by the] defendant. The defendant has asserted the right to [a] setoff for the value of assets retained by the plaintiff. Neither party has provided evidence as to the value of the business as of the split-up or today or what each would have received in a distribution upon liquidation, but rather have based their claims for damages and [a] setoff on very incomplete and subjective evidence of the value of all the partnership property at the time of the split-up.[4] The defendant took assets with a minimum value of $173,000 based on the most credible testimony as to historic cost of equipment and customer list purchase pricing used to approximate their value in 2014. If the partnership

[4] "The partnership has not been dissolved or wound down formally . . . . Neither party has sought an accounting from the other. Each partner accepted the de facto dissolution and winding down that occurred in 2014 and conducted their respective businesses separately since then. The Appellate Court has approved direct damages actions between partners in lieu of formal accountings to wind up a partnership in cases where no complex accounting is necessary. *Chioffi* [v. *Martin*], 181 Conn. App. 111, 145, 186 A.3d 15 (2018). The parties have waived any rights to an accounting."

had sold these assets that is the minimum amount that would have been available for distribution assuming all other partnership liabilities and revenues off set. The evidence as to the value of assets retained by the plaintiff is sketchy at best, and [the] defendant abandoned those assets to the plaintiff when he walked out with the landscaping business, so the court declines a set off. The plaintiff is awarded one-half of the value of the partnership property taken by the defendant, $86,500, as damages for breach of the partnership agreement."

In challenging the trial court's award of damages, the defendant argues that "[t]he 'very incomplete and subjective evidence' [that] the court had before it was exclusively the result of the plaintiff's testimony—no documentation (invoices, repair bills, parts orders, customer lists) was introduced, [nor was there any testimony of] nonparty witnesses. . . . [T]his almost total absence of any contemporaneous record of the value of the assets should have raised serious credibility [questions] for the court." Although the only evidence of damages was the plaintiff's testimony, which, at times, was less than certain, the trial court, as the trier of fact, was entitled to weigh the plaintiff's testimony, assess its reliability and credibility, and afford it whatever weight it deemed appropriate. The plaintiff testified that, when he was locked out of the business, the defendant assumed control of approximately eighty-five customer accounts, including two condominium complexes. The plaintiff testified that the condominium accounts were each worth $20,000, and the individual accounts were worth between $1000 and $1500 each. The plaintiff also testified that the defendant maintained possession of several trucks and various larger pieces of landscaping equipment, including a trailer, a chipper, a backhoe, and multiple commercial mowers. The plaintiff testified to the approximate value of each vehicle and larger piece of landscaping equipment, and also

testified that the defendant took possession of approximately $7500 worth of smaller tools, including hand tools, ropes, backpack blowers, weed wackers and a sprayer. On the basis of the foregoing, the court found that the plaintiff met his burden of providing the court with sufficient evidence to enable the court to make a fair and reasonable determination of the amount of damages awarded to the plaintiff. Having reviewed the evidentiary record before the court and affording the trial court the broad discretion to which it is entitled in awarding damages, we are not convinced that the damages award was clearly erroneous or that a mistake was made.

III

The defendant finally argues that the trial court erred in rejecting his special defense that the plaintiff's action was barred by the statute of limitations under § 52-577.[5] The trial court rejected the defendant's argument that the plaintiff's action was barred by the statute of limitations with little discussion. The court held: "The statute of limitations for breach of an implied contract is six years pursuant to [General Statutes] § 52-576 (a). This action was timely commenced less than four years after the defendant took partnership property to start his own landscaping business." The defendant claims that the trial court applied the wrong statute of limitations, arguing that the plaintiff's cause of action is governed by the three year statute of limitations for conversion or breach of fiduciary duty, set forth in § 52-577.

"The determination of which, if any, statute of limitations applies to a given action is a question of law over which our review is plenary." *Government Employees Ins. Co.* v. *Barros*, 184 Conn. App. 395, 398, 195 A.3d 431 (2018). The plaintiff's one count complaint sounded

[5] The defendant does not challenge on appeal the trial court's rejection of his special defense based on the statute of limitations under § 52-581.

in breach of an implied contract and did not assert a claim sounding in tort. We therefore agree with the trial court's conclusion that the plaintiff's action was governed by the six year statute of limitations set forth in § 52-576 (a).

The judgment is affirmed.

In this opinion the other judges concurred.

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## NATALIE BRAY *v.* DWAYNE BRAY, SR.
## (AC 43309)

Moll, Cradle and Pellegrino, Js.

*Syllabus*

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court challenging an order issued by the trial court in connection with its denial of the plaintiff's postjudgment motion for contempt. Under the parties' separation agreement, which was incorporated into the judgment of dissolution, the defendant was required to pay to the plaintiff, as child support, alimony, and/or property distribution, certain percentages of the net income that he received from his employer in the form of cash bonuses and stock awards. In 2015, the plaintiff filed a postjudgment motion for contempt, claiming that the defendant had failed to pay certain amounts required under the separation agreement. The trial court issued an order in connection therewith, requiring that the annual amounts paid with respect to the defendant's bonus and stock funds be based on his effective tax rate from the prior year. The plaintiff filed another motion for contempt alleging, inter alia, that the defendant violated the dissolution judgment by deducting extra amounts from his bonus and stock payments for taxes that he did not actually pay. The defendant asserted that these amounts were properly deducted because his net proceeds were to be calculated using his marginal tax rate rather than his effective tax rate. After a four day hearing, during which neither of the parties ever mentioned the 2015 order, the trial court found that the defendant's noncompliance was not wilful, but it issued a remedial order that required that he reimburse the plaintiff for certain funds based on its conclusion that the term "net," as used in the separation agreement, clearly and unambiguously did not contemplate the consideration of his net income to calculate the amount of his bonus and stock income that was subject to distribution to the plaintiff, and the defendant appealed to this court. *Held* that the trial court's analysis underlying its conclusion that the meaning of the

term "net," as used in the separation agreement, was clear and unambiguous was erroneous because it failed to take into consideration the stipulation of the parties set forth in the 2015 order, which provided specific directions as to how the net amounts of the defendant's bonus and stock income were to be calculated; accordingly, the remedial order was vacated.

Argued March 8—officially released July 20, 2021

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Ficeto*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Bozzuto*, *J.*, granted the plaintiff's motion for contempt; subsequently, the court, *Johnson*, *J.*, granted the plaintiff's motion for contempt; thereafter, the court, *Nguyen-O'Dowd*, *J.*, denied the plaintiff's motion for contempt and entered a remedial order, and the defendant appealed to this court. *Order vacated.*

*Adam J. Teller*, for the appellant (defendant).

*Christopher P. Kriesen*, with whom were *Qing Wai Wong* and *Emily Covey*, certified legal interns, for the appellee (plaintiff).

*Opinion*

PER CURIAM. This appeal arises from a postjudgment motion for contempt filed by the plaintiff, Natalie Bray, alleging that the defendant, Dwayne Bray, Sr., wilfully failed to comply with certain provisions of the parties' separation agreement, which had been incorporated into their judgment of dissolution. The provisions at issue required the defendant to pay to the plaintiff, as child support, alimony and/or property distribution, certain portions of income that he received from his employer in the form of cash bonuses and stock awards (bonus and stock income). Although the court found

that the defendant had not complied with those provisions of the separation agreement, it concluded that his noncompliance was not wilful, and, therefore, it denied the plaintiff's motion for contempt.[1] On appeal, the defendant challenges the court's remedial order that required him to reimburse the plaintiff for certain funds based on the court's conclusion that the term "net," as used in the applicable provisions of the separation agreement, clearly and unambiguously did not contemplate the consideration of his net income in order to calculate the amount of his bonus and stock income that was subject to distribution to the plaintiff. The defendant specifically claims that the trial court (1) incorrectly determined that the term "net" was clear and unambiguous as used in the parties' separation agreement, and (2) erred in interpreting the term "net" to exclude from those income sources "only the amounts withheld by his employer, disregarding the defendant's actual income tax obligations, despite clear evidence that the parties intended to consider his actual marginal tax obligations and not merely the employer's withholding for those obligations." We conclude that the analysis underlying the trial court's conclusion that the term "net" was clear and unambiguous was erroneous in that it failed to take into consideration a stipulation of the parties, which was entered as an order of the court, between the date of dissolution and the hearing on the motion for contempt. That stipulation specifically directed how the "net" amounts of the defendant's bonus and stock income were to be calculated. Accordingly, we vacate the remedial order.

The following procedural history and undisputed facts are relevant to our resolution of the issues on appeal. The parties' marriage was dissolved on October 10, 2014. They executed a separation agreement on

[1] The plaintiff has not cross appealed from the denial of her motion for contempt.

that date, which was incorporated into the judgment of dissolution. The separation agreement provided, inter alia, that the defendant would pay to the plaintiff alimony, various portions of marital assets and child support for their minor child. Specifically, as to alimony, § 4.1 of the parties' separation agreement provided that the defendant would pay to the plaintiff periodic alimony in the amount of $1000 per week for fifteen years, plus "15 [percent] of any and all net cash bonus(es) received by the [defendant]." Section 4.5 of the separation agreement provided in relevant part: "So long as there is an alimony obligation payable to the [plaintiff], as additional alimony, the [plaintiff] shall be entitled to 15 [percent] of any and all such future stock earned from Disney[2] once liquidated as cash by the [defendant]. The 15 [percent] shall be payable from the liquidated net amount." (Footnote added.)

As to the marital assets, specifically, as to restricted stock units that had been awarded to the defendant, but had not vested, as of the date of dissolution, § 5.1 of the separation agreement provided, inter alia, that "the [plaintiff] shall be entitled to 50 [percent] of the net value of the stock upon vesting, after provision for payment of all associated taxes and fees . . . ."

As to child support, the separation agreement required the defendant to pay periodic support in accordance with the child support guidelines. Section 11.2 of the separation agreement provided that, as additional child support, "the [defendant] shall pay 15 [percent] of his net yearly bonus (non-stock bonus(es)), to the [plaintiff] so long as child support is due and owing . . . ."

On January 5, 2015, the defendant informed the plaintiff that he believed that the "net" of his cash bonus and stock income should be calculated by employing

[2] At all times relevant herein, the defendant was employed by ESPN, which is owned by Disney Worldwide Services, Inc.

a federal tax rate of 33 percent, which was his marginal tax rate, instead of the 25 percent that his employer withheld. Accordingly, he told the plaintiff that he would subtract an additional 8 percent from the amount that he received from his employer before calculating the plaintiff's percentage of each distribution.

On May 7, 2015, the plaintiff filed a motion for contempt, alleging, inter alia, that the defendant had not complied with the periodic child support or alimony orders, or the provisions of the separation agreement that required him to pay to her a certain portion of his bonus and stock income.[3] As a result of that motion, on November 2, 2015, the trial court, *Johnson*, *J.*, issued an order that provided, inter alia: "The parties stipulate to the following . . . [t]he parties shall each receive their bonus and stock funds based upon the [defendant's] ***effective tax rate*** from the previous year and not his marginal tax rate. At the end of each tax year, the parties shall reconcile within thirty (30) days of the [defendant] filing his tax returns. The reconciliation shall be done to determine if the [defendant] over withheld or under withheld. The parties shall adjust their

[3] The plaintiff also had filed a motion for contempt on January 26, 2015, alleging that the defendant had stopped paying child support and alimony, both the periodic orders and those stemming from his bonus and stock income. As a result of that motion, an order for immediate wage withholding was entered on April 7, 2015, to secure the defendant's periodic obligation. The court also issued another order, by agreement of the parties, pertaining to the parties' exchange of financial information. Of particular note, the court ordered: "Each party shall authorize their respective accountants to speak with the other *regarding applicable tax rates*, *2014/2015 income*, *and any other information necessary to determine net proceeds* due to the [plaintiff] pursuant to the [separation] agreement dated October 10, 2014." (Emphasis added.) Like the November 2, 2015 order discussed subsequently in this opinion, this order is indicative of the parties' intent and understanding that the defendant's net income and the tax rate applied to calculate that income were relevant to the calculation of the "net" amounts contemplated in the separation agreement. Also, like the November 2, 2015 order, this order belies the court's determination that the term "net" clearly and unambiguously was not a factor of the defendant's net income.

earnings based on this determination by the parties' accountants. The difference after reconciliation, if any, shall be paid within thirty (30) days of reconciliation to the party who is owed money." (Emphasis in original.)

On March 28, 2018, the plaintiff filed another motion for contempt, alleging, inter alia, that the defendant violated the dissolution judgment by deducting "extra money from bonuses and stock payments for 'extra taxes' " that he does not actually pay. The plaintiff argued that the "net" proceeds from the defendant's bonus and stock income were to be calculated by subtracting the actual taxes paid by the defendant, which she referred to as the defendant's "effective tax rate." The defendant maintained his position that his marginal tax rate of 33 percent should be applied to calculate the net proceeds.

Following a four day hearing beginning on September 5, 2018, and concluding on May 9, 2019, the trial court filed a memorandum of decision on August 2, 2019. In its memorandum of decision, the court stated, inter alia:[4] "The parties provided the court with extensive testimony and argument to support their position that the parties' [separation] agreement, specifically [§§] 4.1, 4.5, 5.1 and 11.2, requires the court to define the term 'net income' before it can determine how . . . additional alimony and child support payments are to be calculated. Specifically, the defendant argues that the term 'net income' as contemplated by the parties in the [separation] agreement is defined as his marginal tax rate. The plaintiff argues the opposite, claiming that 'net income' is defined as his effective tax rate." The trial court concluded that it did "not need to resolve the issue presented by the parties as to the definition of 'net income' pursuant to the parties' [separation] agreement" because "neither party has established a

[4] The court addressed additional issues that are not relevant to this appeal.

plausible argument for their position that the parties' [separation] agreement for the defendant to make additional alimony and child support payments is linked to his net income and how the term 'net income' is defined. To the contrary, each of the provisions in the [separation] agreement that are the subject of the plaintiff's motion for contempt are clear and unambiguous and nothing within the parties' [separation] agreement requires a definition of the defendant's net income in order to enforce the provisions." The court addressed each of the specific provisions of the separation agreement and explained: "In each of the sections that is the subject of the plaintiff's motion for contempt, the term 'net' has been attached to the specific type of additional compensation received by the defendant—cash bonuses, stocks or distribution from [restricted stock units]." The court further reasoned: "[I]n reviewing the [separation] agreement as a whole, there is no language to suggest that the defendant's net income has any effect on his obligation to make additional alimony and child support payments. Nothing within the [separation] agreement requires the parties to reconcile payments related to cash bonuses and stock distributions after the defendant files his tax returns. Presumably, this (nonexistent) condition would allow the parties to conduct a forensic accounting and determine the defendant's tax rate for that particular year. There is also no language in the [separation] agreement that ties the exchange of the end-of-year statements for bonuses and stock distribution to the payments of additional alimony and child support. Instead, the provisions in the [separation] agreement that are at issue stand alone and are clear and unambiguous as to when and how much additional alimony and child support payments should be paid to the plaintiff by the defendant, regardless of his net income." The court found that the defendant's failure to comply with the provisions of the separation

agreement by deducting additional taxes from his proceeds was based on a "legitimate misunderstanding by the defendant . . . ." On that basis, the court concluded that the defendant's failure to comply with the separation agreement was not wilful and, therefore, denied the plaintiff's motion for contempt. The court further concluded, however: "Despite this misunderstanding, the defendant is still responsible to pay the plaintiff her percentage share under the [separation] agreement without the additional 8 [percent] removed on the net amount he received from his cash bonuses, stock or distribution from [restricted stock units]. The court orders that the defendant reimburse the plaintiff the payments made pursuant to [§§] 4.1, 4.5, 5.1 and 11.2, consistent with this decision." This appeal followed.

The defendant argues that the court's remedial order requiring him to reimburse the plaintiff for the additional 8 percent that he had deducted from his bonus and stock income was based on an incorrect interpretation of the separation agreement. As noted, both parties argued to the trial court that the plaintiff's portion of the defendant's bonus and stock income was dependent on the applicable tax rate, but the trial court rejected those arguments, reasoning that, if the parties had intended "net" to be a factor of the defendant's net income, they would have provided for an exchange of tax information or annual accountings. The November 2, 2015 order did just that. The November 2, 2015 order[5] expressly provided for an annual reconciliation of the amounts due each year based on the defendant's income tax returns, as determined by their accountants.[6] Thus,

[5] We note that the November 2, 2015 order reflects that both parties were present in court with counsel at the time that the order was entered.

[6] Our review of the parties' respective filings and arguments before the trial court, including the transcripts of the four day contempt hearing, reveals that neither the parties nor the trial court mentioned the November 2, 2015 order. On April 15, 2021, this court issued an order directing the parties to file supplemental briefs "addressing what effect, if any, this order has on the appeal presently pending in this matter." Both parties filed supplemental briefs in accordance with the April 15, 2021 order.

the rationale underlying the court's remedial order—that the separation agreement clearly and unambiguously did not contemplate the consideration of the defendant's net income because it did not provide for an annual reconciliation of the amount owed to the plaintiff based on the defendant's tax obligations—is inconsistent with the November 2, 2015 order that directed the parties to employ that exact procedure. Accordingly, the court's remedial order cannot stand.

The August 2, 2019 remedial order is vacated.

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## JOHN B. ONTHANK *v.* PIERCE ONTHANK ET AL.
## (AC 43949)

Moll, Clark and Eveleigh, Js.

*Syllabus*

The plaintiff sought to recover damages for, inter alia, breach of contract, alleging that the defendants had failed to make all payments required under a promissory note. The trial court rendered judgment for the plaintiff on his breach of contract claim and rejected the defendants' special defenses, including their defense that the plaintiff failed to allege or establish that he had fulfilled every condition precedent prior to bringing an action on the promissory note. On the defendants' appeal to this court, *held*:

1. This court affirmed the judgment of the trial court as to the breach of contract claim on the ground that the plaintiff substantially complied with the notice of default provision in the promissory note under the circumstances of this case; although the plaintiff did not send the letter declaring default by certified mail, as required by the notice provision in the promissory note, there was no contractual requirement of proof of actual delivery, the defendants did not contest that they had actual notice of the declaration of default, and any noncompliance by the plaintiff with the requisite method of delivery as provided in the promissory note did not result in any prejudice to the defendants.
2. The trial court's award of damages was not clearly erroneous, as there was ample evidence in the record to support its finding that the defendants were not entitled to a $120,000 credit for the purported value of certain stock provided to the plaintiff as security; the share value for the stock claimed by the defendants was based on market transactions in December, 2015, but the plaintiff did not have an obligation under

the note to sell the shares until after he declared a default in September, 2016, the defendants provided no evidence as to the value of the shares at the time of the declaration of default, the evidence actually revealed substantial fluctuations in the stock price over the years, and there was evidence that the shares were not accessible in the plaintiff's account and, therefore, not transferable, until January, 2017, contradicting the defendants' claim that the plaintiff could freely sell the shares in December, 2015.

Argued May 24—officially released July 20, 2021

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Kenneth B. Povodator*, judge trial referee; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

*Pierce Onthank* and *Susan Onthank*, self-represented, the appellants, with whom, on the brief, was *John B. Kaiser* (defendants).

*John B. Onthank*, self-represented, the appellee (plaintiff).

*Opinion*

MOLL, J. The self-represented defendants, Pierce Onthank and Susan Onthank,[1] appeal from the judgment of the trial court, rendered following a bench trial, in favor of the self-represented plaintiff, John B. Onthank, on count one of his second revised complaint asserting

[1] The appeal form filed in this matter lists only Pierce Onthank as an appellant; however, the appellants' brief and docketing statement were filed on behalf of both Pierce Onthank and Susan Onthank as appellants. In light thereof, and given that their claims raised on appeal are identical, we consider them both as the appellants, and we refer to them in this opinion collectively as the defendants and individually by first name. See, e.g., *Celentano* v. *Rocque*, 282 Conn. 645, 647 n.1, 923 A.2d 709 (2007).

a breach of contract claim.[2] On appeal, the defendants claim that the court erred in (1) rejecting their special defense asserting that the contract at issue—a promissory note—was unenforceable because the plaintiff did not provide them with a notice of default in strict compliance with the terms of the note and, thus, failed to satisfy a condition precedent to the enforcement thereof, and (2) awarding the plaintiff damages on the breach of contract claim because the court improperly declined to credit them $120,000 to account for the purported value of one million shares of stock transferred to the plaintiff. We disagree and, accordingly, affirm the judgment of the trial court.

The trial court found the following facts. In June, 2009, the defendants executed several documents, including a loan agreement and a promissory note, relating to a $300,000 loan from the plaintiff to the defendants. The one year fixed term loan was made to assist the defendants in purchasing a home in Wilton. The loan agreement required, inter alia, the execution of a mortgage on the Wilton property in favor of the plaintiff. Although the defendants made payments to the plaintiff between 2009 and 2016, the defendants still owed the plaintiff a substantial amount on the loan in September, 2016,

[2] The defendants also claim on appeal that the trial court erred in the contingent manner in which it rendered judgment on count two of the plaintiff's second revised complaint asserting an unjust enrichment claim. That is, because the plaintiff had prevailed on his breach of contract claim, and because the plaintiff's breach of contract and unjust enrichment claims were mutually exclusive (i.e., legally inconsistent) theories of liability, the court, relying on *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 724, 183 A.3d 1164 (2018), rendered judgment for the defendants on the unjust enrichment claim "subject to being reinstated as the operative judgment for the plaintiff should there be a determination that judgment improperly [was rendered] in favor of the plaintiff on the breach of contract count." In light of our conclusion that the court properly rendered judgment for the plaintiff on the breach of contract claim, we need not address the defendants' challenge to the court's disposition of the unjust enrichment claim.

around which time it was discovered that a valid mortgage in favor of the plaintiff had not been recorded on the Wilton land records.

On November 18, 2017, the plaintiff commenced this action. On September 20, 2018, the plaintiff filed a second revised complaint (i.e., the operative complaint). The plaintiff's four count second revised complaint asserted the following claims against the defendants: (1) breach of contract (count one); (2) unjust enrichment (count two); (3) statutory theft (count three); and (4) fraud (count four). In support of his claims, the plaintiff alleged, inter alia, that the defendants had failed to repay him the $300,000, plus interest, that he had loaned to them. On March 21, 2019, the defendants filed an answer and special defenses. Relevant to this appeal, the sixth special defense directed to the breach of contract claim asserted in general terms that the plaintiff neither alleged nor established that he had fulfilled every condition precedent to suing on the promissory note. In their answer, the defendants admitted to having borrowed the money from the plaintiff, but generally denied the substantive allegations of wrongdoing.[3] On April 3, 2019, the plaintiff filed a reply to the defendants' special defenses.

The matter was tried to the trial court, *Hon. Kenneth B. Povodator*, judge trial referee, on August 1 and 2, 2019. During trial, the plaintiff withdrew count four of his second revised complaint sounding in fraud. Thereafter, the parties submitted posttrial briefs.

On January 30, 2020, the court issued its forty-six page memorandum of decision. With respect to the plaintiff's breach of contract claim, the court concluded

[3] In addition to their answer and special defenses, the defendants filed a three count counterclaim asserting claims for negligent infliction of emotional distress, intentional infliction of emotional distress, and loss of consortium. During trial, the defendants abandoned their counterclaim in its entirety.

that the promissory note was "prima facie enforceable" and that the defendants breached the note by nonpayment of the full principal amount as of the one year anniversary of the loan (i.e., the maturity date). The court proceeded to reject all of the defendants' special defenses to the breach of contract claim,[4] including the sixth special defense, which the court construed as alleging that the plaintiff failed to comply with a condition precedent to the enforcement of the note by not providing the defendants with a notice of default in strict compliance with the terms of the note. The court found in favor of the plaintiff on count one and awarded the plaintiff $388,530.76 in compensatory damages, with per diem interest of $61.64.

With respect to the plaintiff's unjust enrichment claim, because the plaintiff prevailed on the breach of contract claim, the court rendered judgment for the defendants on the unjust enrichment claim on the ground that it was a legally inconsistent, alternative theory of liability. The court further concluded that, in the event that its judgment in the plaintiff's favor on the breach of contract claim was later reversed, judgment should enter in favor of the plaintiff on count two.[5]

With respect to the plaintiff's claim of statutory theft, the court rendered judgment in the defendants' favor. This appeal followed.[6] Additional facts and procedural history will be set forth as necessary.

[4] During trial, the defendants withdrew their first special defense asserting usury directed to count one. In addition, during trial, the defendants moved to amend their special defenses to add a defense based on the statute of limitations. The court reserved its decision on that motion. In its memorandum of decision, the court rejected the statute of limitations defense as untimely and further observed that, if considered on the merits, the defense would have failed.

[5] See footnote 2 of this opinion.

[6] The plaintiff has not filed a cross appeal.

I

The defendants first claim that the trial court erred in concluding that they breached their contract with the plaintiff. Specifically, the defendants contend that the court improperly rejected their sixth special defense asserting that the plaintiff did not strictly comply with the notice of default provision of the promissory note, thereby failing to satisfy a condition precedent to its enforcement. They contend that the court improperly construed the notice provision and found it satisfied under the circumstances of this case. The plaintiff claims, inter alia, that the trial court properly concluded that he substantially complied with the notice provision. We agree with the plaintiff.

We begin our analysis by setting forth the relevant standard of review and applicable legal principles. "A promissory note is nothing more than a written contract for the payment of money, and, as such, contract law applies." (Internal quotation marks omitted.) *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 707, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002). "In construing a contract, the controlling factor is normally the intent expressed in the contract, not the intent which the parties may have had or which the court believes they ought to have had. . . . Where . . . there is clear and definitive contract language, the scope and meaning of that language is not a question of fact but a question of law. . . . In such a situation our scope of review is plenary . . . ." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 265, 186 A.3d 708 (2018). "Under the plenary standard of review, we must decide whether the court's conclusions are legally and logically correct and supported by the facts in the record." (Internal quotation marks omitted.) *Estela* v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 207–208, 180 A.3d 595 (2018).

The following additional facts, as found by the trial court, and procedural history are relevant to our consideration of the defendants' claim. The loan agreement required the defendants to execute a mortgage in favor of the plaintiff on the Wilton property. The defendants attempted to comply with this requirement by filing a copy of the loan agreement and the note on the land records, but the filing lacked even a property description and did not constitute a mortgage in favor of the plaintiff. Furthermore, a number of liens subsequently were placed on the Wilton property, including by the Internal Revenue Service (IRS) with respect to tax liabilities. Accordingly, any subsequently filed encumbrance would be behind the IRS lien and the first mortgage, leaving the plaintiff with little or no protection.

Although the defendants made payments to the plaintiff totaling $148,678 between 2009 and 2016, the defendants still owed the plaintiff a substantial amount on the loan in September, 2016, at which time the plaintiff declared a default. By way of background, the parties' promissory note provided that certain enumerated events of default "shall not occur until [the defendants] are first sent a notice of the default or deficiency *by certified mail, postage prepaid or personal delivery*, whereupon [the defendants] shall have the opportunity to cure the default or deficiency within five (5) days of the date of the notice. For purposes hereof, the date of the notice shall be deemed to be the earlier of the date of the receipt of the notice of default by [the defendants] and the date which is the third business day after the date the notice is deposited, postage prepaid, in the United States Mail addressed to [the defendants], whether or not said notice is received." (Emphasis added.)

On September 9, 2016, Susan sent an e-mail to the plaintiff explaining that she had seen a spreadsheet that he

had sent calculating the amount owed on the promissory note and that she and Pierce "clearly ha[d] no other choice but to give [the plaintiff] the [Wilton] house." In that e-mail, Susan also asked the plaintiff to "move forward and send the certified letter."

In a letter dated September 12, 2016, the plaintiff explicitly declared a default (default notice). The plaintiff wrote in relevant part that "[a]s I have exhausted my efforts to contact either of you by phone or resolve this via [e-mail], I am exercising my rights under our agreement and am declaring this loan in 'Default' under the [terms of the promissory note] . . . ." In the default notice, the plaintiff further explained that he was sending it because the promissory note was "in breach and not being met or upheld in the spirit of" the parties' agreement. The court found that the defendants actually had received the default notice.

In support of their sixth special defense, the defendants maintained that the plaintiff failed to comply with the provision that a notice of default be sent "by certified mail, postage prepaid or personal delivery," focusing specifically on the lack of evidence as to any certified mailing. As an initial matter, in rejecting the defendants' sixth special defense, the court construed the notice provision and concluded that the phrase "personal delivery" was satisfied by actual delivery, even by noncertified mail.[7] In this regard, the court found that the plaintiff had strictly complied with the notice provision. In the alternative, the court deemed "delivery and actual receipt" to constitute substantial compliance with the notice provision. Because the court determined that the plaintiff had complied, either strictly or substantially, with the notice requirement of the note, it

[7] The court noted that the plaintiff had been living in Paris, France, and did not have access to the United States postal system and its certified mail form of delivery.

concluded that there was no material failure to comply with a condition precedent.

The defendants claim that the court erred in analyzing "what 'personal delivery' [as that phrase is used in the notice provision] could or might mean" because "[t]he plain meaning [of the notice provision] is the plain meaning." In essence, the defendants contend that the court improperly construed the notice provision to permit actual delivery, even by means of noncertified mail.[8] Because we affirm the court's conclusion that the plaintiff substantially complied with the notice provision, we need not address the defendants' claim that the court improperly construed the "personal delivery" language in the notice provision to mean "actual" delivery under a strict compliance standard.

"On several occasions, this court has considered the role of substantial performance in the enforcement of contract obligations. The concept is not a novel one. Although the doctrine was most eloquently articulated in the celebrated case of *Jacob & Youngs, Inc.* v. *Kent*, 230 N.Y. 239, 129 N.E. 889 (1921), in the context of building contracts, it has long been recognized to have application as well to the enforcement of 'contracts of all kinds . . . .' 8 A. Corbin, Contracts (Rev. Ed. 1999) § 36.2, p. 336. At issue in a claim of substantial performance is whether partial performance by one party is so 'nearly equivalent to that for which the parties bargained' that it will 'protect him from having his defaults considered as breaches' sufficient 'to justify the other party in refusing' to comply with its own contractual obligations. 15 S. Williston, Contracts (4th Ed. Lord 2000) § 44:54, pp. 227–28.

[8] The defendants do not challenge the court's factual finding that they actually received the default notice. Rather, they limit their claim to the contention that the plaintiff did not strictly comply with the notice provision of the promissory note.

" 'There is no simple test for determining whether substantial performance has been rendered'; *Hadden* v. *Consolidated Edison Co.*, 34 N.Y.2d 88, 96, 312 N.E.2d 445, 356 N.Y.S.2d 249 (1974); but among the factors to be considered is 'the degree to which the purpose behind the contract has been frustrated . . . .' Id." *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, 110 Conn. App. 367, 373, 955 A.2d 544, cert. denied, 289 Conn. 956, 961 A.2d 420 (2008). "The doctrine of substantial compliance is closely intertwined with the doctrine of substantial performance. . . . The doctrine of substantial performance shields contracting parties from the harsh effects of being held to the letter of their agreements. Pursuant to the doctrine of substantial performance, a technical breach of the terms of a contract is excused, not because compliance with the terms is objectively impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is immaterial." (Citation omitted; internal quotation marks omitted.) *Pack 2000, Inc.* v. *Cushman*, 311 Conn. 662, 675, 89 A.3d 869 (2014). "[T]he proper application of the doctrine of substantial performance requires a determination as to whether the contractual breach is material in nature. . . . [T]he doctrine of substantial performance applies only where performance of a *nonessential* condition is lacking, so that the benefits received by a party are far greater than the injury done to him by the breach of the other party." (Citations omitted; emphasis in original; internal quotation marks omitted.) *21st Century North America Ins. Co.* v. *Perez*, 177 Conn. App. 802, 815, 173 A.3d 64 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018).

This court repeatedly has applied the substantial performance doctrine in determining whether a contractual notice requirement has been satisfied in a given case, generally with respect to the *contents* of the notice

itself. See, e.g., *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, supra, 110 Conn. App. 373–76; id., 375 ("[a]lthough generally contracts should be enforced as written, we will not require mechanistic compliance with the letter of notice provisions if the particular circumstances of a case show that the actual notice received resulted in no prejudice and fairly apprised the noticed party of its contractual rights" (internal quotation marks omitted)); *Fidelity Bank* v. *Krenisky*, supra, 72 Conn. App. 713–15 (concluding that notice of default substantially complied with notice provision in mortgage because defendants were sufficiently apprised of their rights); see also *Wells Fargo Bank, N.A.* v. *Fitzpatrick*, 190 Conn. App. 231, 241–43, 210 A.3d 88 (applying substantial compliance doctrine to mortgage deed's notice requirements), cert. denied, 332 Conn. 912, 209 A.3d 1232 (2019); *Twenty-Four Merrill Street Condominium Assn., Inc.* v. *Murray*, 96 Conn. App. 616, 620–25, 902 A.2d 24 (2006) (declining to require strict compliance with notice requirement in bylaws where delay in notice resulted in no prejudice to defendant under circumstances of case). The present case gives us the occasion to consider, and affirm, the court's application of the substantial compliance doctrine to the *method of mailing* identified in the contractual notice provision.

Applying the foregoing principles to the present case, we conclude that, even assuming arguendo that the method of delivery of the default letter did not mechanistically comply with the contractual notice provision, "literal enforcement . . . would serve no purpose"; *Fidelity Bank* v. *Krenisky*, supra, 72 Conn. App. 712; because, as found by the trial court, the defendants had actual notice of the declaration of their default—a finding that they do not challenge on appeal. We therefore affirm the trial court's judgment as to count

one on the ground that the plaintiff substantially complied with the notice requirement of the promissory note under the circumstances of this case, namely, where there is no contractual requirement of proof of actual delivery, actual delivery is not contested, and any noncompliance with the requisite method of delivery did not result in any prejudice to the defendants. Cf. *Aurora Loan Services, LLC* v. *Condron*, supra, 181 Conn. App. 276 ("we decline to apply the doctrine [of substantial performance] where there is a contractual provision requiring proof of actual delivery for a notice of default sent by certified mail, return receipt requested, and there is no evidence that the defendants actually received the notice of default").

II

The defendants next claim that the trial court erred in its calculation of damages awarded to the plaintiff. Specifically, the defendants assert that the damages award should have been reduced by a credit of $120,000, representing the purported value of one million shares of stock provided to the plaintiff as security. We are not persuaded.

"Our Supreme Court has held that [t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . In other words, we are constrained to accord substantial deference to the fact finder on the issue of damages. . . . Under the clearly erroneous standard, we will overturn a factual finding only if there is no evidence in the record to support it . . . or [if]

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, 202 Conn. App. 315, 353, 245 A.3d 804, cert. denied, 336 Conn. 933, 248 A.3d 709 (2021).

The following additional facts, as found by the trial court, are relevant to our consideration of the defendants' claim. The loan agreement between the plaintiff and the defendants required the defendants to provide, inter alia, 1.1 million shares of American Energy Group Ltd. (AEG)[9] stock to the plaintiff as collateral. The defendants argued that because (1) they transferred one million shares of AEG stock to the plaintiff on December 11, 2015, and (2) on that date, the shares were valued at $0.12 per share, they were entitled to a credit in the amount of $120,000 (i.e., one million multiplied by 0.12) in connection with any damages awarded to the plaintiff.

In its memorandum of decision, the court found that the $0.12 share value claimed by the defendants was based on market transactions on December 11, 2015, and that the evidence revealed substantial fluctuations in the stock price over the course of years. Perhaps most importantly, the court found that there was no indication of value in 2016, when the plaintiff formally declared a default and had a duty under the loan agreement to look to the securities for an initial source of repayment of the debt. The court further found that the plaintiff had encountered problems liquidating the shares and that, at the time that he had declared the promissory note in default in 2016, he "was encountering issues relating to transferring the shares to his

[9] AEG is a business controlled by Pierce.

own personal account . . . .” Furthermore, although the defendants argued that they should be credited with the value of the one million shares as of December 11, 2015, the court found that the shares were not actually accessible in the plaintiff’s personal account until January, 2017.

With respect to the plaintiff’s difficulties in liquidating the AEG shares, the court found that there were “repeated references to and evidence of the substantial fluctuations in [the value of AEG stock] particularly over the course of years, and the plaintiff identified the general illiquidity” of the AEG shares—which the court classified as “penny stock[s].” Additionally, the court found that: (1) there was no “credible evidence as to the value on a per share basis as of the [plaintiff’s] declaration of default”; and (2) there was no “documentation as to time, price, or number of [AEG] shares]” sold beyond the actual sale of a small number of shares sold for $13,249. Finally, the court found that “there were continuing problems into at least 2018 concerning the ability of the plaintiff to sell the [AEG] shares.”

On the basis of the evidence before it, the court determined that there were “uncertainties as to [the] marketability and value” of the one million shares of AEG stock. Accordingly, the court declined to credit the defendants with the $120,000 they were claiming; instead, the court credited the defendants for sales of the shares actually “made/documented,” and treated unsold shares separately. To that end, the court found that the plaintiff had sold a number of AEG shares for a total of $13,249, and credited the defendants accordingly. Moreover, the court concluded that, to the extent that the plaintiff had sold any of the one million AEG shares in addition to those sold to generate the $13,249 credited as payment, “the additional amount recovered

[was] to be treated as a payment against the indebtedness." The court further ordered the plaintiff to transfer any unsold AEG shares in his possession back to Pierce.

The defendants claim that the court erred in failing to deduct the $120,000 from the plaintiff's damages award. The defendants contend that (1) there is no dispute that they transferred one million shares of AEG stock, valued at $0.12 per share, to the plaintiff on December 11, 2015, and (2) the evidence in the record reveals, contrary to the court's finding, that the plaintiff was able to sell those shares freely as of that date. We are not persuaded.

As our Supreme Court has explained: "[T]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative . . . but which allows for some objective ascertainment of that amount. . . . This certainly does not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate." (Internal quotation marks omitted.) *American Diamond Exchange, Inc.* v. *Alpert*, 302 Conn. 494, 510–11, 28 A.3d 976 (2011).

Applying the clearly erroneous standard of review, which requires that we substantially defer "to the fact finder on the issue of damages"; (internal quotation marks omitted) *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, supra, 202 Conn. App. 353; we conclude that the record supports the court's determination that the defendants were not entitled to the claimed $120,000 credit.

First, the court correctly found that the plaintiff did not have an obligation to sell the shares on December 11, 2015. The loan agreement provided that in "the event

of a default . . . Lender agrees to first resort to the Collateral Shares for repayment of the debt evidenced by the Note, attorneys' fees and costs through a resale of a sufficient number of the Collateral Shares in the open market reasonably necessary to recoup all sums due to Lender under the Note and Pledge Agreement." The court found that the plaintiff first declared a default in his letter dated September 12, 2016. Thus, because the plaintiff had not declared a default until September, 2016, he did not have an obligation to sell the AEG shares on December 11, 2015.

Second, the defendants did not submit evidence to support their claim that the AEG shares were worth $120,000. Rather, the defendants' own trial exhibits showed that there were substantial fluctuations in the value of the AEG stock. Simply put, the defendants did not provide the trial court with sufficient evidence to allow the court to " 'objective[ly] [ascertain]' " the value of the AEG stock. *American Diamond Exchange, Inc.* v. *Alpert*, supra, 302 Conn. 510–11.

Finally, there is evidence in the record that contradicts the defendants' claim that the plaintiff was able to sell the AEG shares freely as of December 11, 2015. In the plaintiff's September 12, 2016 letter to the defendants, the plaintiff explained that he was "still waiting to receive the 1.1 [million] shares of American Energy stock into [his] account." On January 26, 2017, the plaintiff received an e-mail notifying him that one million AEG shares had been transferred to his personal account. Thus, the trial court's finding that the shares were not actually accessible in the plaintiff's personal account—and therefore not transferable—until January, 2017, was amply supported by the evidence.

In sum, because the record readily supports the court's finding that the defendants were not entitled to a $120,000

credit for the purported value of the AEG stock, the defendants' claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* TAMARA GORDON (AC 42039)

Alvord, Prescott and Cradle, Js.

*Syllabus*

Convicted of the crime of larceny of an elderly person by embezzlement in the second degree in connection with certain credit card transactions, the defendant appealed to this court. The defendant was a health care aide who lived part-time with the alleged victim, R, and his wife. Eventually, the defendant and R became romantic and intimate. R gave the defendant large sums of money, and, according to the defendant, authorized the use of his credit card to make purchases for the defendant's own personal needs. After R's health declined, his son, B, hired a bookkeeper to help R manage his finances. When the bookkeeper found certain credit card charges and checks written to the defendant, the defendant's employment was terminated. B filed a complaint with the police, who conducted a larceny investigation, during which a detective, S, interviewed R. Prior to trial, R died, and the court granted a motion in limine filed by the defendant to preclude the admission of statements made by R to any law enforcement agent. At trial, S testified that he met with R and that R consented to the investigation. On appeal, the defendant claimed that the trial court improperly admitted into evidence a testimonial hearsay statement of R in violation of her constitutional right to confrontation and that she was deprived of her due process rights when the prosecutor engaged in prosecutorial impropriety by making substantive use of the testimonial hearsay statement in her closing rebuttal argument. *Held*:

1. The trial court violated the defendant's right to confrontation under the federal constitution by admitting into evidence, without limitation, S's testimony that R consented to the larceny investigation, which constituted hearsay: R's consent to the larceny investigation was an out-of-court statement, and, although S did not repeat any of the specific words that R spoke during his interview with S, S's testimony presented to the jury, by implication, the substance of R's statements during the interview, that, after being informed of the nature of the investigation into the defendant's conduct, R communicated to S that the police had his permission to continue to pursue the larceny investigation because

the transactions were unauthorized; moreover, R's statement of consent was admitted for the truth of the matter asserted, as the court indicated to the parties that it would admit the statement even if it were hearsay in that it was akin to a dying declaration, the court admitted the statement at issue without limitation, which meant it could be used for any purpose, and the prosecutor's closing rebuttal argument that the jury should infer that the defendant made unauthorized purchases with R's credit card because otherwise R would not have consented to the police investigation was a powerful indicia that the parties and the court understood that R's statement of consent was admitted for substantive purposes; furthermore, R's statement was testimonial in nature because the state conceded it would be if it came in for substantive purposes and it was provided amidst an interrogation to establish or to prove past events potentially relevant to later criminal prosecution, and the defendant did not previously have the opportunity to cross-examine R, who was unavailable due to his death; additionally, the defendant was harmed by the error, because the circumstances of the trial suggested that the admission of S's testimony influenced the judgment of the jury in that R effectively testified against the defendant on this critical issue from the grave without ever having been subjected to cross-examination, the jury had been presented with evidence that R had often gifted the defendant money and that the state did not charge the defendant for the theft of those funds, and, less than ten minutes after the jury reheard S's testimony, it returned a guilty verdict.

2. Because this court concluded that the trial court improperly admitted R's testimonial statement for substantive purposes, in contravention of the defendant's constitutional right to confrontation, it did not need to reach the merits of the defendant's prosecutorial impropriety claim.

Argued January 6—officially released July 20, 2021

*Procedural History*

Substitute information charging the defendant with the crime of larceny of an elderly person by embezzlement in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the jury before *Hernandez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed*; *new trial.*

*Megan L. Wade*, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

*Melissa E. Patterson*, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Justina Moore*, assistant state's attorney, for the appellee (state).

*Opinion*

PRESCOTT, J. The defendant, Tamara Gordon, appeals from the judgment of conviction, rendered following a jury trial, of larceny of an elderly person by embezzlement in the second degree in violation of General Statutes §§ 53a-119 (1) and 53a-123 (a) (5). On appeal, the defendant claims that (1) the court improperly admitted into evidence a testimonial hearsay statement of the alleged victim, Robert Duke, Sr. (Duke), who died prior to trial, in violation of the defendant's right to confrontation under the sixth amendment to the United States constitution[1] and article first, § 8, of the Connecticut constitution,[2] and (2) she was deprived of her due process rights when the prosecutor engaged in prosecutorial impropriety by making substantive use of Duke's testimonial hearsay statement in her closing rebuttal argument. Because we conclude that the court improperly admitted Duke's testimonial statement for substantive purposes, in contravention of the defendant's right to confrontation, we do not need to reach the merits of the defendant's prosecutorial impropriety claim. Accordingly, we reverse the judgment of conviction and remand for a new trial.

[1] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI. "[T]he sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018).

[2] Article first, § 8, of the Connecticut constitution provides in relevant part: "In all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him . . . ."

The following facts, as presented to the jury, and procedural history are relevant to our review of the defendant's claims. For approximately thirty-eight years, Duke, a lawyer, and his wife, Jeanette Duke,[3] lived together in their family home in Wilton where they raised four children. Jeanette Duke developed a degenerative neurological disorder and eventually required around-the-clock care. To assist with Jeanette Duke's care, Duke hired two live-in health care aides, Tina Grigoryan, who was responsible for Jeanette Duke's care from Monday morning until Saturday morning, and the defendant, who was responsible for Jeanette Duke's care from Saturday morning until Monday morning. The aides' responsibilities included, inter alia, purchasing groceries, household items, and personal items for the Dukes. For such purchases, Duke authorized the aides to use his credit card, which was kept in a designated kitchen drawer.

Duke was generous to his employees. Grigoryan and the defendant were well compensated, earning between $400 and $500 per day and regular bonuses. Duke loaned Grigoryan money on at least two occasions for eye surgery and a personal family matter. Duke also assisted the defendant with a business endeavor that ultimately was unsuccessful, by drafting the requisite legal documents, connecting the defendant with an attorney, and providing funds.

According to the defendant, in April, 2010, her relationship with Duke became romantic and intimate. At that time, Duke was in his early eighties and the defendant was in her early thirties. The defendant testified that Duke's generosity increased in tandem with the intimacy of the relationship, and that he made sure she did not "want for anything at all." At a certain point, the Dukes' children became upset about the amount of money their father was providing to the defendant. In March, 2012, Ben Duke, Duke's son, met with the defendant and his father to

[3] We refer to Robert Duke, Sr., and Jeanette Duke collectively as the Dukes.

present information that he thought would demonstrate that the defendant was making misrepresentations to his father. After that conversation, the defendant quit working for the Dukes. Duke wrote the defendant a $10,000 severance check.

Approximately three weeks later, the defendant returned to work for the Dukes at Duke's request. When the defendant returned to work, Duke continued to give her large sums of money in addition to her daily pay, in the form of checks designated for a Health Reimbursement Account (HRA).[4] The defendant testified that she used Duke's credit card to make purchases for her own personal needs and that Duke was aware of, and authorized, those purchases.

Ben Duke testified that Duke's health declined significantly in late 2012, and he began to need additional assistance. In March, 2013, the Dukes moved to an independent living facility in Redding, at which the aides continued to provide care for them pursuant to the same schedule—Grigoryan during the week and the defendant on the weekends. In August, 2013, Ben Duke hired Beth Wagner, a bookkeeper, to help his father manage his finances. Upon reviewing eight months of Duke's credit card statements, from January through September, 2013, Wagner found that there were $7371.43 worth of weekend charges at CVS Pharmacy, $4197.57 at T.J. Maxx, and $7812.30 at Stop & Shop. Duke had written checks to pay these credit card bills. Wagner also determined that, in 2013, Duke wrote the defendant a number of HRA checks totaling

[4] The defendant testified that Duke came up with two different "plans" concerning the money that he was giving to her. The first plan was to say that Duke was giving money to the defendant as a loan that she would repay when she sold a property that she owned in Jamaica. The second plan, which took effect after the defendant returned to work in approximately April, 2012, was to say that the defendant had breast cancer and the money from Duke was to pay for medical expenses. The defendant further testified that she used the money for her business and to take care of herself and her family.

$78,446.43. On September 7, 2013, shortly after Wagner presented her findings to Ben Duke and Duke, the defendant's employment was terminated.

On September 13, 2013, Ben Duke filed a complaint with the Wilton Police Department regarding approximately $23,000 in suspicious weekend transactions on Duke's credit card from January through September, 2013. The Wilton police then conducted a larceny investigation, during which the police detective assigned to the case, Robert Scott Sear, interviewed Duke. The defendant was arrested in 2014, and later charged, by an amended long form information, with larceny of an elderly person by embezzlement in the second degree, in violation of §§ 53a-119 (1)[5] and 53a-123 (a) (5).[6] Duke died in October, 2014, approximately three and one-half years before trial.

Prior to trial, the defendant filed a motion in limine to preclude the admission of statements made by Duke to "any law enforcement agent," in which she argued that any statements made to the police were inadmissible testimonial hearsay. At the hearing on the motion in limine, the court asked the state if it intended to offer any hearsay testimony regarding statements of Duke. The state's response was that it would follow the rules of evidence, it did not plan to claim any exceptions to the hearsay rule that would apply to Duke's statements, and it would

[5] General Statutes § 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to: (1) Embezzlement. A person commits embezzlement when he wrongfully appropriates to himself or to another property of another in his care or custody. . . ."

[6] General Statutes § 53a-123 (a) provides in relevant part: "A person is guilty of larceny in the second degree when he commits larceny, as defined in section 53a-119, and . . . (5) the property, regardless of its nature or value, is obtained by embezzlement, false pretenses or false promise and the victim of such larceny is sixty years of age or older, or is a conserved person . . . or is blind or physically disabled . . . ."

notify opposing counsel if it found "some crazy exception that [it] think[s] would be useful . . . ." The court granted the defendant's motion in limine, explaining that its decision was based on the prosecutor's representation that she would not be offering any testimony regarding hearsay statements of Duke.

The defendant later filed a motion to suppress certain evidence obtained from the stores at which the defendant had used Duke's credit card to make personal purchases. At the hearing on the motion to suppress, Detective Sear testified regarding, inter alia, his interview with Duke. Specifically, he stated, "I went to Yale New Haven Hospital, spoke to [Duke], met with him on normal rapport. He had a very weak voice. He obviously was partially blind. He could not write, but he was aware of his surroundings. He was alert. He was oriented. He agreed to speak with me. I thought the interview was appropriate. His son with power of attorney was present and I began to speak to him about why I was there.

"He explained that he knew and understood why I was there, and then I began to ask him questions about these certain transactions in which he did explain that there were some food items that may have been purchased. It would be difficult for him to isolate those, *but the items of gift card transactions, he was insistent that he never authorized such purchases and he never authorized any purchases within the T.J. Maxx store purchases that were used.*" (Emphasis added.)

Shortly thereafter, the court denied the defendant's motion to suppress on grounds not relevant to the present appeal. Defense counsel then raised additional issues with respect to Detective Sear's potential trial testimony. Specifically, defense counsel argued, inter alia, that any statements that Duke made to Detective Sear during the interview are testimonial hearsay and not admissible at trial pursuant to *Crawford* v. *Washington*, 541 U.S. 36, 124 S.

Ct. 1354, 158 L. Ed. 2d 177 (2004). The following colloquy ensued:

"The Court: All right. Does the state intend to offer the substance of that interview and the statements that [Duke] made?

"[The Prosecutor]: I think that the jury should know that Detective [Sear] met with [Duke] for sure.

"The Court: All right. And—but are you offering [Duke's] statements to the detective at trial?

"[The Prosecutor]: The state is not offering that as evidence, Your Honor.

"The Court: There's your answer. There's no *Crawford* issue."

On February 13, 2018, the first day of trial, but before the jury was sworn in, defense counsel again raised to the court the issue of Detective Sear testifying on the topic of his interview with Duke:

"[Defense Counsel]: And then also, Your Honor, on—on Thursday last week we had talked about—a little bit about the hospital visit of Detective Sear. And our position, the court may recall, was that given the fact that no statement from [Duke] would be admissible because it's testimonial hearsay, that there's just no relevance to that meeting between Detective Sear and—

"The Court: No, I disagree. Do you intend to offer any statements from that meeting, or just the fact that it occurred?

"[The Prosecutor]: Do I intend to offer any statements from that meeting? I'm going to ask Detective Sear, did there come a time that he met with [Duke]. And I don't know exactly what his response will be, but I'm not going to [ask] what did he tell you.

"The Court: All right. I think that answers your question. The fact that he met with [Duke] I think is highly relevant. It shows the integrity and the thoroughness of the investigation, which is always an issue in a criminal trial.

"[Defense Counsel]: But—

"The Court: And it sounds like the state does not intend to offer any statements from [Duke], which would qualify as hearsay evidence.

"[Defense Counsel]: But it presumes the competency of [Duke] regarding whatever was said.

"The Court: Well, you're free to cross-examine on that. Do you intend to cross-examine on that?

"[Defense Counsel]: I guess we'll see.

"The Court: All right. Well then it shouldn't be an issue. I mean, it seems to me that you're—that you're—you're jumping ahead. Just because he had a conversation with the person that somehow that calls the person's competence into—into question. If the state's not offering any substantive statements from [Duke] from that meeting, then I don't see what the hearsay problem is."

Detective Sear was the first witness to testify, and when he took the stand, he testified as follows with respect to
his interview with Duke:

"Q. Did you ever meet with [Duke]?

"A. I did. I did meet with [Duke] I wanted to have him relay facts to me, even though his son was represented by power of attorney. I made arrangements to meet with him and develop what he could provide me with the information as to his concerns and validate the complaint.

"Q. Did he consent to the investigation?

"A. He did."

Defense counsel did not object at the time to Detective Sear's testimony. After the court dismissed the jury for its morning recess, however, defense counsel moved for a mistrial on the ground that Detective Sear's testimony that Duke had consented to the investigation was a constitutional violation under *Crawford* v. *Washington*, supra, 541 U.S. 36. Defense counsel further explained that he did not object at the time that Detective Sear made the comment because it "would have highlighted the damaging nature of that testimony to the jury," and that "[t]he only remedy is a mistrial" because if the jury was told to disregard that portion of Detective Sear's testimony, it only would have highlighted that remark for the jury.

The court disagreed with defense counsel on the basis that Duke's consent to the investigation is not a statement of fact offered for the truth of the matter asserted, but instead was a verbal act. As such, it concluded that Detective Sear's response was not hearsay, and, even if it was, the court explained that it was admissible under the residual exception to the hearsay rule because the circumstances under which Duke gave consent "bore a high level of credibility and authenticity," and it was almost akin to a dying declaration.[7]

[7] Specifically, the court stated, inter alia: "It's an act. I agree, is an act. It's not—it's not a statement of fact. So it's not even hearsay. . . . [Y]our exception is noted for the record. I would note that even if—under the totality of the circumstances offered at the hearing and during today's testimony, that even if it were hearsay, I would still admit it under the residual hearsay evidence rule in as much as it's apparent under the totality of the circumstances, that the statements were—that the circumstances under which the statement was made bore a high level of credibility and authenticity.

"It was taken at a time when [Duke] obviously was very concerned about his finances and had every reason to be fully transparent with the investigation about the nature of his finances.

"It's almost, it's not exactly, but it's almost like a dying declaration. Somebody in that situation, I think would be very, very interested in getting his finances in order. So it bears independent indicia of reliability.

"And therefore, even if it were hearsay it would—it would be admissible. And it was not, in my view, testimonial nature.

"And again, at the very heart of it, it's not a statement, it's an act."

The topic of Detective Sear's interview with Duke did not come up again until the rebuttal portion of the prosecutor's closing argument, during which she argued, inter alia: "Is it far-fetched to think that [Duke] would be generous with writing checks and then think who cares about the credit card? I would submit to you that [Duke] was generous in writing checks. *Why else would it explain that* [*Duke*], *gave consent to Detective* [*Sear*] *and to Ben Duke to pursue the charges that we have before you today*. Generosity is not on trial here. The only thing that's on trial is whether [the defendant] abused her authority to use [Duke's] credit card." (Emphasis added.) The defendant did not object during the prosecutor's rebuttal argument.

During its multiday deliberation, the jury submitted several notes. In one of the final notes that the jury submitted before reaching a verdict, it requested a replay of Detective Sear's testimony. After the court played Detective Sear's testimony, it played a one minute long portion of the defendant's testimony, which the jury had also requested. Then, after an additional five minutes of deliberation, the jury returned a verdict of guilty. The defendant later was sentenced to ten years of imprisonment, execution suspended after twelve months, followed by five years of probation. The court also ordered restitution in the amount of $12,908. This appeal followed. Additional facts will be set forth as necessary.

The defendant first claims that she was deprived of her constitutional right to confrontation under the sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution when the trial court improperly admitted Detective Sear's testimony that Duke had consented to the larceny investigation.[8]

[8] The state concedes that the defendant's claim under the federal constitution is preserved. It maintains, however, that the defendant's claim under the state constitution is not preserved. Because we conclude that the defendant's right to confrontation under the federal constitution was violated, it is

Specifically, the defendant argues that Duke's consent constituted implied hearsay that was testimonial in nature, because it implied the content of Duke's statements to Detective Sear during the interview and the testimony was offered for the truth of the matter asserted, namely, that Duke consented to the investigation because he agreed that the defendant had made unauthorized purchases on his credit card. As such, the court's admission of the contested testimony violated the defendant's right to confrontation, because Duke was an unavailable witness and the defendant did not have an opportunity to cross-examine him. The defendant further argues that the state cannot demonstrate that the improper admission of Detective Sear's testimony was harmless beyond a reasonable doubt.

The state responds that Duke's consent to the investigation constituted a verbal act and, accordingly, was properly admitted into evidence as a nonhearsay statement. In addition, the state argues that even if Duke's consent constituted testimonial hearsay, the defendant is not entitled to reversal because such error was harmless beyond a reasonable doubt. We conclude that the trial court's admission of Detective Sear's testimony without limitation violated the defendant's right to confrontation and the state has failed to demonstrate that the error was harmless beyond a reasonable doubt.

We begin by setting forth the appropriate standard of review and governing legal principles. "The standard under which we review evidentiary claims depends on the specific nature of the claim presented. . . . To the extent a trial court's admission of evidence is based on an interpretation of [law], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a

unnecessary to consider whether the state constitution provides greater constitutional protections with respect to the right to confrontation.

hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . .

"As a general matter, hearsay statements may not be admitted into evidence unless they fall within a recognized exception to the hearsay rule. . . . In the context of a criminal trial, however, the admission of a hearsay statement against a defendant is further limited by the confrontation clause of the sixth amendment. Under *Crawford* v. *Washington*, supra, 541 U.S. 59, hearsay statements of an unavailable witness that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had the opportunity to cross-examine the unavailable witness. Nontestimonial statements, however, are not subject to the confrontation clause and may be admitted under state rules of evidence. . . . Thus, the threshold inquiries that determine the nature of the claim are whether the statement was hearsay, and if so, whether the statement was testimonial in nature, questions of law over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Smith*, 289 Conn. 598, 617–19, 960 A.2d 993 (2008).

We first consider, as an initial threshold inquiry, whether Duke's consent to the larceny investigation constituted hearsay. "An out-of-court statement offered to establish the truth of the matter asserted is hearsay. . . . The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay." (Citations omitted; internal quotation marks omitted.) *Farrell* v. *Johnson & Johnson*, 335 Conn. 398, 407, 238 A.3d 698 (2020); see also Conn. Code Evid. §§ 8-1 and 8-2. "Subject to certain

exceptions, hearsay is inadmissible. . . . A statement is defined as an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion." (Citation omitted; internal quotation marks omitted.) *Loiselle* v. *Browning & Browning Real Estate, LLC*, 147 Conn. App. 246, 257, 83 A.3d 608 (2013); see also Conn. Code Evid. §§ 8-1 and 8-2. "If the conduct is assertive in nature, that is, meant to be a communication—like the nodding or shaking of the head in answer to a question—it is treated as a statement, and the hearsay rule applies." (Internal quotation marks omitted.) *State* v. *King*, 249 Conn. 645, 670, 735 A.2d 267 (1999).

"There are certain circumstances when, although the witness did not repeat the statements of another person, his or her testimony presented to the jury, by implication, the substance of another person's statements. . . . Under these circumstances, a witness has implied an out-of-court statement of another by testifying to the witness' own verbal or nonverbal response to an identifiable conversation." (Citation omitted; internal quotation marks omitted.) *Loiselle* v. *Browning & Browning Real Estate, LLC*, supra, 147 Conn. App. 257–58; see *State* v. *Burton*, 191 Conn. App. 808, 832–33, 216 A.3d 734 (concluding that unmarked photographic array documents offered for purpose of establishing inference that eyewitnesses were unable to identify defendant constituted implied hearsay), cert. denied, 333 Conn. 927, 217 A.3d 995 (2019).

We now turn to a category of nonhearsay statements known as verbal acts. "A verbal act is an out-of-court statement that causes certain legal consequences, or, stated differently, it is an utterance to which the law attaches duties and liabilities . . . [and] is admissible nonhearsay because it is not being offered for the truth of the facts contained therein." (Internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 255,

856 A.2d 917 (2004). Often cited examples of verbal acts include words of offer and acceptance in a contract action; *Gyro Brass Mfg. Corp.* v. *United Automobile Workers, Aircraft & Agricultural Implement Workers of America, AFL-CIO*, 147 Conn. 76, 80, 157 A.2d 241 (1959); *Carrano* v. *Hutt*, 93 Conn. 106, 111, 105 A. 323 (1918); defamatory statements in a slander action; *Hayward* v. *Maroney*, 86 Conn. 261, 262, 85 A. 379 (1912); an offer of a bribe; *State* v. *Halili*, 175 Conn. App. 838, 861, 168 A.3d 565, cert. denied, 327 Conn. 961, 172 A.3d 1261 (2017); and statements of conspirators that form the basis of the conspiracy. *State* v. *Azevedo*, 178 Conn. App. 671, 680–81, 176 A.3d 1196 (2017), cert. denied, 328 Conn. 908, 178 A.3d 390 (2018).

In the present case, Duke's consent to the larceny investigation was an out-of-court statement. See *State* v. *King*, supra, 249 Conn. 670 (conduct that is meant to be communication is treated as statement for hearsay purposes). Moreover, although Detective Sear did not repeat any of the specific words that Duke spoke, Detective Sear's testimony presented to the jury, by implication, the substance of Duke's statements during the interview. Specifically, Detective Sear's testimony implied that, after being informed of the nature of the investigation into the defendant's conduct with respect to the credit card transactions at issue, Duke communicated to Detective Sear that the police had his permission to continue to pursue the larceny investigation because the transactions were unauthorized, which is precisely what the prosecutor argued in her closing rebuttal argument. The full context of Detective Sear's testimony to the jury further highlights this implication. That is, immediately before the question and answer related to Duke's consent, Detective Sear stated that he met with Duke to "have him *relay facts* to me . . . and develop what he could provide me with the information as to his concerns and *validate the complaint*." (Emphasis added.)

Next, we consider the purpose for which Duke's out-of-court statement of consent was admitted. We conclude for three reasons that it was admitted for the truth of the matter asserted, and, thus, constituted hearsay. First, the court stated, when ruling on the defendant's motion for a mistrial, that Duke's consent was not hearsay because it was a verbal act, but, even if it were hearsay, it would be admissible under recognized exceptions to the hearsay rule. Specifically, the court said that it would admit the statement under the residual exception, and that the statement was akin to a dying declaration. Irrespective of whether these hearsay exceptions were, in fact, applicable, it is significant that the court indicated to the parties that it would admit the statement even if it were hearsay.

Second, the court admitted the statement at issue without limitation. "Evidence that is admissible . . . for one purpose but not for another, is admissible . . . for that purpose. The court may, and upon request shall, restrict the evidence to its proper scope." Conn. Code Evid. § 1-4. "Absent a party's request for a limiting instruction, upon the admission of evidence, the court is encouraged to instruct the jury on the proper scope of the evidence or inquire whether counsel desires a limiting instruction to be given." Conn. Code Evid. § 1-4, commentary; see also *Rokus* v. *Bridgeport*, 191 Conn. 62, 67, 463 A.2d 252 (1983) ("it is the better practice for the trial court to instruct the jury whenever evidence is admitted for a limited purpose even when not requested to do so"). If Duke's consent had been admitted only as a verbal act, the jury should have been so instructed.[9] Because the court did not place any restriction on the jury's use of the testimony, the evidence

[9] The fact that the defendant did not ask for a limiting instruction, with respect to the admission of Duke's consent solely as a verbal act, is not fatal to her claim because such a request likely would have been futile in light of the fact that the court said it would admit the statement even if it were hearsay.

could be used for any purpose. See *Curran* v. *Kroll*, 303 Conn. 845, 864, 37 A.3d 700 (2012) ("This evidence was admitted in full, without limitation. In the absence of any limiting instruction, the jury was entitled to draw any inferences from the evidence that it reasonably would support."). In the present case, the failure to limit the purpose for which Duke's statement of consent came in was particularly egregious because, as we explain subsequently, it resulted in a violation of the defendant's constitutional right to confrontation. See *State* v. *Atkins*, 118 Conn. App. 520, 535–36, 984 A.2d 1088 (2009) (concluding, in context of reviewing for plain error trial court's failure to give limiting instruction concerning use of evidence of prior misconduct, that "[t]he failure by the court to give, sua sponte, an instruction that the defendant did not request, *that is not of constitutional dimension* . . . is not so egregious that it affects fundamental fairness or the integrity of and public confidence in the judicial proceedings" (emphasis added)), cert. denied, 295 Conn. 906, 989 A.2d 119 (2010).

Third, the prosecutor's closing rebuttal argument that the jury should infer that the defendant made unauthorized purchases with Duke's credit card because otherwise Duke would not have consented to the police pursuing charges against the defendant, is a powerful indicia that the parties and the court understood that Duke's statement of consent was admitted for substantive purposes. That is to say that if Duke's statement of consent was admitted solely as a verbal act, it would have been improper for the prosecutor to argue that Duke's statement should be understood to mean that he had not authorized the credit card transactions, particularly in light of the fact that Detective Sear had testified, outside of the presence of the jury, that Duke "was insistent that he never authorized [gift card transactions] and he never authorized any purchases within

the T.J. Maxx store . . . .'' See *State* v. *Alexander*, 254 Conn. 290, 306, 755 A.2d 868 (2000) (''A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument.'' (Citations omitted; internal quotation marks omitted.)). For Duke's statement of consent to be admitted properly as a verbal act, the consent would have to be offered for a purpose related not to its substance but, rather, solely to the fact that it was given.[10] See *State* v. *Perkins*, supra, 271 Conn. 255. By simultaneously arguing that Duke's consent was admitted as a verbal act and that the prosecutor's substantive use of the consent in her closing rebuttal argument did not constitute prosecutorial impropriety, the state attempts to have it both ways. It cannot. The statement of consent was either a verbal act and it was prosecutorial impropriety to use it for substantive purposes in the closing rebuttal argument, or, the statement of consent came in as implied hearsay under an exception to the hearsay rule and it was not improper for the prosecutor to use it substantively in the closing rebuttal argument. We reach the latter conclusion, and express no opinion as to whether, under a different set of circumstances, an out-of-court statement of consent could constitute a verbal act.

The second inquiry under our confrontation jurisprudence is to determine whether the statement at issue is testimonial in nature. See *State* v. *Smith*, supra, 289

[10] We note that, here, Duke's statement of consent does not appear to have had any legal consequence, as the police generally do not require consent from the victim of an alleged crime in order to conduct an investigation. See *State* v. *Perkins*, supra, 271 Conn. 255 (''verbal act is an out-of-court statement that causes certain legal consequences'' (internal quotation marks omitted)). Moreover, to the extent that Detective Sear testified that the police require a sworn statement to make a complaint official, Ben Duke provided such a sworn statement before Detective Sear interviewed Duke.

Conn. 622 ("the confrontation clause applies only to statements that are testimonial in nature"). During oral argument before this court, the state conceded that if we were to conclude that Duke's statement of consent came in for substantive purposes, it was testimonial in nature. See *State* v. *Sinclair*, 332 Conn. 204, 219–20, 210 A.3d 509 (2019) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *They are testimonial when the circumstances objectively indicate* that there is no such ongoing emergency, and *that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*" (Emphasis in original; internal quotation marks omitted.)). Because we have determined that Duke's statement of consent came in for its truth and the state has conceded that under such circumstances the statement was testimonial, and because the statement was provided amidst an interrogation to establish or prove past events potentially relevant to later criminal prosecution, we conclude that the statement was testimonial in nature.

As previously mentioned, pursuant to *Crawford*, "hearsay statements of an unavailable witness that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had the opportunity to cross-examine the unavailable witness." (Internal quotation marks omitted.) Id., 218. In the present case, it is undisputed that Duke was unavailable because he had died; *State* v. *Frye*, 182 Conn. 476, 481, 438 A.2d 735 (1980); the defendant did not previously have the opportunity to cross-examine him, and Duke's consent to the larceny investigation was testimonial in nature. Therefore, the court violated the defendant's right to confrontation under the

federal constitution by admitting, without limitation, Detective Sear's testimony that Duke consented to the larceny investigation.

This conclusion, however, does not end our inquiry. We must also consider whether the defendant was harmed by this error. "Because the error is constitutional in magnitude, the state has the burden of proving [that] the constitutional error was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Hutton*, 188 Conn. App. 481, 521, 205 A.3d 637 (2019). "Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) *State* v. *Smith*, supra, 289 Conn. 628.

First, we conclude that this is a close case because there was a dearth of evidence on the critical factual question of whether Duke authorized the defendant to use his credit card to purchase items for her personal use, or whether the defendant wrongfully appropriated Duke's money for such purchases. In other words, the key question to be answered by the jury was whether the items that the defendant purchased with Duke's credit cards were gifts, or whether they were stolen. Additionally, it is important to note that the jury was presented with evidence that Duke often had gifted the defendant money, and the state did not charge the defendant for theft of those funds. Moreover, there are

only two people who could have definitively answered the critical question: the defendant and Duke. By virtue of the admission of Detective Sear's testimony that Duke consented to the larceny investigation, Duke effectively testified against the defendant on this critical issue, from the grave, without ever having been subjected to cross-examination. See *State* v. *Hutton*, supra, 188 Conn. App. 503–504 ("[t]he test of cross-examination is the highest and most indispensable test known to the law for the discovery of truth" (internal quotation marks omitted)). Indeed, the defendant never had an opportunity to ask Duke under oath whether he had consented to the investigation because he did not authorize the credit card transactions or, conversely, whether he had let the defendant use the credit card for personal reasons and that he had consented to the investigation in the belief that she would be exonerated. Finally, we note that less than ten minutes after the jury reheard Detective Sear's testimony it returned a guilty verdict. These circumstances suggest that the admission of Detective Sear's testimony influenced the judgment of the jury.

The state argues that the court's error in admitting Detective Sear's testimony was harmless beyond a reasonable doubt because (1) Ben Duke also testified that Duke had given him permission to go to the police regarding the credit card transactions at issue,[11] and (2) in light of the other evidence at trial, the jury reasonably could have concluded that the defendant's use of Duke's credit card was unauthorized.

We are not persuaded. With respect to the state's first argument, we acknowledge that Duke's improperly admitted statement could be considered cumulative of

[11] Specifically, Ben Duke testified: "My father said I could go to the police. . . . And so I had his authorization [to] do that." The defendant has not challenged the admission of this testimony.

Ben Duke's testimony, and, as such, that factor favors the state's position that the admission of Duke's consent was harmless. As the defendant points out, however, Ben Duke is an individual with both a financial and emotional interest in the outcome of the case, and, therefore, his testimony on this issue likely would have carried less weight with the jury than the hearsay statement of the witness, Duke, who had a critical perspective in the matter.

As to the state's second argument, it fails to appreciate the magnitude of the state's burden. It is not sufficient to say that the jury could have reached the same result in the absence of the improperly admitted testimony. The state must establish, beyond a reasonable doubt, that the improperly admitted testimony did not have a tendency to influence the judgment of the jury. In this vein, with respect to the overall strength of the prosecution's case, we consider the following to be significant: (1) there were a number of letters submitted into evidence, written by Duke, that corroborated the defendant's story that the two were having a romantic relationship and that he enjoyed providing for her financially; (2) the evidence suggests that Duke was aware of the defendant's spending on his credit card, as he was the one that wrote the checks to pay for the charges; and (3) aside from Ben Duke and Detective Sear's testimony that Duke authorized and/or consented to the larceny investigation, there was no other evidence regarding Duke's mindset after the defendant's employment was terminated.

Under these circumstances, we conclude that Detective Sear's testimony that Duke consented to the larceny investigation may have had a tendency to influence the jury's decision to find the defendant guilty of larceny of an elderly person by embezzlement in the second degree in violation of §§ 53a-119 (1) and 53a-123 (a) (5). As such, the state has failed to meet its burden of

proving, beyond a reasonable doubt, that the improper admission of Detective Sear's testimony and its effect on the jury was harmless.

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

In this opinion the other judges concurred.

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## ROGER SAUNDERS, TRUSTEE *v.* KDFBS, LLC, ET AL. (AC 40918)

Moll, Alexander, and Suarez, Js.

*Syllabus*

The plaintiff, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant L Co. In the first count of his complaint, the plaintiff sought foreclosure of the mortgage, alleging, inter alia, that there were encumbrances on the subject property that were subsequent and subordinate to his mortgage, including the mortgage of the defendants K and D. In the second count, the plaintiff sought a declaratory judgment that the mortgage of K and D, which was purportedly recorded before the plaintiff's mortgage, was subordinate to the plaintiff's mortgage on the ground that the plaintiff had no notice of K and D's mortgage because it had been incorrectly indexed by the town clerk's office. K and D denied the allegation in each count that their mortgage was subordinate to the plaintiff's mortgage and asserted a special defense that L Co. had mortgaged the subject property to them and that their mortgage was prior in right and title to the plaintiff's mortgage. Due to a mistake on the mortgage, the town clerk's office initially indexed the deed under S, the sole member of L Co., as an individual, rather than as a representative of L Co. The trial court rendered judgment for the plaintiff on both counts and ordered a foreclosure by sale. Prior to the sale date set by the court, K and D appealed from the judgment of foreclosure to this court, which dismissed the appeal for lack of a final judgment. K and D, on the granting of certification, appealed to our Supreme Court, which reversed this court's order and remanded this case to this court for further proceedings. *Held* that the trial court's finding that the plaintiff's mortgage had priority over K and D's mortgage was not clearly erroneous; K and D's mortgage did not put the plaintiff on actual or constructive notice when it was lodged with the town clerk, as, due to an error in the language of the mortgage, the chain of title for L Co. was silent as to the existence of K and D's mortgage, which

was indexed with S as the grantor according to accepted practice, and there were no documents, information or other matters that appeared in the chain of title of L Co. to put the plaintiff's title searcher on any notice as to K and D's mortgage.

Argued January 12—officially released July 20, 2021

*Procedural History*

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Hon. William J. Lavery*, judge trial referee; judgment of foreclosure by sale and determination of the parties' mortgages as to the subject property; thereafter, the defendant Karen Davis et al. appealed to this court, which granted the plaintiff's motion to dismiss the appeal, and the defendant Karen Davis et al., on the granting of certification, appealed to the Supreme Court, which reversed this court's order dismissing the appeal and remanded the case to this court for further proceedings. *Affirmed*.

*Alexander Copp*, with whom were *Neil R. Marcus*, and, on the brief, *Barbara M. Schellenberg*, for the appellants (defendant Karen Davis et al.).

*Ryan S. Tougias*, with whom were *Michael J. Jones* and *John J. Ribas*, and, on the brief, *Jessica M. Signor*, for the appellee (plaintiff).

*Opinion*

ALEXANDER, J. This appeal returns to us on remand from our Supreme Court. *Saunders* v. *KDFBS, LLC*, 335 Conn. 586, 239 A.3d 1162 (2020). The defendants Daniel Davis and Karen Davis[1] appealed from the judgment of foreclosure by sale rendered by the trial court in favor

[1] KDFBS, LLC, Brian Scanlon, The United States of America, and The Village at Ridgefield Condominium Association, Inc., were also named as defendants in the plaintiff's complaint but have not participated in the present appeal. We refer to Daniel Davis and Karen Davis as the defendants.

of the plaintiff, Roger Saunders, Trustee of Roger Saunders Money Purchase Plan. At trial, the plaintiff sought a judgment of foreclosure by sale and a declaratory judgment that the plaintiff's mortgage had priority over the defendants' mortgage. The defendants argued on appeal that the trial court erred in its determination that the mortgage held by the plaintiff (Saunders mortgage) on the underlying real property had priority over the mortgage held by the defendants (Davis mortgage) on the same property. This court summarily dismissed the appeal for lack of a final judgment. Our Supreme Court granted certification and reversed the decision of this court and remanded the appeal to this court for further proceedings. Id., 606.

On appeal, the defendants argue that the Davis mortgage has priority over the Saunders mortgage because the Davis mortgage was a valid mortgage that had been lodged with the town clerk's office first. The Davis mortgage initially was recorded outside the chain of title for the defendant KDFBS, LLC (KDFBS), due to a drafting error contained in the grantor clause of the mortgage. The town clerk's office recorded the Davis mortgage within the chain of title for KDFBS after a correction report was issued in 2009, but this occurred after the Saunders mortgage had been properly recorded. The defendants claim that, notwithstanding the fact that the Davis mortgage was submitted to the town clerk's office with a drafting error, the plaintiff nonetheless had constructive notice of the Davis mortgage when it initially was lodged with the town clerk in 2008. We disagree and, accordingly, affirm the judgment of the trial court.

In its decision, our Supreme Court set forth the following relevant facts and procedural history. "In March, 2008, [KDFBS] purchased the subject property, a condominium in Ridgefield, by way of a deed that was

recorded under its name in April, 2008. KDFBS is managed by its sole member, the defendant Brian Scanlon.

"In June, 2008, KDFBS executed a mortgage deed on the property in favor of [the defendants] in the principal amount of $565,000. Although the signature line and the acknowledgement clause of the deed reflected that Scanlon was executing the deed in his capacity as a member of KDFBS, his designation as a member was erroneously omitted in the grantor clause at the top of the mortgage deed. The Ridgefield town clerk's office indexed the deed under Scanlon's personal name as the grantor.

"In October, 2009, KDFBS executed a second mortgage deed on the Ridgefield property in favor of the plaintiff as security for a joint loan in the amount of $110,000 to KDFBS and to Scanlon individually. Scanlon told the plaintiff that he would have a first mortgage on the property. To ensure his security for the loan, the plaintiff had a title search conducted. That search revealed no mortgages of record in KDFBS' chain of title. The [Saunders] mortgage deed was duly recorded in October, 2009.

"In December, 2009, the Ridgefield town clerk's office changed the official index for the Davis mortgage after an unidentified person brought the indexing error to the town clerk's attention. A correction report was issued, and the Davis mortgage was changed from the grantor index for Scanlon to the index for KDFBS.

"KDFBS and Scanlon subsequently defaulted on their obligation to the plaintiff . . . . In the first count of the complaint, the plaintiff sought foreclosure of [the Saunders] mortgage. In addition to asserting allegations regarding the default, this count alleged that there were encumbrances on the subject property that were subsequent and subordinate to the [Saunders] mortgage, among which was the purported Davis mortgage, which

was recorded in 2008. In the second count, the plaintiff sought a declaratory judgment that the 2008 Davis mortgage was subordinate to the . . . 2009 [Saunders] mortgage because the plaintiff had no notice of it due to it having been indexed under Scanlon's name.

"[The defendants] filed an answer denying the allegation in each count that [the Davis] mortgage was subordinate to the [Saunders] mortgage. They also asserted a special defense that KDFBS, acting through its duly authorized member, Scanlon, had mortgaged the subject property to them and that this mortgage was prior in right and title to the [Saunders] mortgage.

"KDFBS was defaulted for failure to appear and Scanlon was defaulted for failure to plead. The plaintiff then filed a motion for a judgment of foreclosure by sale. The motion was supported by an affidavit of debt totaling $176,467.50, an affidavit of attorney's fees in the amount of $18,345, and an appraisal assessing the property's fair market value at $310,000.

"Following a contested trial between the plaintiff and [the defendants], the court rendered judgment in favor of the plaintiff on both counts and ordered a foreclosure by sale." (Footnotes omitted.) Id., 588–90. This appeal followed. Additional facts will be set forth as necessary.

The defendants seek reversal of the trial court's declaratory judgment in which it found that the Saunders mortgage had priority over the Davis mortgage. The defendants argue that the language of the mortgage deed, as recorded in 2008, put the plaintiff on constructive notice of the Davis mortgage. The plaintiff counters that he cannot be charged with constructive notice of the Davis mortgage because it was recorded outside the chain of title for KDFBS.

We begin our analysis by setting forth our standard of review. "Our standard of review is plenary when we are

required to determine the intent behind language in a deed or other written instrument by which litigants claim an interest in real estate. Under that plenary standard, we are not required to give customary deference to the trial court's factual inferences." *Ginsberg & Ginsberg, LLC* v. *Alexandria Estates, LLC*, 136 Conn. App. 511, 515, 48 A.3d 101 (2012). "To the extent that the court has made findings of fact, our review is limited to a determination of whether the court's conclusions were clearly erroneous." *Torgerson* v. *Sarah Tuxis Residential Services, Inc.*, 81 Conn. App. 435, 439, 840 A.2d 66, cert. denied, 269 Conn. 903, 852 A.2d 737 (2004). Further, "[t]o the extent that our review requires us to construe statutory provisions, this presents a legal question over which our review also is plenary." *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 288, 145 A.3d 408, cert. denied, 323 Conn. 939, 151 A.3d 387 (2016).

In the present matter, the court determined in the judgment of foreclosure that the Saunders mortgage, which was recorded in October, 2009, had priority over the Davis mortgage. The court found that the Davis mortgage had not been recorded in the chain of title for KDFBS until December, 2009. "The law relating to the priority of interests has its roots in early Connecticut jurisprudence. A fundamental principle is that a mortgage that is recorded first is entitled to priority over subsequently recorded mortgages provided that every grantee has a reasonable time to get his deed recorded." (Internal quotation marks omitted.) *Equicredit Corp. of Connecticut* v. *Kasper*, 122 Conn. App. 94, 97, 996 A.2d 1243, cert. denied, 298 Conn. 916, 4 A.3d 831 (2010). In addition, General Statutes § 47-10 (a) provides in relevant part: "No conveyance shall be effectual to hold any land against any other person but the grantor and his heirs, unless *recorded* on the records of the town in which the land lies. . . ." (Emphasis added.)

The defendants do not argue on appeal that the plaintiff had actual notice of the Davis mortgage. The plaintiff testified that he was told by Scanlon that he would have the first mortgage on the property and that he would not have engaged in business with Scanlon had he known of the other mortgage on the property.

The defendants argue that, when the plaintiff recorded his mortgage in 2009, he had constructive notice of the Davis mortgage, which had been lodged with the Ridgefield town clerk in 2008. The defendants assert that the two elements for constructive notice in a land record, namely, (1) a valid mortgage[2] under either our common law or the safe harbor provision of General Statues § 49-31b (a),[3] which was (2) "lodged for [the] record" with the town clerk, were satisfied in this case. *Butchers' Ice & Supply Co.* v. *Bascom*, 109 Conn. 433, 441, 146 A. 843 (1929); see also *Connecticut National Bank* v. *Lorenzato*, 221 Conn. 77, 82, 602 A.2d 959 (1992). After a thorough review of the record, we conclude that the Davis mortgage did not put the plaintiff on constructive notice when it was lodged with the town clerk in 2008.

The defendants claim that, notwithstanding the drafting error naming Brian Scanlon as the grantor in the grantor clause, the language of the mortgage deed as

[2] Because the trial court made findings as to the priority of the Davis and Saunders mortgages, and the plaintiff does not contest the validity of the Davis mortgage on appeal, we limit our analysis to the issue of whether the Davis mortgage provided constructive notice to the plaintiff when it was lodged with the town clerk.

[3] General Statutes § 49-31b (a) provides: "A mortgage deed given to secure payment of a promissory note, which furnishes information from which there can be determined the date, principal amount and maximum term of the note, shall be deemed to give sufficient notice of the nature and amount of the obligation to constitute a valid lien securing payment of all sums owed under the terms of such note." See also *Dart & Bogue Co.* v. *Slosberg*, 202 Conn. 566, 578, 522 A.2d 763 (1987) (concluding that "§ 49-31b (a) is a 'safe harbor' provision that does not preempt [common-law] standards governing the validity of mortgages against subsequent lien creditors").

a whole put the plaintiff on constructive notice that KDFBS was the intended grantor of the mortgage. The defendants assert that "any possible ambiguity created by the granting clause is resolved when the Davis mortgage is reviewed in its entirety" and that, therefore, the plaintiff was put on constructive notice of the Davis mortgage when that mortgage was first lodged with the Ridgefield town clerk in 2008.

The defendants rely on two separate lines of authority in support of their constructive notice claim. The first line of authority stands for the proposition that "recordation of a valid mortgage gives constructive notice to third persons if the record sufficiently discloses the real nature of the transaction so that the third party claimant, exercising common prudence and ordinary diligence, can ascertain the extent of the encumbrance." *Connecticut National Bank* v. *Lorenzato*, supra, 221 Conn. 81; see id., 82 (citing cases).

The defendants argue that *Lorenzato* controls the present case. We disagree. In *Lorenzato*, the mortgage at issue was recorded in the land records with a signature page that did not have the required signatures and acknowledgment. Id., 79. Our Supreme Court held that the recordation was effective, so as to supply constructive notice upon subsequent encumbrancers, because "an express reference to the omitted documentation in the recorded mortgage deed would have enabled a title searcher to make a requisite inquiry to discover the terms of the mortgage." Id., 83. In its analysis, the court made the distinction between "a mortgage deed that is imperfectly executed and one that is imperfectly recorded. The former is a nullity and is, therefore, incapable of giving constructive notice; the latter affords constructive notice to subsequent third party creditors *to the extent that the mortgage, as recorded, contains sufficient information to put a title searcher on*

*inquiry*. From the point of view of the third party who relies on that which the recorded conveyance purports to encumber, it is immaterial whether an imperfect recordation is attributable to the inadvertence of the recording clerk or to the inadvertence of the mortgagee. We have, in effect, so held in *Connecticut National Bank* v. *Esposito*, 210 Conn. 221, 230–31, 554 A.2d 735 (1989), in which the issue was whether a recorded mortgage deed gave constructive notice to [third-party] creditors, even though the mortgagee in recording its deed had inadvertently omitted documentation containing important information about the amount of the mortgage obligation. We concluded that the recordation was effective because an express reference to the omitted documentation in the recorded mortgage deed would have enabled a title searcher to make the requisite inquiry to discover the terms of the mortgage." (Emphasis added.) *Connecticut National Bank* v. *Lorenzato*, supra, 221 Conn. 82–83.

The defendants argue that *Lorenzato*, and similar cases, instruct that our analysis should focus "exclusively on the face of the subject deed at the time it is lodged with the recording clerk, even if a subsequent recording error caused the mortgage to be undetectable by third-party creditors." We disagree. Central to the holding in *Lorenzato* was the fact that other documents *recorded within the chain of title* would have put a title searcher on inquiry about the status of the mortgage. Our Supreme Court stated that it was "persuaded that the mortgagee's inadvertent mistake in recordation gave constructive notice to the lien creditor because *the properly executed rider* was sufficient to put a title searcher on inquiry about the status of the mortgage." (Emphasis added.) *Connecticut National Bank* v. *Lorenzato*, supra, 221 Conn. 83; see also *Connecticut National Bank* v. *Esposito*, supra, 210 Conn. 230.

In *Lorenzato*, the court also reasoned that "[m]any errors in recording . . . are so neutralized by other matters *which do appear in the record*, that no searcher after the title possibly could be misled. Obviously, such shortcomings should not affect the validity of the record as notification. Among them are . . . an error or omission cured by the appearance of the information at some other point *in the record*. . . . In the cases in which the defective recordation of a valid deed was held not to give constructive notice, in contradistinction to the circumstances here, there appears to have been nothing on the face of the recorded deed to put a title searcher on inquiry about the error or omission." (Citations omitted; emphasis added; internal quotation marks omitted.) *Connecticut National Bank* v. *Lorenzato*, supra, 221 Conn. 83–84.

The second line of authority on which the defendants rely consists of cases, dating back to 1795, standing for the proposition that a valid mortgage, once lodged with the town clerk, provides constructive notice even if the town clerk makes a mistake in the recording of the mortgage or fails to record the mortgage. See id., 82 ("[w]e have held that the imperfect recordation of a valid mortgage gives constructive notice to third persons, despite a clerk's mistake in its actual recordation, at least if the mistake is so obvious as to have put a [third-party] claimant 'upon inquiry' to ascertain what the mortgage contains"); *Butchers' Ice & Supply Co*. v. *Bascom*, supra, 109 Conn. 441 ("if the question arose, as to the respective priorities of a grantee of a deed lodged for record but failing of record through no fault of his, and of a subsequent purchaser without notice, it seems clear to us that when an attaching creditor has done all that the law requires of him to perfect his attachment of real estate, he should not lose the benefit of his attachment because of the failure of the town clerk to record the certificate of attachment, and that

by the express terms of the statute his attachment if completed as therein provided, is made when the certificate is lodged in the office of the town clerk"); *Lewis* v. *Hinman*, 56 Conn. 55, 67, 13 A. 143 (1888) ("The consequences of [a] mistake [by the town clerk] should not be visited upon the mortgagee. He did all he could do and all that the law required of him. He left his deed for record, and the record, by the statute, is to be as of that date. From that time, which necessarily antedates the actual recording, his title is secure. He cannot be prejudiced by any subsequent action without his fault."); *Booth* v. *Barnum*, 9 Conn. 286, 289 (1832) ("[I]t is settled law, that when a deed is lodged for record with the [town clerk], it is constructive notice to all the world. This principle has been so long established, and it is so essential to the preservation of all the benefits of the registering act, that it can admit of no doubt."); *Judd* v. *Woodruff*, 2 Root (Conn.) 298, 299 (Super. 1795) ("[t]he plaintiffs' deed was delivered to the town clerk and by him entered upon the 26th of June 1766, and it was the duty of the town clerk to have recorded it at length; and the plaintiffs are not to suffer for his neglect [in not recording the deed at full length until 1794]").

The defendants argue that this line of cases controls the resolution of the present case. They claim that their mortgage provided constructive notice to the plaintiff because it had been lodged in 2008 with the Ridgefield town clerk. They assert that the Davis mortgage should be given priority over the Saunders mortgage because the Ridgefield town clerk "misindexed" their otherwise valid mortgage by recording it based on Scanlon and not KDFBS in the grantor clause. We are unpersuaded by the defendants' argument.

In the present case, there were no documents, information or "other matters" that appeared in the chain of title for KDFBS to put the plaintiff's title searcher on any notice as to the Davis mortgage. The plaintiff's

title searcher, Albert Testani, testified extensively as to the steps he had undertaken in performing a title examination for obligations of KDFBS secured by the underlying property. Testani testified that his search did not reveal the existence of the Davis mortgage because it had not been indexed under KDFBS. Testani testified that, at the time he conducted his title search, he did not know that Scanlon was a member of KDFBS, and the documents that he found during the search did not mention Scanlon or the Davis mortgage. He further testified that when conducting a title search it is his standard practice to search by name and not by property address as that is too "unreliable" and "dangerous." The trial court found Testani's testimony to be credible and concluded that "the title search was done and the run of the title was done in a professional manner and that the plaintiff had no actual or constructive notice of the [Davis mortgage]." We conclude that the face of the mortgage as recorded did not put the plaintiff on constructive notice because the chain of title for KDFBS was silent as to the existence of the Davis mortgage and could provide no basis for inquiry to the plaintiff's title searcher.

Moreover, our review of the record shows that the town clerk indexed the Davis mortgage in 2008, based on the standard practice that a mortgage is indexed according to the grantor clause of the mortgage deed. Barbara Serfilippi, chief clerk for the town of Ridgefield, testified that the Davis mortgage was properly indexed. Further, Serfilippi brought a copy of a handbook that the Connecticut Town Clerks Association has created for use by town clerks' offices as a guide and reference, which was admitted into evidence. The handbook indicates that, when a mortgage deed is involved, town clerks should "not index the names of [comakers] or guarantors on a note who do not appear in the granting clause

of the instrument. Index the name of the owner-mortgagor as grantor and the lender-secured party-mortgagee as grantee." Serfilippi testified that the Davis mortgage was indexed under Scanlon, and not KDFBS because only Scanlon's name appeared in the grantor clause of the mortgage deed.[4] Serfilippi testified that the Saunders mortgage was indexed under KDFBS because KDFBS was the entity listed in the grantor clause of that deed in accordance with the handbook guidelines.

Additionally, on cross-examination, the following colloquy took place:

"[The Defendants' Counsel]: In 2008, was a mistake made in indexing Scanlon versus [KDFBS]?

"[Serfilippi]: I don't know if it was a mistake, because if we follow the guidelines in the handbook, it was not a mistake, the way that we interpreted it did.

"[The Defendants' Counsel]: Yeah. . . . If . . . .

"[Serfilippi]: That . . . was the granting clause."

Our review of the record supports the court's finding that the Ridgefield town clerk's office indexed the Davis mortgage according to accepted practice and that the mortgage was not "misindexed." The present case is

[4] At trial the following colloquies took place:

"[The Plaintiff's Counsel]: Were you able to determine why it is that the Davis mortgage was recorded under the name Brian Scanlon?

"[Serfilippi]: No, it's just the way that it was indexed . . . .

"[The Plaintiff's Counsel]: Okay. And, that's . . . .

"[Serfilippi]: [T]here was no reason, that's the way that they did it.

"[The Plaintiff's Counsel]: That's because of the grantor clause?

"[Serfilippi]: Of the grantor clause."

* * *

"[The Plaintiff's Counsel]: As you sit here today, do you think that the Davis mortgage was properly indexed, um, in 2008?

"[Serfilippi]: Under Brian Scanlon?

"[The Plaintiff's Counsel]: Correct?

"[Serfilippi]: Yes."

readily distinguishable from those cases relied on by the defendants in which the town clerk's office was the source of the error. In the present case, the source of the error was the language of the mortgage, specifically, the omission of KDFBS in the grantor's clause, that was lodged with the town clerk's office for recording. The Ridgefield town clerk's actions were not the source of the error.

The Davis mortgage was not recorded within the chain of title for KDFBS at the time the Saunders mortgage was recorded because of an error in the language of the mortgage, and, therefore, the plaintiff was not on constructive notice of the Davis mortgage. "The concept of the chain of title is well explained and expressed in the Connecticut Standards of Title: The chain of title concept is a principle of case law, developed to protect subsequent parties from being charged with constructive notice of the existence and contents of those recorded instruments which a title searcher would not be expected to discover by the customary search of land records." (Internal quotation marks omitted.) *Ginsberg & Ginsberg, LLC* v. *Alexandria Estates, LLC*, supra, 136 Conn. App. 516. It is well established that "one searching title to land is not bound to search the records at large, but only is bound with such facts as appear in the chain of title to the particular lot in question." (Internal quotation marks omitted.) *Powers* v. *Olson*, 252 Conn. 98, 108, 742 A.2d 799 (2000). In the present case, the plaintiff, through a professional title searcher, conducted a thorough examination of the land records and did not discover the Davis mortgage. "The law implies notice on the ground that it is conclusively presumed that a person will not purchase an interest in a piece of land without examining the condition of the record. Such an act would be required by common prudence." *Hunt* v. *Mansfield*, 31 Conn. 488, 490–91 (1863); see also *Beach* v. *Osborne*, 74 Conn. 405, 412,

50 A. 1019 (1902). The record supports the court's determination that the plaintiff had neither actual nor constructive notice of the Davis mortgage.

"It is the policy of our law to make every man's title to his real estate, as far as practicable, appear of record, and the land records are constructive notice to all the world of any instruments there recorded." *Butchers' Ice & Supply Co.* v. *Bascom*, supra, 109 Conn. 440. We conclude that the trial court's finding that the plaintiff did not have actual or constructive notice of the Davis mortgage on the property was not clearly erroneous and, therefore, as a matter of law, the Saunders mortgage had priority over the Davis mortgage.

The judgment is affirmed.

In this opinion the other judges concurred.

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## HELEN MONTS *v.* BOARD OF EDUCATION OF THE CITY OF HARTFORD (AC 43856)

Prescott, Suarez and Bear, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant for, inter alia, disability discrimination pursuant to the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.) and for interference with the Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et seq.) following the termination of her employment. The plaintiff was first hired by the defendant in 1995 but her position was eliminated and she was terminated in June, 2015. The plaintiff was rehired for a new position in August, 2015, and was subject to a probationary period for her first 120 days at work. In September, 2015, the plaintiff injured her left knee and lower back while at work. The plaintiff was placed on modified work duty but was eventually placed on an indefinite leave of absence and remained on leave until October, 2015. She missed additional work in November, 2015, after she experienced a flare-up of her knee injury. All of the time that she missed from work was considered workers' compensation leave by the defendant. The plaintiff received two negative performance evaluations in January and February, 2016, based solely

on her performance while she was at work. The plaintiff was terminated for her poor job performance in March, 2016. During the trial on the plaintiff's complaint, the trial court declined to instruct the jury on the plaintiff's FMLA interference claim, concluding that there was no evidence to support the claim that the plaintiff made an FMLA request to the defendant. On the plaintiff's remaining claims, the jury returned a verdict for the defendant and the court rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly declined to charge the jury with regard to the plaintiff's claim of interference with the Family and Medical Leave Act of 1993: the plaintiff failed to satisfy the preliminary requirement for the court to consider her interference claim, namely, that she made an initial showing that she was denied a right under FMLA, as there was no evidence that the plaintiff made an FMLA request to the defendant and, thus, the defendant had no notice that she was interested in utilizing FMLA leave; moreover, the court's determination that the defendant's policy with regard to nonconcurrent applications of workers' compensation leave under the Workers' Compensation Act (§ 31-275 et seq.) and FMLA leave worked to the benefit of the plaintiff, was supported both by federal regulation and by common sense, as allowing or requiring the plaintiff to use both forms of leave at the same time would have diminished the total legally available amount of her paid and unpaid leave; furthermore, the plaintiff offered no evidence to demonstrate to the jury that she was prejudiced by the defendant's long-standing policy not to run workers' compensation leave and FMLA leave concurrently, and, even if such evidence had been offered, it would not have been relevant to the defendant's evaluations of the plaintiff's work during her probationary period.
2. The trial court did not err in admitting into evidence a letter written by the plaintiff's coworker, containing observations about the plaintiff's workplace behavior and performance, under the business records exception to the hearsay rule: the letter was made in the regular course of the defendant's business, as the record made clear that it was standard procedure for the defendant to subject new employees to a probationary period, based on their actual days at work, and to evaluate the performance of these employees during that period; moreover, even if the letter was inadmissible hearsay, any error in its admission into evidence was harmless because the author of the letter also testified at trial, and the opinions expressed in the letter were made directly to the jury and the plaintiff did not object to the testimony.
3. The trial court did not abuse its discretion in refusing to admit into evidence certain medical records of the plaintiff; the records the plaintiff sought to admit into evidence were created after the date of her termination of employment and described her condition as it existed approximately six months after she was terminated and the court concluded that the evidence lacked probative value as to whether the plaintiff had

a chronic condition at the time she was employed by the defendant, the records containing no information as the plaintiff's condition at the time she was discharged.

Argued May 20—officially released July 20, 2021

*Procedural History*

Action to recover damages for, inter alia, alleged disability discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Scholl*, *J.*; verdict and judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

*James V. Sabatini*, for the appellant (plaintiff).

*Lisa S. Lazarek*, for the appellee (defendant).

*Opinion*

BEAR, J. The plaintiff, Helen Monts, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant, the Board of Education of the City of Hartford. On appeal, the plaintiff claims that the court erred by (1) failing to charge the jury on her claim of interference with the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. (2012), (2) admitting inadmissible hearsay into evidence, and (3) precluding evidence showing that she was disabled within the meaning of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of the plaintiff's appeal. The plaintiff initially was hired by the defendant in February, 1995, as a "house secretary." In 2014, the plaintiff was employed by the defendant as an executive assistant at Opportunity High School in Hartford. On June 30, 2015, after being notified that her position was being eliminated,

the plaintiff's employment was terminated by the defendant. On August 26, 2015, the defendant rehired the plaintiff as a secretary in the facilities department. As was customary for the defendant, the plaintiff's employment in this position was subject to a 120 "working day" probationary period, meaning that she was subject to enhanced scrutiny, and potential termination, based on her performance during her first 120 days at work in her new position. On September 1, 2015, the plaintiff injured her left knee and lower back while in the workplace. On that same day, the plaintiff reported her injuries to the defendant and received medical care.

After receiving care for her workplace injuries, the plaintiff was placed on modified work duty, in accordance with her physicians' recommendations that she work reduced hours and refrain from lifting objects or standing. After the plaintiff began experiencing radiating pain and numbness in her leg, she was placed on an indefinite leave of absence. The plaintiff remained on leave until October 28, 2015, when she returned with the recommendations that she not lift objects or stand. On November 2, 2015, the plaintiff experienced another flare-up of her knee injury that required her to miss additional time from work. All of the time that the plaintiff missed from work was considered workers' compensation leave by the defendant because her injuries were work-related and because the plaintiff had not requested FMLA leave. In any event, it was the long-standing policy of the defendant not to run FMLA leave concurrently with workers' compensation leave. The defendant instituted and applied this policy because, unlike workers' compensation leave, FMLA leave could be used to care for a sick family member or for the employee's own nonwork related injury or illness. The policy had been in place since at least 1997.

On January 26, 2016, the plaintiff received a negative performance evaluation informing her that her quality

of work, adaptability, and planning and organizing needed improvement. On February 24, 2016, the plaintiff received a second negative performance evaluation, this time noting that her quality of work was unsatisfactory, and that she had not shown improvement in any performance categories since her last evaluation. Both performance evaluations were based solely on the plaintiff's performance while she was at work and did not consider her absences that resulted from her injuries. On March 2, 2016, while the plaintiff was still in her probationary period, the defendant terminated her employment on the basis of her poor job performance. At the time of her termination, the plaintiff was still being treated for her knee injury.

On March 2, 2018, the plaintiff commenced this action against the defendant, alleging in a five count complaint that it had engaged in (1) disability discrimination in violation of CFEPA, (2) retaliation in violation of CFEPA, (3) retaliation in violation of § 31-290a of the Workers' Compensation Act, General Statutes § 31-275 et seq., (4) interference with her exercise of rights under FMLA, and (5) FMLA retaliation.

At trial, the plaintiff argued that there was sufficient evidence to support her allegations in counts four and five of FMLA interference and retaliation, and submitted to the court proposed jury instructions on those counts. The plaintiff also argued that there was sufficient evidence for the jury to conclude that the plaintiff had put the defendant on notice that her injuries were likely an FMLA qualifying event. The court, however, declined to instruct the jury on the plaintiff's FMLA counts, concluding that there was no evidence "to support the claim that the plaintiff even made an FMLA request to the defendant." The court ultimately charged the jury on the plaintiff's remaining counts, and the jury returned a verdict in favor of the defendant on those

counts. The court then rendered judgment for the defendant. It is from this judgment that the plaintiff appeals. On appeal, the plaintiff claims that the court erred by (1) failing to charge the jury on her FMLA interference claim,[1] (2) admitting inadmissible hearsay into evidence, and (3) precluding evidence showing that she was disabled within the meaning of CFEPA. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff's first claim is that the court erred by failing to charge the jury on her FMLA interference claim. Specifically,the plaintiff claims that "[t]he evidence in the case supported a jury charge on the FMLA interference claim," and that "[t]he trial court's reasoning for not charging the jury on the . . . claim was flawed." According to the plaintiff, the court (1) improperly "assumed that the defendant's policy was to not run the FMLA [leave] concurrently with [the] workers' compensation leave," and (2) failed to account for the fact that an "FMLA interference claim does not require proof of intent." In response, the defendant argues that "[g]iven the lack of any evidence that the plaintiff was harmed by the [defendant's] policy not to run the two leaves concurrently, there was no reason for the trial judge to put this claim to the jury . . . ." We agree with the defendant.

"It is well established that [j]ury instructions should be confined to matters in issue by virtue of the pleadings and evidence in the case. . . . It is error to submit a specification . . . to the jury in respect to which no evidence has been offered." (Internal quotation marks omitted.) *Al-Janet, LLC* v. *B & B Home Improvements*,

[1] The plaintiff appeals only with regard to the FMLA interference count and does not take issue with the court's refusal to charge the jury on her FMLA retaliation count.

*LLC*, 101 Conn. App. 836, 841, 925 A.2d 327, cert. denied, 284 Conn. 904, 931 A.2d 261 (2007). In the present case, the court's decision to not charge the jury regarding the plaintiff's FMLA interference claim is "tantamount to a directed verdict." *Musorofiti* v. *Vlcek*, 65 Conn. App. 365, 371, 783 A.2d 36, cert. denied, 258 Conn. 938, 786 A.2d 426 (2001). Thus, the standard of review that we must apply is that applicable to directed verdicts. "Our standard of review of a directed verdict is well settled. A trial court should direct a verdict for a defendant if, viewing the evidence in the light most favorable to the plaintiff, a jury could not reasonably and legally reach any other conclusion than that the defendant is entitled to prevail." (Internal quotation marks omitted.) Id., 371–72.

With regard to claims of FMLA interference, our Supreme Court has "endorse[d] the framework employed by the majority of federal courts . . . ." *Cendant Corp.* v. *Commissioner of Labor*, 276 Conn. 16, 31, 883 A.2d 789 (2005). Under this burden-shifting framework, "the employee [must] make an initial showing that she has been denied a right under FMLA and that the denial of that right was caused in part by her leave. . . . Once an employee has made this showing, liability attaches to the employer for a violation of FMLA. . . . [A]n employee alleging a claim of interference under FMLA does not need to prove the employer's intent for liability to attach to the employer. . . . To underscore the immateriality of the employer's intent, some courts have described this attachment of liability to the employer absent a showing of intent as 'strict liability.' . . . [T]he use of the term 'strict liability' signifies only that an employee need not prove the employer's intent when claiming that the employer interfered with her rights under FMLA. . . . An employer may overcome the attachment of so-called strict liability by demonstrating, by way of affirmative defense, that an employee

would have been terminated even if she had not taken leave. . . . Accordingly, the framework . . . places on the employer the ultimate burden of proving that the employee would have been terminated even if she had not taken leave." (Citations omitted.) Id., 28–30.

In the present case, the court, in declining to charge the jury on the plaintiff's FMLA interference claim, found that the trial evidence did not support this claim, and that "there was not any real evidence to support the claim that [the] plaintiff even made an FMLA request to the defendant." Thus, the plaintiff did not satisfy the preliminary requirement for the court to consider her claim that an FMLA interference claim does not require proof of intent. The court further found that "there was evidence that the benefits of the Workers' Compensation Act were better for the plaintiff than [they] would have been under the FMLA. And that [the] policy that the [defendant] stated about [not] running FMLA and workers' compensation benefits concurrently was to the benefit of the plaintiff." Our review of the record supports the court's findings. There is nothing in the record to suggest that the plaintiff ever requested FMLA leave, and thus the defendant had no specific notice that she was interested in utilizing it. Additionally, it is clear that the defendant's policy with regard to the nonconcurrent applications of workers' compensation and FMLA leave was long-standing, and that it worked to the benefit of the plaintiff and other employees because workers' compensation leave applies only to a work-related personal illness or injury, while FMLA leave could be used for nonwork-related situations such as the need to care for an ill or injured family member. This conclusion is supported by both federal regulation[2]

[2] Title 29 of the Code of Federal Regulations, § 825.702 (d) (2), provides in relevant part that "[a]n employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave *may* run concurrently (subject to proper notice and designation by the employer)." (Emphasis added.) Thus, when an employee is out

and by common sense; to allow or to require the plaintiff and other employees to use both forms of leave at the same time diminishes the total legally available amount of their paid and unpaid leave. Furthermore, the plaintiff offered no evidence to demonstrate to the jury that she was prejudiced by the defendant's policy of nonconcurrent leaves and, even if such evidence had been offered, it would not be relevant to the defendant's evaluations of the plaintiff's work during the times she was present during the probationary period. Therefore, we conclude that the court properly declined to charge the jury with regard to this claim.

II

The plaintiff's second claim is that the court erred by admitting inadmissible hearsay into evidence. Specifically, the plaintiff claims that the evidence at issue—a letter written by Hope Newton, the plaintiff's coworker, at the request of her supervisor—was improperly admitted into evidence during Newton's testimony under the business records exception to the hearsay rule. The letter at issue contained Newton's observations of the plaintiff's workplace behavior and performance. According to the plaintiff, the letter is "not a business record because it was not in Newton's regular course of business to create such a document." The defendant counters that the plaintiff's reading of this exception is "unduly narrow," and that the court properly admitted the letter under the exception. We agree with the defendant.

Both the plaintiff and the defendant state that the standard of review of the court's ruling on this issue is that

on workers' compensation leave, there is no requirement that the employer run the employee's FMLA leave concurrently. In fact, an employer cannot run the leaves concurrently unless they take specific additional steps designed to put the employee on notice that his or her limited amount of FMLA leave is going to be used.

of abuse of discretion. "It is well settled that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . [Its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Emphasis omitted; internal quotation marks omitted.) *Tomick* v. *United Parcel Service, Inc.*, 135 Conn. App. 589, 628, 43 A.3d 722, cert. denied, 305 Conn. 920, 47 A.3d 389 (2012), and cert. denied, 305 Conn. 920, 47 A.3d 389 (2012); see also *McNeff* v. *Vinco, Inc.*, 59 Conn. App. 698, 701, 757 A.2d 685 (2000). However, "[t]o the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary." (Internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 572, 78 A.3d 828 (2013).

The court admitted the letter into evidence under the business records exception, which states: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course *of any business*, and that it was the regular course *of the business* to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." (Emphasis added.) Conn. Code Evid. § 8-4 (a). The plain language of § 8-4 (a) makes clear that the business records exception applies when the record at issue was made in the regular course of the business, not in the regular course of the general work responsibilities of the individual who authors it. In light of the record,

which makes clear that it was standard procedure for the defendant to subject new employees to a probationary period, based on their actual days at work, and to evaluate the performance of these employees during that period, we conclude that the court did not err in admitting the letter into evidence under the business records exception.

In any event, even if we were to determine that there was error in the admission of the letter and that it was inadmissible hearsay, that error would be harmless. This is true because, in light of Newton's testimony, to which the plaintiff did not object, the same opinions expressed in the letter were made directly to the jury, and, therefore, even if the letter had been excluded, the result would almost certainly have been the same. See *In re Tayler F.*, 111 Conn. App. 28, 54, 958 A.2d 170 (2008) ("[T]he court abused its discretion by ruling that the information in [a] report was admissible under the business record exception to the hearsay rule. The respondent, however, cannot show that any harm resulted from the erroneous admission . . . [because] a witness to all of the events discussed in the report testified about all of the allegations in the report." (Citation omitted.)), aff'd, 296 Conn. 524, 995 A.2d 611 (2010); see also *Iino* v. *Spalter*, 192 Conn. App. 421, 431, 218 A.3d 152 (2019) ("[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.)).

III

The plaintiff's final claim is that the court erred by refusing to admit into evidence certain "medical records [that] were relevant to proving that [the] plaintiff had a disability within the meaning of [CFEPA]." In

response, the defendant claims that "[t]he [plaintiff's] position in this regard is unavailing because there was sufficient medical evidence on the record pertaining to [her] condition from which the jury could have determined whether [she] was disabled . . . ." We agree with the defendant.

As discussed previously, a court's ruling on the admissibility of evidence is entitled to great deference, and a ruling on evidentiary matters will not be overturned unless there is a clear showing that the court abused its discretion. *Tomick* v. *United Parcel Service, Inc.*, supra, 135 Conn. App. 628. "Evidence is admissible only if it is relevant. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . It is well settled that questions of relevance are committed to the sound discretion of the trial court." (Internal quotation marks omitted.) *Boretti* v. *Panacea Co.*, 67 Conn. App. 223, 227–28, 786 A.2d 1164 (2001), cert. denied, 259 Conn. 918, 791 A.2d 565 (2002).

At trial, the plaintiff offered as full exhibits the medical records at issue, which were created after the date of the termination of her employment. The defendant objected to their admission on the ground of relevance. In sustaining the defendant's objection, the court stated: "I'm not so sure [this evidence] has probative value as to whether she had a chronic condition at that time she was [employed by the defendant]—I mean you want [the jury] to be able to speculate that because she had a chronic condition . . . six months later she's got a chronic condition . . . prior too." The records at issue clearly were created after the plaintiff's employment with the defendant was terminated, and, crucially, described her condition as it existed approximately six

months after she was terminated. There is nothing in these records that refers to the plaintiff's condition at the time she was discharged; each report refers only to her condition at the time the record was made. Therefore, the court did not abuse its discretion in excluding these reports from evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

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## JAMES BOYAJIAN ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF VERNON
## (AC 43273)

Prescott, Suarez and Vitale, Js.

*Syllabus*

The plaintiffs, B and J Co., operated a liquor store in the town of Vernon. The town's zoning regulations required establishments that sell alcoholic liquors to be separated by a distance of no less than 3000 feet. T filed an application with the town's zoning board of appeals for a variance that would allow him to establish a liquor store in a location that was 2935 feet from the plaintiffs' store. The board scheduled a public hearing on the application and provided notice of the hearing to the abutting landowners by letter and to the general public in a local newspaper. At the conclusion of the hearing, which the plaintiffs did not attend, the board voted to approve the variance. T then submitted an application to the town's planning and zoning commission for a special permit to allow the sale of alcohol at the property. After a public hearing, at which B spoke on the record and claimed that the underlying variance was void, the commission approved the special permit application. The plaintiffs appealed the commission's decision to the Superior Court, claiming, inter alia, that the variance was void, that the commission should not have relied on the variance in determining whether to grant the special permit, and that the board lacked the authority to grant the variance. The trial court denied the appeal, and the plaintiffs, on the granting of certification, appealed to this court. *Held* that the plaintiffs' failure to appeal from the decision of the board that granted the application for the variance rendered their opposition to the commission's decision to grant the special permit an impermissible collateral attack on the validity of the variance: once the statutory period to appeal the board's decision

to grant the variance had expired, the decision became final; moreover, collateral attacks on the decisions of zoning authorities are generally impermissible in light of the need for stability in land use planning and the need for justified reliance by the interested parties; furthermore, the plaintiffs failed to demonstrate that either of the conditions that may permit a collateral attack on a previously unchallenged zoning decision were satisfied, as, because the board acted within its statutorily authorized power to vary zoning regulations, its decision was not so far outside of what could have been regarded as a valid exercise of zoning power that there could not have been any justified reliance on it, and the plaintiffs' argument that the continued maintenance of the variance would violate a strong public policy because it varied the town's zoning regulations was unavailing because it merely described the purpose of a variance.

Argued March 3—officially released July 20, 2021

*Procedural History*

Appeal from the decision of the defendant granting a special permit application filed by Jagdev Toor, brought to the Superior Court in the judicial district of Tolland where the court, *Sicilian*, *J.*, granted the motion of Jagdev Toor to intervene as a defendant; thereafter, the matter was tried to the court, *Hon. Samuel J. Sferrazza*, judge trial referee; judgment denying the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

*James H. Howard*, for the appellants (plaintiffs).

*Louis A. Spadaccini*, with whom, on the brief, were *Martin B. Burke* and *Roseann Canny*, for the appellee (defendant).

*Opinion*

PRESCOTT, J. This appeal requires us to consider whether the plaintiffs, who failed to appeal from a decision of the local zoning board of appeals to grant a variance; see General Statutes § 8-8 (b); may nevertheless collaterally attack the validity of that variance by opposing, before the local planning and zoning commission, a special permit application related to the property

to which the variance attached. We conclude that the plaintiffs may not collaterally attack the validity of the variance.

The plaintiffs, James Boyajian and JPB, LLC,[1] appeal from the judgment of the trial court. The trial court denied the plaintiffs' appeal from the decision of the defendant, the Planning and Zoning Commission of the Town of Vernon (commission), granting a special permit application filed by the intervening defendant, Jagdev Toor.[2] As they did before the trial court, the plaintiffs claim that (1) the variance that the Zoning Board of Appeals of the town of Vernon (board) granted to Toor, and which otherwise entitled Toor to receive the special permit, was void, (2) the commission, in granting the special permit, improperly relied on the variance, and (3) the board lacked the authority to grant the variance. Essentially, each of these claims is a challenge to the validity of the variance granted to Toor by the board. We conclude that the plaintiffs' failure to appeal from the decision of the board that granted Toor's application for the variance renders the plaintiffs' opposition to the commission's decision to grant Toor's special permit application an impermissible collateral attack on the validity of the variance. Accordingly, we affirm the judgment of the Superior Court.

The following facts and procedural history are relevant to our resolution of this appeal. Boyajian is the sole owner of JPB, LLC. The plaintiffs operate Riley's Liquor, located at 312 Hartford Turnpike in Vernon. The Vernon Zoning Regulations (zoning regulations) mandate that establishments that sell alcoholic liquors be separated by a distance of no less than 3000 feet, measured in a straight line from the main public access doors of each

[1] Collectively, we refer to Boyajian and JPB, LLC, as the plaintiffs. Individually, we refer to Boyajian and JPB, LLC, by their respective names.

[2] Toor filed a motion to intervene in the underlying appeal to the Superior Court, which was granted. Toor has not participated in the present appeal.

establishment. Vernon Zoning Regs., § 17.1.2. Toor sought to open and operate a liquor store at a commercial building located at 206 Talcottville Road in Vernon (property), which was located 2935 feet from Riley's Liquor. On or around January 31, 2018, Toor filed an application to the board for a variance[3] from the 3000 foot separating distance requirement by sixty-five feet to permit the 2935 foot separating distance between the property and Riley's Liquor. In the absence of the variance, the proposed liquor store would have violated the distance requirement contained in the zoning regulations.

The board scheduled a public hearing on the variance application for April 18, 2018. In anticipation of the hearing, the board provided notice of the variance application and hearing by letter to abutting property owners and to the public in the Journal Inquirer. On April 18, 2018, the board held a public hearing and, on its conclusion, voted to approve the variance by a four to one vote. The plaintiffs did not attend the hearing. The board notified Toor of its approval on April 19, 2018. At no point did the plaintiffs appeal from the board's decision to grant the variance.[4]

[3] "A variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town." (Internal quotation marks omitted.) *Mayer-Wittmann* v. *Zoning Board of Appeals*, 333 Conn. 624, 640, 218 A.3d 37 (2019).

[4] General Statutes § 8-8 (b) provides in relevant part: "[A]ny person aggrieved by any decision of a board . . . may take an appeal to the superior court for the judicial district in which the municipality is located . . . . The appeal shall be commenced by service of process . . . within fifteen days from the date that notice of the decision was published as required by the general statutes. . . ." The record demonstrates, and the plaintiffs concede, that notice of the board hearing concerning the variance was published in the Journal Inquirer on April 11, 2018. On April 18, 2018, the board granted the variance at the conclusion of the hearing and notified Toor the following day. The plaintiffs do not claim in this appeal that the board did not give proper notice to the public of its decision to grant the variance.

In July, 2018, Toor submitted to the commission an application for a special permit for the sale of alcohol at the property. The commission held a public hearing on the special permit application on August 16, 2018, at which Boyajian spoke on the record[5] and expressed, inter alia, his contention that the underlying variance was void.[6] At the conclusion of the hearing, the commission voted to approve the special permit application by a five to one vote and noted that the variance was "in effect" at the time of the hearing.[7]

The plaintiffs appealed the commission's approval of the special permit application to the Superior Court. In their brief to the trial court, the plaintiffs argued, in relevant part, that (1) the variance was void, (2) the board lacked the authority to grant the variance, (3) the commission's reliance on the void variance was a "flawed foundation upon which [it] premised its" approval of the special permit, and (4) the commission "ignored" the zoning regulations, which otherwise prohibited approval of the special permit.[8]

[5] Boyajian did not identify himself as the owner of JPB, LLC, or the operator of Riley's Liquor in his comments to the commission.

[6] When he addressed the commission, Boyajian conceded on the record that the granting of the variance was appealable within the statutory period.

[7] Board member Roland Klee noted after the conclusion of the hearing, "the variance is in effect, [it has] been recorded on the [l]and [r]ecords . . . ." Klee later moved to approve the special permit application "based on its compliance with the [s]pecial [p]ermit standards of [§] 17.3.1. [of the zoning regulations]."

[8] The plaintiffs raised as an additional ground for reversing the decision of the commission that the variance had lapsed because of Toor's failure to make any substantial progress on the use in the year following the board's decision. The trial court rejected this ground, finding the following: (1) "no party adduced evidence . . . relevant to" the claim; (2) Toor "expeditiously applied" for the special permit after the board approved the variance; and (3) because the plaintiffs appealed to the trial court just one month after the commission granted the special permit application, Toor was justified in delaying construction until after the resolution of the appeal. The plaintiffs have not raised this issue in the present appeal, and, accordingly, it is not properly before us.

The trial court, *Hon. Samuel J. Sferrazza*, judge trial referee, denied the appeal. In considering whether the commission should have independently reviewed the property's compliance with the statutory separating distance requirement and the validity of the underlying variance, the court recognized that the plaintiffs' arguments posed "some very interesting and challenging legal issues."[9] "The court determine[d], however, that it need not resolve those conundrums. This is because no appeal was taken from the decision in which all these issues could have been adjudicated. Whether the [board's] decision was erroneous became immaterial once the appeal period expired." The trial court characterized the plaintiffs' contention with the commission's decision, insofar as the plaintiffs sought independent review of the commission's decision to grant a special permit predicated on an allegedly void variance, as an impermissible "collateral attack on an unappealed . . . decision . . . ." Because the trial court concluded that the attack did not fall under one of the potential exceptions the Supreme Court identified in *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 104–105, 616 A.2d 793 (1992), the plaintiffs could not prevail on the issue. Pursuant to Practice Book § 81-1 et seq. and § 8-8 (o), the plaintiffs requested certification to appeal to this court. Upon consideration of the plaintiffs' petition, we granted review.

The plaintiffs claim that the trial court improperly upheld the commission's decision to grant the special permit application. More specifically, the plaintiffs argue that (1) the underlying variance granted to Toor was void, (2) in determining whether Toor qualified for the special permit, the commission should have applied the standards prescribed by the zoning regulations,

[9] The trial court considered and rejected the merits of the plaintiffs' argument that the variance was fundamentally void. As set forth subsequently in this opinion, we decline to consider the merits of this argument.

rather than relying solely on the variance, and (3) the board lacked the statutory authority to grant the variance.[10] The defendant argues in response that the plaintiffs' opposition to the commission's decision to grant the special permit constitutes an impermissible collateral attack on the board's approval of the variance. It argues that the commission and the trial court properly rejected the plaintiffs' arguments on the ground that the plaintiffs should have raised their claim on direct appeal from the board's decision to grant the variance. We agree with the defendant.

We first set forth the relevant law, including our standard of review. On appeal, we review the trial court's legal conclusion that the plaintiffs' opposition to the commission's decision to grant the special permit application is an impermissible collateral attack on the board's decision to grant the variance application. Resolution of this issue presents a question of law over which our review is plenary. *Santarsiero* v. *Planning & Zoning Commission*, 165 Conn. App. 761, 772, 140 A.3d 336 (2016) ("[b]ecause the court . . . made conclusions of law in its memorandum of decision [in this case], our review is plenary" (internal quotation marks omitted)).

"A special permit allows a property owner to use his property in a manner expressly permitted by the local

[10] The plaintiffs argue that they properly appealed to the trial court the *commission's* improper application of the zoning regulations and, thus, have valid grounds outside of the underlying variance. The plaintiffs contend that, because the commission did not apply the 3000 foot separating distance set forth in the zoning regulations, it "illegal[ly]" granted the special permit application. The plaintiffs' arguments, however, inextricably recognize the alternative separating distance on which the commission relied in granting the special permit—the 2935 foot separating distance, as authorized by the board. Further, before the trial court, when asked whether the plaintiffs asserted any "claim that there was some other provision unrelated to the variance," counsel for the plaintiffs answered, "[n]o. No traffic issue. Nothing like that, Your Honor."

zoning regulations." (Internal quotation marks omitted.) *Putnam Park Apartments, Inc.* v. *Planning & Zoning Commission*, 193 Conn. App. 42, 53, 218 A.3d 1127 (2019). An applicant may apply for a special permit from a zoning commission; see General Statutes § 8-2 (a); and "[i]t is well settled that [for a commission to grant] a special permit, an applicant must satisf[y] all conditions imposed by the regulations." (Internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 591, 170 A.3d 73 (2017). "[A]lthough it is true that the zoning commission does not have discretion to deny a special permit when the proposal meets the standards, it does have discretion to determine whether the proposal meets the standards set forth in the regulations. If, during the exercise of its discretion, the zoning commission decides that all of the standards enumerated in the special permit regulations are met, then it can no longer deny the application. The converse is, however, equally true. Thus, the zoning commission can exercise its discretion during the review of the proposed special [permit], as it applies the regulations to the specific application before it." (Emphasis omitted; internal quotation marks omitted.) Id., 593–94. "In making such determinations, moreover, a zoning commission may rely heavily upon general considerations such as public health, safety and welfare." (Internal quotation marks omitted.) *Torrington* v. *Zoning Commission*, 261 Conn. 759, 770, 806 A.2d 1020 (2002).

By contrast, "a variance is an expression of explicit authority to contravene local zoning ordinances." *R & R Pool & Patio, Inc.* v. *Zoning Board of Appeals*, 129 Conn. App. 275, 286, 19 A.3d 715 (2011). "Zoning boards of appeals are authorized to grant variances in cases in which enforcement of a regulation would cause unusual hardship . . . ." *Mayer-Wittmann* v. *Zoning Board of Appeals*, 333 Conn. 624, 640, 218 A.3d 37 (2019). "[W]e

have interpreted [General Statutes] § 8-6 to authorize a zoning board of appeals to grant a variance . . . when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan." (Internal quotation marks omitted.) *Turek* v. *Zoning Board of Appeals*, 196 Conn. App. 122, 134, 229 A.3d 737, cert. denied, 335 Conn. 915, 229 A.3d 729 (2020). "Interpretation of the zoning regulations is a function of a zoning board of appeals. The variance power exists to permit what is prohibited in a particular zone. . . . [T]he zoning board of appeals is the court of equity of the zoning process . . . ." (Internal quotation marks omitted.) *Santarsiero* v. *Planning & Zoning Commission*, supra, 165 Conn. App. 779.

Although an aggrieved individual may challenge the decision of a zoning authority; see, e.g., General Statutes § 8-8 (b); as a general rule, "one may not institute a collateral action challenging the decision of a zoning authority." *Torrington* v. *Zoning Commission*, supra, 261 Conn. 767. "A collateral attack is an attack upon a judgment, decree or order offered in an action or proceeding other than that in which it was obtained, in support of the contentions of an adversary in the action or proceeding . . . ." (Internal quotation marks omitted.) *Warner* v. *Brochendorff*, 136 Conn. App. 24, 32 n.7, 43 A.3d 785, cert. denied, 306 Conn. 902, 52 A.3d 728 (2012). A party asserting a collateral attack "attempt[s] to avoid, defeat, or evade [a judgment], or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." (Internal quotation marks omitted.) *Lewis* v. *Planning & Zoning Commission*, 49 Conn. App. 684, 688–89

n.5, 717 A.2d 246 (1998). "A collateral attack on a judgment is a procedurally impermissible substitute for an appeal." (Internal quotation marks omitted.) *Federal National Mortgage Assn.* v. *Farina*, 182 Conn. App. 844, 853, 191 A.3d 206 (2018); see also *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 103 (suggesting that "[i]t would be fundamentally unfair . . . to permit" collateral attack).

"The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings. Unless it is entirely invalid and that fact is disclosed by an inspection of the record itself the judgment is invulnerable to indirect assaults upon it." (Internal quotation marks omitted.) *Federal National Mortgage Assn.* v. *Farina*, supra, 182 Conn. App. 853.

"[W]e have ordinarily recognized that the failure of a party to appeal from the action of a zoning authority renders that action final so that the correctness of that action is no longer subject to review by a court." *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 102. Thus, "the general rule [is] that one may not institute a collateral action challenging the decision of a zoning authority. . . . [T]he rule requiring interested parties to challenge zoning decisions in a timely manner rest[s]

in large part . . . on the need for stability in land use planning and the need for justified reliance by all interested parties—the interested property owner, any interested neighbors and the town—on the decisions of the zoning authorities." (Internal quotation marks omitted.) *Reardon* v. *Zoning Board of Appeals*, 311 Conn. 356, 366, 87 A.3d 1070 (2014); see also *Lallier* v. *Zoning Board of Appeals*, 119 Conn. App. 71, 78–79, 986 A.2d 343 ("[L]itigation about the merits of a cease and desist order does not permit a collateral attack on the validity of the underlying zoning decision that was not challenged at the time that it was made . . . . In light of [*Upjohn Co.* and *Torrington*], the trial court in the present case properly declined to address the merits of the defendants' disagreement with the zoning commission's . . . approval of the plaintiff's . . . proposal." (Citations omitted; footnote omitted.)), cert. denied, 295 Conn. 914, 990 A.2d 345 (2010).

In *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 102, our Supreme Court determined that a plaintiff may not collaterally attack a condition to an approved zoning permit application because the plaintiff had failed to appeal the condition at the time it was imposed. The plaintiff in *Upjohn Co.* had applied to the local planning and zoning commission to build structures on its property, and the commission approved the zoning permit application, subject to several conditions. Id., 98. The plaintiff "did not appeal or otherwise challenge the validity or imposition of" one condition with which it later failed to comply. Id., 98–99. When a zoning enforcement officer served the plaintiff with a cease and desist order for failure to comply with the condition, the plaintiff appealed to the zoning board of appeals and, subsequently, to the trial court, contesting the validity of the underlying condition. Id., 99. The trial court sustained the appeal. Id., 100.

On review, our Supreme Court agreed with the zoning board of appeals that "the trial court incorrectly concluded that [the plaintiff] could collaterally attack the

validity of [the] condition . . . in the enforcement proceedings more than three years after its imposition by the commission and acceptance by [the plaintiff]." Id. "We conclude that [the plaintiff], having secured the permits . . . subject to [the] condition . . . and not having challenged the condition by appeal at that time, was precluded from doing so in the [later] enforcement proceedings . . . . [W]hen a party has a statutory right of appeal from the decision of an administrative agency, he may not, instead of appealing, bring an independent action to test the very issue which the appeal was designed to test. . . . It would be inconsistent with th[e] needs [of stability in land use planning and justified reliance by interested parties] to permit, in this case, a challenge to a condition imposed on a zoning permit when the town seeks to enforce it more than three years later." (Citations omitted; internal quotation marks omitted.) Id., 102.

Subsequent cases have applied the rule set forth in *Upjohn Co*. In a somewhat related procedural context, our Supreme Court in *Torrington* v. *Zoning Commission*, supra, 261 Conn. 761, 767–68, applied the rule set forth in *Upjohn Co.* to an action in which a plaintiff attacked a stipulated judgment it had previously failed to appeal. Because the plaintiff had ample notice and opportunity to challenge the judgment at the time it was entered, it could "not [later] collaterally attack the stipulated judgment." Id., 767, 770.

In *Santarsiero* v. *Planning & Zoning Commission*, supra, 165 Conn. App. 779, this court upheld a trial court's determination that a collateral attack by the plaintiffs, nearby property owners, was impermissible under the circumstances. The zoning board in *Santarsiero* had granted an application filed by a landowner for a variance to construct a restaurant with a drive-up window in a zone that specifically prohibited such windows. Id., 764–65. The plaintiffs received notice of the hearing but did not appeal

the decision of the board. Id., 765, 777. Relying on the variance, the landowner applied for a special exception[11] from the local planning and zoning commission, and the commission granted the exception. Id., 765–66. Following three years of related disputes, the plaintiffs appealed to the trial court and attacked, inter alia, the validity of the variance. Id., 770. The trial court dismissed the plaintiff's appeal. Id.

On appeal to this court, the plaintiffs in *Santarsiero* reiterated their argument that the trial court improperly upheld the actions of the commission because the zoning board's decision to grant the variance, on which the commission's decision was predicated, "was not a valid exercise of zoning power and there could not have been any justified reliance on it." Id., 778. This court disagreed. Id., 776. This court noted that the "variance formed the basis of the commission's authority to grant the . . . special exception to the defendant," and the plaintiffs failed to appeal from the variance. Id., 776–77. Accordingly, the plaintiff's opposition to the commission's decision to grant the special exception application, premised on its opposition to the board's granting of the variance application, constituted an impermissible collateral attack. Id., 779.

*Upjohn Co.* and its progeny govern our resolution of the present appeal, and *Santarsiero* is on all fours with the case before us. Nothing in the record suggests that the plaintiffs in the present case were prevented from raising by direct appeal their substantive contentions concerning the validity of the variance. Yet, just as in *Santarsiero*, the plaintiffs failed to appeal from the board's decision to grant the variance. See id., 777. Once the statutory period to appeal the board decision had expired, the board's decision to grant the variance became final.

[11] "[T]he terms 'special exception' and '[s]pecial permit' are interchangeable." *American Institute for Neuro-Integrative Development, Inc.* v. *Town Planning & Zoning Commission*, 189 Conn. App. 332, 338–39, 207 A.3d 1053 (2019); see also R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 5:1, p. 191.

See *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 102. Nevertheless, the plaintiffs attacked the validity of the variance at the commission's hearing on the special permit application. Once again, just as in *Santarsiero*, the variance here "formed the basis of the commission's authority to grant the [special permit] to" Toor; *Santarsiero* v. *Planning & Zoning Commission*, supra, 165 Conn. App. 776; which, according to the plaintiffs, required the commission to deny the special permit application. The commission nonetheless approved the special permit application.[12] The plaintiffs asserted the same argument to the trial court and insisted that the commission's reliance on the variance was misplaced because the variance was void. The trial court concluded that the plaintiffs' argument concerning the variance was an impermissible substitute for an appeal of the board's decision. Finally, the grounds on which the plaintiffs appeal to this court rest entirely on their challenges to the validity of the variance.[13] The plaintiffs' failure to appeal the board's granting of the variance ostensibly forecloses consideration of the merits of their arguments. See *Bochanis* v. *Sweeney*, 148 Conn. App. 616, 627–28, 86 A.3d 486 (prohibiting collateral "attack on *the substance* of the wetlands permit, which . . . the plaintiffs could have done" by filing appeal (emphasis in original)), cert. denied, 311 Conn. 949, 90 A.3d 978 (2014). Consequently, their collateral attack on the variance is impermissible, unless it falls within one of the exceptions to the general rule barring collateral attacks.

[12] No section of the zoning regulations expressly allows the commission to ignore a related variance, previously granted by the board, in considering an application for a special permit. Moreover, we note that our Superior Courts have suggested that planning and zoning commissions may not ignore related variances that directly bear on the applications before them. See, e.g., *Scandia Construction & Development Corp.* v. *Planning & Zoning Commission*, Superior Court, judicial district of Danbury, Docket No. CV-01-0341705-S (November 16, 2001).

[13] See footnote 10 of this opinion.

Our Supreme Court has stated that there may be two types of "exceptional cases" wherein "a collateral attack" may be permissible. *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 104–105. Our Supreme Court explained, "[w]e recognize . . . that there may be exceptional cases in which a previously unchallenged condition was so far outside what could have been regarded as a valid exercise of zoning power that there could not have been any justified reliance on it, or in which the continued maintenance of a previously unchallenged condition would violate some strong public policy. It may be that in such a case a collateral attack on such a condition should be permitted. We leave that issue to a case that, unlike this case, properly presents it." Id.[14]

"In *Gangemi* v. *Zoning Board of Appeals*, 255 Conn. 143, 150–51, 763 A.2d 1011 (2001), [our Supreme Court] converted this dictum into a holding, and concluded that the continued maintenance of [a] previously unchallenged condition . . . violated the strong public policy against restraints on alienation." *Torrington* v. *Zoning Commission*, supra, 261 Conn. 768. As we have noted, the plaintiffs' attack on the commission's decision to grant the special permit here is premised on the board's alleged lack of authority to grant the variance. Thus, we consider, in turn, the applicability of the exceptions recognized by *Upjohn Co.* to the actions taken by the board in the present case.

[14] In discussing the *Upjohn Co.* exceptions, our Supreme Court, in *Torrington* v. *Zoning Commission*, supra, 261 Conn. 768, noted that the *Upjohn Co.* exceptions were available "to the extent that a party seeks to attack collaterally a previously unchallenged zoning decision *on the basis of the zoning authority's lack of subject matter jurisdiction* . . . ." (Emphasis added.) The plaintiffs in the present case make no claim that the board lacked subject matter jurisdiction to grant a variance. They simply argue that the commission should not have granted the special permit application, on the basis of the invalidity of the underlying variance. Although our case law is somewhat unclear as to whether the *Upjohn Co.* exceptions may apply to cases in which there is no attack as to subject matter jurisdiction of the prior tribunal, we nonetheless consider the exceptions here.

We first consider whether the board's decision to grant the variance fell "so far outside what could [be] regarded as a valid exercise of [its] zoning power that there could not have been any justified reliance on it . . . ." *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 104–105. "[I]t must be an exceptional [case] that will justify disturbing the stability of unchallenged land use decisions. . . . It is not enough that the conduct in question was in violation of the applicable zoning statutes or regulations. . . . [A] litigant who seeks to invoke this exception must meet a very high standard." (Citation omitted; internal quotation marks omitted.) *Torrington* v. *Zoning Commission*, supra, 261 Conn. 768; see, e.g., *Gay* v. *Zoning Board of Appeals*, 59 Conn. App. 380, 388, 757 A.2d 61 (2000) (permitting collateral attack of condition "imposed by [a] board on a parcel that was not the subject of the variance application before it" under first exception of *Upjohn Co.*). "[T]he party seeking to invoke the exception to the general rule barring collateral attack on a previously unchallenged land use decision . . . ha[s] the burden to establish that the [board or] commission [acted] . . . without an adequate basis on which to do so." *Torrington* v. *Zoning Commission*, supra, 773. "The question of whether an extrajudicial act of a zoning authority is so far outside the valid exercise of zoning power that there could not have been any justified reliance on it, necessarily permits, in an appropriate case, some inquiry into the reasons for that reliance." Id., 775–76; see also *Santarsiero* v. *Planning & Zoning Commission*, supra, 165 Conn. App. 779.

Section 8-6 provides in relevant part: "(a) The zoning board of appeals shall have the following powers and duties . . . (3) to determine and vary the application of the zoning . . . regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience,

welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such . . . regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured, provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed. . . .''

As we have stated, ''[i]nterpretation of the zoning regulations is a function of a zoning board of appeals. The variance power exists to permit what is prohibited in a particular zone.'' (Internal quotation marks omitted.) *Santarsiero* v. *Planning & Zoning Commission*, supra, 165 Conn. App. 779. The zoning regulations, similarly, recognize the power of the board to hear and decide variance applications. Vernon Zoning Regs., § 17.2.

By granting the variance at issue, the board acted squarely within its statutorily authorized power to vary zoning regulations. General Statutes § 8-6 (a) (3). The board held a hearing to decide whether to approve the application for the variance, which would vary the 3000 foot separating distance requirement between liquor stores under the zoning regulations. Vernon Zoning Regs., § 17.1.2. The record reflects that the board considered the significance of a sixty-five foot variance as well as any alleged hardship. After discussion and consideration of the application, the board granted the application, that is, it varied the 3000 foot requirement to permit a separating distance of 2935 feet. See id.

The plaintiffs, however, contend that the board impermissibly granted the variance because Toor failed to establish a sufficient unique hardship that affected the property. The plaintiffs also argue that, because ''the

location of property is not a legal basis for the granting of a variance . . . the statute confer[red] no authority upon the [board] to grant such a variance." The plaintiffs also asserted that the effect of the variance conflicted with other zoning regulations. Each of these arguments inherently accepts the "adequate basis on which" the board acted—the statutory power conveyed on the board to vary regulations—and forecloses the suggestion that granting the variance constituted an extrajudicial act. *Torrington* v. *Zoning Commission*, supra, 261 Conn. 769–70, 773. Assuming, arguendo, that the plaintiffs' arguments, as the trial court noted, could have presented a "colorable claim" in an appeal of the board's decision, the plaintiffs' arguments nonetheless fail to render the board's action so far outside what could be regarded as a valid exercise of the board's statutory power that there could not have been any justified reliance on it. That is to say, because the board maintained the power to vary zoning regulations, we are unconvinced that the plaintiffs have met the "very high standard" that would trigger an acceptable collateral attack on the board's action. *Torrington* v. *Zoning Commission*, supra, 768.

We now turn to the second *Upjohn Co.* exception. The court in *Upjohn Co.* suggested that, if "the continued maintenance of a previously unchallenged condition would violate some strong public policy," a collateral attack may be warranted. *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 105. "We begin by emphasizing that, under this prong of the *Upjohn Co.* formulation, we focus, not on the state of affairs that existed when the condition at issue originally was imposed, but on the current state of affairs in which the condition is being enforced. . . . [W]e focus on the continued maintenance of the condition, and whether, irrespective of the fact that the condition was previously unchallenged, it nonetheless currently violate[s] some strong

public policy." (Citation omitted; internal quotation marks omitted.) *Gangemi* v. *Zoning Board of Appeals*, supra, 255 Conn. 150–51. As under the first exception, review under this exception demands a high standard. Compare, e.g., id., 151, 157 (permitting collateral attack on condition to variance that contradicted "the strong and deeply rooted public policy in favor of the free and unrestricted alienability of property" and failed to serve "legal and useful purpose" (internal quotation marks omitted)), with *George* v. *Watertown*, 85 Conn. App. 606, 611–12, 858 A.2d 800 (prohibiting collateral attack on commission action that implicated strong public policy interest but fell within "conformity [of] the law"), cert. denied, 272 Conn. 911, 863 A.2d 702 (2004), and *Caltabiano* v. *L & L Real Estate Holdings II, LLC*, 122 Conn. App. 751, 762, 998 A.2d 1256 (2010) (prohibiting collateral attack on decision made by commission following public hearing at which untruthful representations were allegedly made by interested party and opining that "misconduct or conflict of interest by members of the board" may, alternatively, "rise to the level of a public policy violation sufficient to support a collateral attack").

Here, the plaintiffs contend that the variance would undermine the "best interests of the town" of Vernon (town). According to the plaintiffs, by adopting its zoning regulations, the town necessarily determined that the allowance of multiple liquor stores within 3000 feet of one another would be "contrary to the best interests of the town." Further, the plaintiffs assert that, if Toor were to open a liquor store on the property, the new store would "establish a new 3000 foot [separating distance] and burden" other preexisting properties. "The applicant's variance, [according to the plaintiffs] will preclude liquor stores from being located within roughly one-half mile of [the] new store." We find the plaintiffs' arguments unavailing.

The plaintiffs' contention that the variance violates public policy because it varies the zoning regulations is not persuasive because it is entirely circular. By definition, "[a] variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town." (Internal quotation marks omitted.) *Mayer-Wittmann* v. *Zoning Board of Appeals*, supra, 333 Conn. 640. Accordingly, every variance granted by a zoning authority, under the plaintiffs' argument, would constitute a violation of public policy sufficient to support a collateral attack. See *Caltabiano* v. *L & L Real Estate Holdings II, LLC*, supra, 122 Conn. App. 762. Such a contention is foreclosed by logic and our existing jurisprudence.

As we have acknowledged, nothing in the record suggests that the plaintiffs could not have expressed their concerns, including those concerns about the number of liquor stores in the town, before the board or on direct appeal. Furthermore, the record establishes that Boyajian expressed before the commission concerns about the number of liquor stores in the town to no avail. Because the continued maintenance of the underlying variance does not "violate some strong public policy"; *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 105; the plaintiffs may not collaterally attack the board's decision to grant the variance under this exception.

The judgment is affirmed.

In this opinion the other judges concurred.