DONALD PIMENTAL ET AL. *v.* RIVER JUNCTION ESTATES, LLC, ET AL.
(AC 42644)

Prescott, Moll and Harper, Js.

Syllabus

The plaintiffs, D, M, J and G, who owned properties in Thompson that abutted property of the defendant R Co., sought, inter alia, to quiet title to a disputed portion of a road, which separated the property of J and G from R Co.'s property and which R Co. claimed was a public highway. Following a trial to the court, the trial court found in favor of the plaintiffs and the defendant town of Thompson on the quiet title claim.

On appeal, R Co. claimed that the court erred in failing to find a manifested intent by the owner of the fee to dedicate the disputed portion of the road to public use. *Held* that the trial court did not err in determining that there had been no implied dedication of the disputed portion as a public road: the court determined that the historical references on which R Co. relied, including the disputed portion's appearance in historical maps and its reference as a boundary in various deeds, did not compel the conclusion that an unidentified owner of the land under the road manifested an intent to dedicate the road for public use, and the court was not required to presume dedication as a matter of law, as evidence of prolonged use as a public highway was lacking; moreover, R Co.'s argument that the disputed portion was necessarily a public road because R Co.'s property otherwise would remain a landlocked parcel was without merit, as the determination of an easement by necessity would have required a distinct analysis from whether particular land had been dedicated to public use.

Argued March 3, 2020—officially released September 14, 2021

Procedural History

Action, inter alia, seeking to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Windham, where the court, *Calmar*, *J.*, granted the plaintiffs' motion to bifurcate; thereafter, the matter was tried to the court, *Hon. Leeland J. Cole-Chu*, judge trial referee; judgment for the plaintiffs, from which the named defendant appealed to this court. *Affirmed.*

Stephen T. Penny, for the appellant (named defendant).

Kenneth R. Slater, Jr., for the appellees (plaintiffs).

Mark R. Brouillard, for the appellees (defendant town of Thompson et al.).

Opinion

MOLL, J. In Connecticut, one method of establishing a public highway is through the common-law theory of dedication and acceptance. See *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 10, 48 A.3d 107, cert. denied, 307 Conn. 932, 56 A.3d 715 (2012). This

appeal concerns the trial court's determination that the defendant River Junction Estates, LLC (River Junction), failed to prove, pursuant to such theory, that a portion of Starr Road in the town of Thompson (town), i.e., from approximately 0.15 miles beyond Starr Road's intersection with New Road to the Rhode Island state border (disputed portion), is a public highway. River Junction appeals from the judgment of the trial court, rendered following a trial to the court—in favor of the plaintiffs, Donald Pimental, Melissa Pimental, Jayson Livingstone, and Gail Livingstone,[1] as well as the defendant town—on the plaintiffs' claim to quiet title to the disputed portion of the road. River Junction's primary claim on appeal is that the court erred in failing to find a manifested intent by the owner of the fee to dedicate the disputed portion of Starr Road to public use. Because we disagree with River Junction's primary claim, which is dispositive of this appeal, we affirm the judgment of the trial court.[2]

The following facts, as found by the trial court or as are undisputed in the record, and procedural history are relevant to our resolution of this appeal. The parties

[1] In this opinion, we refer to Donald Pimental and Melissa Pimental collectively as the Pimentals, and to Jayson Livingstone and Gail Livingstone collectively as the Livingstones.

[2] River Junction also claims on appeal that the court erred in (1) failing to find acceptance of the disputed portion as a public highway, (2) finding that River Junction, by virtue of a subdivision of certain real property known as Benson Farm, had left itself landlocked, (3) finding that it was not clear that certain properties abutting Starr Road, before their subdivision, had no other access to the public road network other than by Starr Road, and (4) failing to find that the town was estopped from denying Starr Road's status as a public road. In light of our conclusion regarding dedication, we need not address River Junction's remaining claims. See *Mihalczo* v. *Woodmont*, 175 Conn. 535, 543, 400 A.2d 270 (1978) ("[w]ithout a dedication there can, of course, be no acceptance"). With regard to River Junction's estoppel argument directed to the town, we note that, even if River Junction were successful with respect to such claim, such success would not obviate River Junction's burden, vis–vis the plaintiffs, to establish the existence of the disputed portion as a public highway.

agree that Starr Road, from its intersection with New Road and travelling thereon for approximately 0.15 miles to the northeast corner of a cul-de-sac, is a public highway. Beyond the cul-de-sac, the road extends to the Rhode Island state border; it is this portion of Starr Road beyond the cul-de-sac that is in dispute.

The Pimentals are the fee simple owners of approximately 7.49 acres of real property located at 40 Starr Road (Pimental property), and the Livingstones own in fee simple approximately ten acres of real property located at 55 Starr Road (Livingstone property). As is relevant to this appeal, River Junction owns in fee simple approximately 15.70 acres of real property (River Junction property) between the Pimental property and the Buck Hill Management Area, the latter of which is owned and managed by the state of Rhode Island. The River Junction property was part of a 112 acre site acquired by River Junction in May, 2004. The Pimental, Livingstone, and River Junction properties are located beyond the cul-de-sac, accessible only by way of the disputed portion of Starr Road, with the River Junction property and the Livingstone property across from one another, separated by the disputed portion. Both the Livingstone property and the River Junction property share their easterly borders with the state of Rhode Island. The Pimental property is located on the northerly side of Starr Road, west of the River Junction property.

The defendant Inland Wetlands Commission of the Town of Thompson (commission) is the duly authorized municipal agency empowered to regulate wetlands and watercourses and to enforce the inland wetlands regulations of the town pursuant to the Inland Wetlands and Watercourses Act, set forth in General Statutes § 22a-36 et seq. On September 4, 2015, River Junction submitted a permit application to the commission to conduct a regulated activity by constructing a bridge across a

watercourse and wetlands for a driveway to access the River Junction property (wetlands permit application). The drawings associated with the wetlands permit application included permission to divert water from a regulated intermittent watercourse. The commission held three public hearings on the wetlands permit application in January and February, 2016, and thereafter denied that application.

Meanwhile, River Junction had modified the plans to remove the water diversion work and, on November 16, 2015, submitted another permit application to conduct water diversions as public highway improvements (second application) within the disputed portion of Starr Road. Pursuant to § 7.5 of the town's inland wetlands regulations, an application to conduct a regulated activity requires the written consent of the property owner. On the second application, River Junction asserted ownership of the property where the regulated activity was proposed to occur. Town Ordinance No. 10-041 requires the submission of an application to the town's Board of Selectmen (board) for any proposal to conduct work on a public highway within the town. By town ordinance, approval by the board or its designee is required to authorize road improvement work. By letter dated November 16, 2015, Paul A. Lenky, the then first selectman of the town, purported to give River Junction the required consent to submit the second application.

In January and February, 2016, pursuant to General Statutes § 22a-19 (a), the Pimentals and the Livingstones, respectively, filed notices of intervention in which they asserted that the activity described in the application would involve conduct by River Junction that would have, or was reasonably likely to have, the effect of unreasonably polluting, impairing, and/or destroying the public trust in the air, water, or other natural resources of the state. A public hearing on divers dates from February through June, 2016, followed. On

July 20, 2016, the commission voted to approve the second application, conditioned on the board's issuance of an approval pursuant to Town Ordinance No. 10-041—approval that required a determination by the commission that Starr Road is a public highway.

Following the conditional approval by the commission, the plaintiffs commenced this action by way of a two count complaint on August 15, 2016. Count one, which was directed to the commission and River Junction, was brought as an administrative appeal pursuant to General Statutes § 8-8, whereby the plaintiffs sought to have the decision by the commission granting River Junction's second application reversed. In count two, which was directed to the town and River Junction, the plaintiffs sought to quiet title to the disputed portion of Starr Road pursuant to General Statutes § 47-31.[3] The plaintiffs filed a motion to bifurcate adjudication of the two counts—such that the court would try count two first—on the ground that if the court found in favor of the plaintiffs on count two, count one would be rendered moot. The court, *Calmar*, *J.*, granted that motion by agreement of the parties. Thereafter, on February 14, 2018, the plaintiffs filed an amended, operative complaint (as to count two only), which was submitted in a format directed by the court that indicated which allegations remained in dispute for trial purposes.

In its defense, River Junction maintained that it was entitled to make improvements to the disputed portion of Starr Road and to travel on it as a public highway.

[3] General Statutes § 47-31 provides in relevant part: "(a) An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the property, or any part of it . . . or to have any interest in the property, or any lien or encumbrance on it, adverse to the plaintiff . . . for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property. . . ."

In its answer, River Junction asserted two special defenses, both sounding in estoppel, alleging that the town was estopped from denying that Starr Road was a public highway.[4] The first special defense was grounded on allegations that in 1978, incident to the approval of a subdivision, the town had accepted a deed for a 17 foot wide strip of land along the southerly boundary of Starr Road, commencing at its intersection with New Road and extending approximately 1246 feet, resulting in a widening of that portion of Starr Road to 50 feet. According to River Junction, that acceptance constituted an acknowledgement by the town in 1978, that Starr Road was a public road. The second special defense rested on allegations that, in connection with three different lots, the town issued building permits, including to the Pimentals and the Livingstones' predecessor in title, on land located beyond the cul-de-sac. The significance of these issuances was that town zoning regulations required lots to have frontage on a public road in order to be buildable. River Junction alleged that, as a result of the town's foregoing conduct, three of the four properties beyond the cul-de-sac—exclusive of its own—received confirmation that those lots were buildable, having frontage on a public road.

On February 15, 16 and 22, 2018, the plaintiffs' quiet title claim, set forth in count two, was tried to the court. The trial included a site visit by the court with counsel. Following posttrial briefing, on January 11, 2019, the trial court entered an order finding in favor of the plaintiffs and the town, with a memorandum of decision to follow. In a comprehensive memorandum of decision dated February 6, 2019, the court explained that River Junction had failed to prove that the disputed portion

[4] At trial, the town agreed with the plaintiffs that Starr Road, insofar as it extends beyond the cul-de-sac, is not a public road and asserted that, as a result, it had no interest in or liability for the disputed portion. The town maintained this position on appeal.

was a public highway. Specifically, the court stated that River Junction had failed to establish (1) a manifested intent by the owner to dedicate the disputed portion for public use, and (2) acceptance by the proper authorities or by the general public. As found by the court, "Starr Road is a town road or public highway only for approximately 0.15 miles from New Road to the northeast edge of the cul-de-sac."[5] This appeal followed.[6] Additional facts will be set forth as necessary.

River Junction claims on appeal that the trial court improperly concluded that it failed to demonstrate a manifest intention by the owner of the fee to dedicate the disputed portion of Starr Road to public use. To put River Junction's claim in its proper context, we note at the outset that, as was made clear by counsel for River Junction at oral argument before this court, its position is that the alleged dedication of Starr Road, including the disputed portion, occurred in the early 1800s. The linchpin of River Junction's argument is that the court rejected or ignored its historical evidence of implied dedication to public use—evidence of a nature previously found probative by our appellate courts—

[5] The court further stated that "[t]he ownership of the roughly thirty-three foot wide bed of the old road known as Starr Road from that point to the entrance of the . . . Livingstones' driveway is not before the court."

[6] Although the court did not expressly dispose of count one (i.e., the plaintiffs' administrative appeal) by dismissing it as moot, we conclude, on the basis of our review of the record, that the court implicitly disposed of count one by virtue of the parties' agreement, endorsed by the court, to bifurcate the adjudication of counts one and two on the ground that if the court found in favor of the plaintiffs on count two (as it did), count one would be rendered moot. See *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 718, 183 A.3d 1164 (2018) ("In assessing whether a judgment disposes of all of the causes of action against a party, this court has recognized that the trial court's failure to *expressly* dispose of all of the counts in the judgment itself will not necessarily render the judgment not final. Rather, the reviewing court looks to the complaint and the memorandum of decision to determine whether the trial court explicitly *or implicitly* disposed of each count." (Emphasis in original.)). Thus, we find no impediment to the exercise of our appellate jurisdiction.

and, rather, focused on the absence of factors indicating a formal dedication.[7] We disagree with River Junction.

We begin with the standard of review and legal principles relevant to this claim. "Our review of the factual findings of the trial court is limited to a determination of whether they are 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." (Internal quotation marks omitted.) *Benjamin* v. *Norwalk*, 170 Conn. App. 1, 11–12, 153 A.3d 669 (2016). Generally, "[w]hether a parcel of land has been dedicated to a public use by the owner of the fee and accepted for such use by and in behalf of the public are questions of fact for the trier." *Mihalczo* v. *Woodmont*, 175 Conn. 535, 542, 400 A.2d 270 (1978). Whether an implied dedication arises by operation of law, however, is a legal question over which we exercise plenary review. See *A & H Corp.* v. *Bridgeport*, 180 Conn. 435, 440, 430 A.2d 25 (1980) ("[a]bsent such unequivocal conduct [to give rise to an implied dedication], the existence of an intent to dedicate is a question of fact"). Therefore, to the extent that River Junction claims that an implied dedication arose by operation of law on the basis of the historical evidence surrounding Starr Road, we undertake plenary review. In addition, we note that the burden of proof rests upon River Junction, as the party seeking to establish the existence of the disputed portion as a public highway. See *Drabik* v. *East Lyme*, 234 Conn. 390, 397, 662 A.2d 118 (1995).

[7] The parties agree that there was no express or formal dedication of Starr Road; the parties disagree as to whether there was an implied dedication of the disputed portion.

Our contemporary laws instruct that "[h]ighways are established by one of the following four methods: (1) through the direct action of the legislature; (2) through authorized proceedings involving an application to a court; (3) through authorized proceedings by agents appointed for that purpose, such as selectmen of towns . . . and specified authorities of cities and boroughs . . . [and] (4) through private dedication of land for that purpose and its acceptance by the public." (Citations omitted; internal quotation marks omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 9. This appeal involves only the fourth method.

"From early times, under the common law, highways have been established in this state by dedication and acceptance by the public. . . . Dedication is an appropriation of land to some public use, made by the owner of the fee, and accepted for such use by and in behalf of the public. . . . Both the owner's intention to dedicate the way to public use and acceptance by the public must exist, but the intention to dedicate the way to public use may be implied from the acts and conduct of the owner, and public acceptance may be shown by proof of the actual use of the way by the public. . . . Thus, two elements are essential to a valid dedication: (1) a manifested intent by the owner to dedicate the land involved for the use of the public; and (2) an acceptance by the proper authorities or by the general public."[8] (Internal quotation marks omitted.) Id., 11.

"No particular formality is required in order to dedicate a parcel of land to a public use; dedication may be express or implied." (Internal quotation marks omitted.) *Vernon* v. *Goff*, 107 Conn. App. 552, 557, 945 A.2d 1017, cert. denied, 289 Conn. 920, 958 A.2d 154 (2008).

[8] "Since 1927, [what is now] General Statutes § 13a-48 has regulated the acceptance of highways by municipalities, or the proper authorities. Public Acts 1927, c. 248." (Footnote omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 11.

"A dedication may be express, as where the intention to dedicate is expressly manifested by an explicit oral or written declaration or deed of the owner, or it may be implied from acts and conduct of the owner of the land from which the law will imply such an intent. An implied dedication, that is, arising by operation of law from the conduct of the owner of the property, rests upon the broad common-law doctrine of equitable estoppel." *Whippoorwill Crest Co.* v. *Stratford*, 145 Conn. 268, 271–72, 141 A.2d 241 (1958). Implied dedication "proceeds upon the principle . . . that the owner, after having permitted the public to use his land for the purpose for which it is claimed to have been dedicated, under such circumstances that the public accommodation and private rights, supposed to be acquired in consequence of such permission, might be injuriously affected by an interruption of such enjoyment, is held to be precluded from denying that the public have acquired a right to such use in whatever manner, on the ground that such denial would be, on his part, a violation of good faith. This doctrine, so far from proceeding on the ground that such enjoyment was adverse and in hostility to the rights of the owner, supposes that it was with his assent. While it is true that an intent to dedicate must in all cases be clearly shown, to establish a valid dedication, it is not necessary that an actual intention should be found to have existed in the mind of the owner, at the time of the alleged dedication, to appropriate his land to a public use. It is the purpose as manifested by his acts, rather than the intention actually existing in his mind, which the law regards as essential to an implied dedication." (Citation omitted; internal quotation marks omitted.) *Kent* v. *Pratt*, 73 Conn. 573, 578–79, 48 A. 418 (1901).

"An implied dedication may arise by operation of law where the conduct of a property owner unequivocally manifests his intention to devote his property to a public

use; but no presumption of an intent to dedicate arises *unless it is clearly shown by the owner's acts and declarations, the only reasonable explanation of which is that a dedication was intended.*" (Emphasis added.) *A & H Corp.* v. *Bridgeport*, supra, 180 Conn. 439–40. "[M]ere permission on the part of the owner to the public to use the land as a way, without more, will not constitute an intention to dedicate, since a temporary right to use a private way is in the nature of a mere license, revocable at pleasure, and does not in any sense establish the requisite intent. Accordingly, mere permissive use of land as a street or the like, where the user is consistent with the assertion of ownership by the alleged dedicator, does not of itself constitute a dedication nor demonstrate a dedicatory intention." (Internal quotation marks omitted.) *Mihalczo* v. *Woodmont*, supra, 175 Conn. 543.

Against this backdrop of legal principles, we set forth the following additional facts found by the trial court relevant to River Junction's claim: Although an old road was labeled as Starr Road on numerous historical maps and was referenced in deeds conveying property bounding upon it, none of the deeds expressed the grantor's intent to dedicate the road for public use. The court stated: "Instead, references to Starr Road in the deeds and maps in evidence show [that] no more of Starr Road is a public road than the 0.15 mile shown on the town road maps, the town road list for state funding, and the Mastronardi-Spirito subdivision plan as 'end of town-maintained road.' Cartographers, be they amateur or professional, presumably map what is on the ground. What is on the ground at [the] time depicted on a map is no more dispositive of the legal status of a road than any other single fact." While finding that Starr Road became convenient as a boundary line, the court was unpersuaded that such evidence demonstrated dedication of the road as a public road, reasoning that "[c]onvenience as a boundary line is far from

the 'common convenience and necessity' for travel that is essential to acceptance by the general public. See *Meshberg* v. *Bridgeport City Trust Co.*, [180 Conn. 274, 282, 429 A.2d 865 (1980)]." The court also found that the evidence of an intention to dedicate based on actual use was not so cogent as to require an inference of dedication.

On the basis of its site visit of the disputed portion, the court explained that it "observed nothing from which dedication of the way as a public road could be inferred, let alone found to be manifest. The deterioration of the road—now in parts a stream bed—is not dispositive; that is to be expected of a very old road, the condition of which is more pertinent to nonuser and abandonment. What was absent in [the court's] view of the site was evidence that Starr Road was ever created to be—i.e., manifestly dedicated as—a public road of useful, let alone convenient and necessary, width and slope." Furthermore, the court stated that it deemed the evidence against Starr Road having been dedicated to be of greater cumulative weight than River Junction's evidence. The court specifically noted (1) certain 1956 and 1958 Connecticut Department of Transportation maps that showed the disputed portion of Starr Road as "abandoned or impassible," (2) aerial photographs from 1934 and 1951 that showed "at most, a vestigial way, consistent with the court's observations on the site walk, through woods to the Rhode Island line—and connecting to no apparent highway or road," and (3) other maps in evidence, one undated and one from 1889, that did not show Starr Road at all. (Internal quotation marks omitted.)

In support of its claim that the trial court erred in failing to find an implied dedication of the disputed portion to public use, River Junction contends that, in contravention of established precedent, the court rejected the probative value of Starr Road's appearance

in historical maps and its reference as a boundary in various deeds, as testified to by River Junction's expert witness, Attorney Elton Harvey. We emphasize at this juncture that the court did not reject any evidence of this nature as a matter of law. Rather, the court placed little weight on such evidence.

The cases on which River Junction relies for this claim are *Guthrie* v. *New Haven*, 31 Conn. 308 (1863), in which it was not disputed that the road at issue was a public highway by virtue of dedication and acceptance; id., 309 (preliminary statement of facts and procedural history); and *Mihalczo* v. *Woodmont*, supra, 175 Conn. 535, which similarly lends River Junction no support. In *Mihalczo*, a seawall-walkway was located across the plaintiff's property, which was bounded to the south by Long Island Sound. *Mihalczo* v. *Woodmont*, supra, 536–38. The walkway had existed for approximately fifty years prior to the plaintiff's purchase of the property and was used by the general public. Id., 537. The plaintiff erected a gate across the walkway to restrict the general public's access, and the defendant constable subsequently removed the gate. Id. Following the commencement of the action, the trial court granted a permanent injunction in favor of the plaintiff to enjoin the defendants from interfering with the plaintiff's right to the property, from which the defendants appealed. Id., 535. On appeal, the defendants claimed, in part, that the plaintiff and her predecessors in title had impliedly dedicated to the general public a right-of-way over the seawall-walkway by virtue of the property owners' acquiescence to its use over a long period of time and the fact that the borough of Woodmont had maintained and repaired the seawall on several occasions without complaint from the owners. Id., 541. Our Supreme Court disagreed, concluding that mere acquiescence by the property owners to the use of the walkway by some members of the public did "not conclusively establish

its dedication to the borough for public use." Id., 543. Indeed, the court held that "mere permissive use of land as a street or the like, where the user is consistent with the assertion of ownership by the alleged dedicator, does not of itself constitute a dedication nor demonstrate a dedicatory intention. . . . The facts found as to the use of the seawall-walkway, and acts and conduct of the landowners with regard to it, are not such as to require an inference as a matter of law of an intention to dedicate it as a public right-of-way." (Citations omitted; internal quotation marks omitted.) Id. Simply put, neither *Guthrie* nor *Mihalczo* stands for the proposition that the fact that a named road appears on historical maps or as a descriptive boundary in property deeds is dispositive or entitled to any more weight than any other factual consideration in determining whether an owner has manifested an intent to dedicate property to public use.

Here, the record readily supports, and we leave undisturbed, the court's determination that the numerous historical references on which River Junction relied did not compel "the conclusion that . . . an unidentified owner of the land under Starr Road manifested his or her intent to dedicate the road for public use." The court properly acknowledged that evidence of prolonged use of a road as a public highway may be so cogent that dedication may be presumed. See 11A E. McQuillin, Municipal Corporations (3d Ed. Rev. 2009) § 33:33, p. 549 ("where the public has used the land for a public purpose for a *long time with the knowledge of the owner and without objection from the owner*, an intent to dedicate will generally be *presumed*" (emphasis added)); see also *Kent* v. *Pratt*, supra, 73 Conn. 578–79. The court found, however, and we agree, that such evidence of public use was lacking in the present case.[9]

[9] For example, there was some evidence that hikers and hunters would access trails and hunting areas in the Bucks Hill Management Area by way of the disputed portion, as well as evidence of occasional off-road

Because the court was left without evidence that clearly shows that the historical owners of the disputed portion unequivocally intended to dedicate it to public use, the court was not required to presume dedication as a matter of law. See *A & H Corp.* v. *Bridgeport*, supra, 180 Conn. 440.

Finally, River Junction contends that the trial court's finding that Starr Road's appearance in multiple deeds as a boundary or reference point did not demonstrate a manifested intention to dedicate ignores the fact that Starr Road was the only means of access for the plaintiffs, River Junction, and their predecessors in title. River Junction suggests in this regard that it would be "reasonable to conclude that the failure to restrict passage to others was sufficient dedication by the grantors to each grantee." In support of this argument, River Junction relies on *Collins* v. *Prentice*, 15 Conn. 38 (1842), and *Francini* v. *Goodspeed Airport, LLC*, 164 Conn. App. 279, 134 A.3d 1278 (2016), aff'd, 327 Conn. 431, 174 A.3d 779 (2018), neither of which discusses the common-law doctrine of dedication and acceptance of a public highway. Rather, *Collins* involved an alleged private right-of-way by necessity. *Collins* v. *Prentice*, supra, 43. *Francini* involved, as a matter of first impression, whether an easement by necessity may be granted for the purpose of accessing utility services. *Francini* v. *Goodspeed Airport, LLC*, supra, 164 Conn. App. 280. Whether an easement by necessity, which River Junction has not claimed here, should be recognized would

recreational vehicle use. That use, however, even if credited by the trial court, was not of the nature and quality to require an inference of dedicatory intent. We also iterate that permissive use alone does not establish dedicatory intent; see *Mihalczo* v. *Woodmont*, supra, 175 Conn. 543; and such occasional public use was too remote in time to require an inference of dedication in the early 1800s. The same holds true for the evidence of the municipal actions on which River Junction relies, including the town's clearing trees on, and paving of, the first approximately 0.15 miles of Starr Road, as well as the town's issuance of driveway and building permits along the disputed portion, sometime after 1978.

require a distinct analysis from whether particular land has been dedicated to public use.[10] In short, River Junction's argument that Starr Road necessarily is a public highway because the River Junction property otherwise would remain a landlocked parcel is without merit.

In sum, on the basis of our comprehensive review of the record, we conclude that "the facts found as to the use of the [disputed portion], and the acts and conduct of the owners with regard to it, are not such as to require an inference as a matter of law of an intention to dedicate it to public use as a highway. Whether or not an inference of intention to dedicate should be drawn from these facts was a question of fact for the trial court and it has found that there was no such dedication. With this conclusion we cannot interfere." *LaChappelle* v. *Jewett City*, 121 Conn. 381, 388, 185 A. 175 (1936).

The judgment is affirmed.

In this opinion the other judges concurred.

2772 BPR, LLC *v.* PLANNING & ZONING COMMISSION OF THE TOWN OF NORTH BRANFORD (AC 42866)

Prescott, Suarez and Vitale, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant planning and zoning commission denying its application to build a facility to be used for the bulk storage of propane on certain of its real property

[10] Accord *Francini* v. *Goodspeed Airport, LLC*, 327 Conn. 431, 437, 174 A.3d 779 (2018) ("[i]n the context of easements by necessity for access to a landlocked parcel, this court's precedent directs us to engage in a three-pronged analysis, considering (1) the cost of obtaining enjoyment from, or access to, the property by means of the easement in relation to the cost of other substitutes, (2) the intent of the parties concerning the use of the property at the time of severance, and (3) the beneficial enjoyment the parties can obtain from their respective properties with and without the easement").

located in an industrial district. The zoning regulations included as a permitted use the bulk storage of propane in this industrial district. The plaintiff's site development plan application met the required site plan requirements and all applicable zoning regulations. The commission held a public hearing at which town residents testified about their concerns regarding the application, specifically about potential safety hazards in the event of an emergency, the location of the facility at the end of a dead-end street which would potentially limit the ability of emergency services to access the area, and potential diminishing property values as a result of the facility being located near their homes. The commission thereafter denied the plaintiff's application. On appeal, the trial court affirmed the commission's decision, concluding that the commission properly had considered off-site traffic concerns, the preparedness of municipal services in an emergency, and the potential impact of property values when reviewing the plaintiff's site plan development application. The plaintiff, on the granting of certification, appealed to this court. *Held* that the trial court erroneously concluded that the commission properly considered off-site factors when it denied the plaintiff's site development plan application, and such error likely affected the judgment: the commission erred in its decision to deny the plaintiff's application on the basis that it did not adhere to regulations regarding the plan of conservation and development and concerns regarding property values, as the commission had amended its zoning regulations to permit the bulk storage of propane as of right in the industrial district in which the property was located and established a conclusive presumption that such use did not adversely affect the district, and the commission's decision reflected that it would have denied the site development plan application regardless of the plan's contents because it took issue with the use of the property as a place for bulk propane storage, even though the zoning regulations fully permitted that use; moreover, the commission erred in its consideration of traffic concerns because, although the commission was permitted to consider traffic concerns for certain limited, site-specific purposes, the record revealed that the commission's concerns were not limited to the site itself, and improperly encompassed the entire area, the commission did not consider alternatives to the planned entrances and exits to the property to increase emergency access that were presented at the public hearing, and, in amending its regulations to permit the bulk storage of propane, the commission was aware of the street's location and accessibility and considered those factors when making its decision to amend its regulations; accordingly, the judgment was reversed and the case was remanded with direction to the commission to approve the plaintiff's site development plan application.

Argued March 3—officially released September 14, 2021

Procedural History

Appeal from the decision of the defendant denying the plaintiff's application for site plan approval for certain of its real property, brought to the Superior Court in the judicial district of New Haven and tried to the court, *S. Richards*, *J.*; judgment denying the appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Jeffrey T. Beatty, with whom, on the brief, was *Megan C. Granfield*, for the appellant (plaintiff).

Barbara M. Schellenberg, for the appellee (defendant).

Opinion

SUAREZ, J. The plaintiff, 2772 BPR, LLC, appeals from the judgment of the trial court denying its appeal from the decision of the defendant, the Planning & Zoning Commission of the Town of North Branford (commission), in which the commission denied the plaintiff's site development plan application to build a facility to be used for the bulk storage of propane. On appeal, the plaintiff claims that the court erred by (1) upholding the commission's consideration of off-site traffic concerns, the preparedness of municipal services, and the potential impact on property values when conducting an administrative review of its site development plan application, and (2) raising independently a reason to deny the appeal that was not one of the bases for the commission's decision to deny the application. We agree with the plaintiff's first claim, and, accordingly, reverse the judgment of the trial court and remand the case with direction to render judgment sustaining the plaintiff's appeal and directing the commission to approve the plaintiff's site development plan application.[1]

[1] We do not reach the merits of the plaintiff's second claim because our conclusion with respect to its first claim is dispositive of the appeal. We note, however, that even if we were to reach the merits of this claim, the plaintiff readily would prevail.

The record reveals the following undisputed facts and procedural history relevant to the plaintiff's claims on appeal. The plaintiff is the contract purchaser of a parcel of land at 40 Ciro Road in North Branford (property). The property is located in an I-2 industrial district. See North Branford Zoning Regs., c. 232, art. II, § 21.1. On August 7, 2014, the commission amended the town's zoning regulations to include as a permitted use in that district the "[b]ulk storage of propane on parcels of land south of Route 80, east of Ciro Road and bounded on all sides at the time of application by similarly zoned properties." North Branford Zoning Regs., District—Map Code, Schedule A, Line C-23, p. 7. This use was coded as "S," which, pursuant to the zoning regulations, "means a use permitted in the district as a matter of right, subject to administrative approval of a site development plan by the [c]ommission in accordance with § 41 [of the zoning regulations]. . . ." North Branford Zoning Regs., c. 232, art. II, § 23.1. The amended regulations became effective on September 5, 2014. On that date, the plaintiff submitted a site

In its memorandum of decision dismissing the plaintiff's appeal, the court concluded, among other things, that the record contained substantial evidence that "the volunteer fire department lacked adequate preparedness capabilities in the event of an emergency in order to evacuate residents of Ciro Road . . . ." As we discuss in more detail later in this opinion, the commission stated three written grounds for denying the plaintiff's application. None of those grounds can reasonably be interpreted as implicating the "preparedness capabilities" of the fire department. The court, in opining on the preparedness of the fire department, improperly looked beyond the three written bases for the commission's decision. See *American Institute for Neuro-Integrative Development, Inc.* v. *Town Plan & Zoning Commission*, 189 Conn. App. 332, 336–37, 207 A.3d 1053 (2019) ("Where a zoning agency has stated its reasons for its actions, the court should determine *only* whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the authority was required to apply under the zoning regulations. . . . The principle that a court should confine its review to the reasons given by a zoning agency . . . applies where the agency has rendered a formal, official, collective statement of reasons for its action." (Emphasis added; internal quotation marks omitted.)).

development plan application to the commission in which it sought approval to construct on the property two 30,000 gallon propane storage tanks, a garage, a connector building, an office building, and canopies.[2] On October 2, 2014, the commission held a public hearing on the plaintiff's application. After hearing testimony from the plaintiff, the commission set aside the application pending review of the inland wetlands portion of the application. On January 17, 2017, with regard to the wetlands matter, the Department of Energy & Environmental Protection issued a final decision in favor of the plaintiff, which allowed it to proceed with its application before the commission. The commission continued the public hearing on the site development plan application on March 2, March 9, and March 16, 2017. During this period, on March 8, 2017, the plaintiff revised the site development plan.

The commission was provided with, among other documents, an "application referral notification" dated February 16, 2017, which was sent from Carey Duques, the town planner, to the heads of various town agencies and commissions. The document provided details about the application and its status before the commission. At the bottom of the document was a section titled "review comments," under which a handwritten comment dated February 27, 2017, stated that the application "meets required site plan requirements & all applicable zoning regulations."

Throughout the public hearing, the commission heard public comment from town residents who opposed the plan. These residents expressed concern about the potential safety hazards posed by a bulk propane storage facility in the event of an emergency, such as a leak, fire, or natural disaster. Residents pointed to the

[2] The plaintiff also included in the site development plan application a proposal to make site improvements associated with the proposed construction.

fact that the property is located at the end of a dead-end street, which would limit the ability of emergency services to respond to an incident there. Additionally, residents who lived near the property testified that they believed their property values would decrease if a propane storage facility was located near their homes.

Members of the commission also questioned the plaintiff and its representatives about their concerns, including accessibility to the site in the event of any emergency.[3] At the March 16, 2017 meeting,[4] Duques

[3] At the March 9, 2017 meeting, the following colloquy occurred between Commissioner Frances Lescovich and Robert Sonnichsen, the plaintiff's engineer:

"[Lescovich]: Oh. The other thing was on the site plan, the question came up and that would be for the architect. There's one . . . entrance and exit on Ciro Road, right?

"[Sonnichsen]: That's correct.

"[Lescovich]: Okay, so if Ciro Road has such a backup . . . where Cherry Hill is and a lot of the other companies and we don't have any other way of in and out, how would you suggest that this is safe?

"[Sonnichsen]: We've taken a look at the—one of the questions, and I know I'm not supposed to be answering the questions, but one of the questions that came up had to do with why there was not a traffic study done as part of our application, and we took a look at it, and I do have a response for that in my letter, and it was provided to us by our traffic consultant.

"[Lescovich]: But this is above a traffic study. This was the congestion on the road that the emergency facilities would have to get in and out of, and if the roads are so congested, how are they supposed to get in or out?

"[Sonnichsen]: Which road are you talking? On Ciro Road?

"[Lescovich]: Right.

"[Sonnichsen]: Ciro Road has a travel way that is approximately forty feet wide. That's [a] very wide industrial road. And normal driveways are around the area of twenty-four feet. So it has a substantial amount of area along the sides, which should still leave adequate travel way down the middle. You could have cars or trucks parked on either side of the road, and you still would be able to get up and down Ciro Road."

[4] We use the term "meeting" to refer to the public meetings that took place before the commission, spanning from when the plaintiff submitted the site development plan application to when the commission denied the application. The meetings were open to the public and the commission heard public comment. Together, the meetings comprise a single "public hearing" on the application.

read into the record her correspondences with town officials regarding questions raised at the March 9, 2017 meeting. Among these correspondences was a letter from Lieutenant James Lovelace of the North Branford Police Department, which stated: "The existing . . . traffic on Ciro Road has not impacted North Branford Police when responding to any emergency incident. We have responded to businesses on Ciro Road for many different types of emergencies and have not had any difficulty responding to incidents during the day or night; therefore, I do not feel that we would have any difficulty responding to any type of incident on 40 Ciro Road. . . . In researching our records, I have only located two parking complaints dating back to 2007. These parking complaints involved trailers up at the dead end of Ciro Road. If a parking issue needs to be addressed in front of these businesses, then that matter can be brought in front of the North Branford Police Commission to be investigated. We have not received any complaints in regards to any entrance issues at Ciro Road and Crossfield Road." Additionally, an e-mail from James Buck, the town's Emergency Management Director, provided an assessment of how evacuations would be conducted in the event of an incident. A portion of the e-mail stated: "Individuals located on Ciro Road and south of 40 Ciro Road currently have no direct roadway evacuation route available that does not pass near the incident location. Finding a way to utilize the town-owned land at the end of Ciro Road to provide safe access away from Ciro Road would be advisable."

On March 16, 2017, the commission voted three to two to deny the plaintiff's application. The commission, citing § 41.2 of the North Branford Zoning Regulations,[5]

[5] Section 41.2 of the North Branford Zoning Regulations provides general standards that "apply to all uses subject to approval of a site development plan by the [c]ommission . . . ."

stated in a written "final motion" that the site development plan did not meet the following criteria: (1) "The site plan is not in conformance with the [p]lan of [c]onservation and [d]evelopment"; (2) "Neighborhood, the proposed project is unable to protect property values of the neighborhood"; and (3) "Access, Ciro Road is a [dead-end] street which limits access both in and out of the area during an emergency . . . ." On March 30, 2017, notice of the commission's decision was published in The Sound.[6]

On April 10, 2017, the plaintiff, pursuant to General Statutes § 8-8 (b), timely appealed the denial of the site development plan application to the Superior Court. The plaintiff claimed that the commission acted "arbitrarily, illegally, in an abuse of discretion and unlawfully" when it denied the site development plan application for the reasons stated in its written motion. In its brief to the court, the plaintiff stated: "Because the proposed use was permitted as of right, concerns about conformance with the plan of conservation and development, property values and access were conclusively presumed to have been considered at the time of the applicable zoning regulations permitting the proposed use were adopted by the commission. As a result, the commission was precluded from basing its decision upon the reasons it gave for its decision." The plaintiff further stated: "Even if the law provided otherwise, the record before the commission at the time it rendered its decision does not support its conclusion."

In response, the commission, in its brief, relied on *Friedman* v. *Planning & Zoning Commission*, 222 Conn. 262, 608 A.2d 1178 (1992), which the commission contended "stands for the proposition that [the] designation of a use as permitted does not preclude inquiry

[6] In its application to appeal the commission's decision to the Superior Court, the plaintiff alleged that The Sound is "a newspaper having circulation in . . . North Branford . . . ."

into specific matters set forth in applicable [zoning] regulations." According to the commission, it "properly applied the . . . zoning regulations . . . to determine that the plaintiff's application must be denied because it failed to comply with the regulations," and that "the record amply support[ed] the reasons cited by the commission in support of its denial."

Following an August 20, 2018 hearing, the court denied the plaintiff's appeal, concluding that the commission properly denied the plaintiff's application. In its memorandum of decision dated December 18, 2018, the court stated that it "agree[d] with the [commission's] interpretation of the *Friedman* holding in addition to its understanding of the fact that its regulation[s] require such an undertaking, under the circumstances presented here, in this case." The court went on to state: "The court, in examining the entire return of record, disagrees with the plaintiff's contention that it does not support the commission's decision. The record shows that the subject property is located on a dead-end street with traffic that flows in one direction either way. It further indicates that the volunteer fire department lacked adequate preparedness capabilities in the event of an emergency in order to evacuate residents of Ciro Road and that there was testimony by lay members of the public who testified about their concerns regarding the potential impact such use of the property would have on the property values. The court is not persuaded that the law requires an expert witness to present an opinion as [to] valuation under these facts as there was no specialized knowledge or training necessary to opine about the potential impact the potential use of the subject property would have on property values."

Subsequently, the plaintiff filed a petition for certification to appeal pursuant to § 8-8 (o) and Practice Book § 81-1, which this court granted. Additional facts and procedural history will be set forth as necessary.

The plaintiff claims that the court erred by upholding the commission's consideration of off-site traffic concerns, the preparedness of municipal services, and the potential impact on property values when conducting an administrative review of its site development plan application.[7] Specifically, the plaintiff argues that the court misinterpreted *Friedman* in concluding that the case allowed the commission to consider off-site factors when reviewing the site development plan application. The commission argues, as it did before the court below, that *Friedman* controls the present case, and reiterates that "*Friedman* stands for the proposition that [the] designation of a use as permitted does not preclude inquiry into specific matters set forth in applicable [zoning] regulations." We agree with the plaintiff.

We begin by setting forth the standard of review. We view the plaintiff's claim as one challenging a legal conclusion of the court. "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Villages, LLC* v. *Planning & Zoning Commission*, 149 Conn. App. 448, 456, 89 A.3d 405 (2014), appeal dismissed, 320 Conn. 89, 127 A.3d 998 (2015).

General Statutes § 8-3 (g) (1) provides in relevant part: "The zoning regulations may require that a site plan be filed with the commission . . . to aid in determining the conformity of a proposed building, use or structure with specific provisions of such regulations. . . . A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning . . . regulations. . . ."

[7] As previously stated, the commission listed as a ground for denying the application that "[t]he site plan is not in conformance with the [p]lan of [c]onservation and [d]evelopment . . . ." Accordingly, we interpret the plaintiff's claim as challenging that ground as well.

When reviewing a site development plan application for a use permitted as of right in a particular zone, "a planning commission . . . acts in an administrative capacity and may not reject an application that complies with the relevant regulations." *Pansy Road, LLC* v. *Town Plan & Zoning Commission*, 283 Conn. 369, 375, 926 A.2d 1029 (2007) (*Pansy Road*). In other words, "[w]hen [a planning commission] undertakes consideration of a site plan application, it has no independent discretion beyond determining whether the plan complies with the site plan regulations and applicable zoning regulations incorporated into the site plan regulations by reference." *Borden* v. *Planning & Zoning Commission*, 58 Conn. App. 399, 408, 755 A.2d 224, cert. denied, 254 Conn. 921, 759 A.2d 1023 (2000).

Before examining the applicability of the holding in *Friedman* to the present case, it is first necessary to discuss two cases that came before it. In *Beit Havurah* v. *Zoning Board of Appeals*, 177 Conn. 440, 443, 418 A.2d 82 (1979), our Supreme Court stated that "[t]he designation of a particular use of property as a permitted use establishes a *conclusive presumption* that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district." (Emphasis added.) This principle was reaffirmed in *TLC Development, Inc.* v. *Planning & Zoning Commission*, 215 Conn. 527, 577 A.2d 288 (1990) (*TLC*). In *TLC*, a plaintiff sought site plan approval for a shopping center in a zone in which such use was permitted as of right. Id., 528. After a public hearing, the defendant planning and zoning commission denied the application, citing concerns about, among other things, "increased traffic on Route 1" and "increased traffic on local streets in the vicinity . . . ." Id., 528–29. The trial court sustained the plaintiff's appeal challenging that denial, concluding that the defendant "lacked the

authority to consider [off-site] traffic impact when determining whether to approve or deny the plaintiff's site plan application." Id., 529. Our Supreme Court affirmed the trial court's judgment, stating that "the language of the Branford zoning regulations [did] not permit [off-site] traffic considerations to serve as the basis for denying a site plan application . . . ."[8] Id. In addition to examining the town's zoning regulations, the court relied on the conclusive presumption set forth in *Beit Havurah*. Id., 532–33. The court stated that "the commission's decision was inconsistent with the fact that the plaintiff's application was for site plan approval of a use that concededly was already *fully permitted* under the Branford zoning regulations." (Emphasis added.) Id., 532.

In *Friedman*, our Supreme Court addressed its holdings in *Beit Havurah* and *TLC* and clarified when a planning and zoning commission is permitted to consider the traffic consequences of a proposed use that is permitted as of right. In that case, the plaintiffs applied for approval of a site plan to construct a three-story office building in Rocky Hill. *Friedman* v. *Planning & Zoning Commission*, supra, 222 Conn. 263. The property was located within a commercial zone; id., 263; in which an office building was a permitted use " 'subject to [s]ite [p]lan [a]pproval in accordance with [§] 9.4 [of the Rocky Hill Zoning Regulations].' " Id., 266. Section 9.46 of the zoning regulations was entitled

[8] Branford's zoning regulations contained a section entitled "Site Plan Standards," which provided that the defendant "may require such modifications of the proposed plans as it deems necessary . . . to assure the accomplishment" of certain "general objectives" such as traffic circulation. (Internal quotation marks omitted.) *TLC Development, Inc.* v. *Planning & Zoning Commission*, supra, 215 Conn. 530. The text of this section "[made] it clear that the general objectives [were] to serve solely as the basis for requiring a modification of the proposed site plan . . . ." Id., 532. The defendant, however, impermissibly "used these general objectives as the basis for denying the application altogether." Id.

" 'Criteria for Approval,' " and " 'specifically require[d] a traffic study addressing the impact of the proposed development upon the street system in the area.' " (Emphasis omitted.) Id. The defendant planning and zoning commission denied the application for failing to comply with a number of applicable zoning regulations, and the plaintiffs appealed to the Superior Court. Id., 263–64. The court dismissed the appeal, "concluding that the plaintiffs' application had been incomplete in that it had not been accompanied by an appropriate, required traffic study." Id., 264.

On appeal to our Supreme Court, the plaintiffs claimed that the court "erred in concluding that the commission could even consider [off-site] traffic issues in determining their site plan application. Specifically, the plaintiffs argue[d] that since an office building was a permitted use in the zone in question, [the] holdings in *TLC* . . . and *Beit Havurah* . . . precluded the commission's consideration of *any* [off-site] traffic matters." (Emphasis added.) Id. Our Supreme Court disagreed, stating that neither *TLC* nor *Beit Havurah* "[preclude] an examination into the special traffic consequences of a given site plan *when the applicable zoning regulations permit it*." (Emphasis added.) Id., 266. The court stated that "§ 9.46 [of the Rocky Hill Zoning Regulations] [did] not deal with general matters such as the volume of traffic that might be generated by an office building, but rather with specific issues such as the placement of entrances and exits in order to disturb arterial traffic minimally and provisions to minimize the impact of traffic on nearby residential areas. It is reasonable to conclude that a commission regulation dealing with the placement of entrances and exits so as to minimize the disturbance of existing traffic flow could require, as a predicate, a traffic study concerning the existing streets so that both the applicant and the commission would know what volumes of traffic were

likely to be disturbed by the proposed use." Id., 267. Accordingly, the plaintiffs' failure to supply a traffic study provided "an adequate legal basis" for the planning and zoning commission's decision to deny the application. Id., 268.

We note that *Friedman* did not purport to overrule *Beit Havurah* or *TLC*. Former Judge Robert A. Fuller, in his treatise, reconciles the holdings of *TLC* and *Friedman*. Citing to *TLC*, he states that a planning and zoning commission "cannot turn down a site plan because of traffic problems on streets adjacent to the property." R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 49.18, pp. 153–54. He goes on to note: "There is a difference between considering the special traffic consequences of development under a particular site plan when the applicable zoning regulations permit it, to be certain that the location of exits and entrances to the property do not adversely affect traffic flow, in contrast with attempting to deny a permitted use because of existing off-site traffic volumes and patterns. The *Friedman* case should not be construed as overruling *TLC* . . . by implication or as adopting a different standard on this issue and can be considered on its facts to be limited to the proposition that a zoning commission can require a traffic study to make sure that the proposed exits and entrances to the property are safe." (Footnote omitted.) Id., pp. 154–55.

More recently, in *Pansy Road*, our Supreme Court reaffirmed the principle set forth in *Friedman* that when a landowner has submitted an application for a permitted use, the planning and zoning commission may consider off-site traffic conditions "only for the limited purpose of reviewing the internal traffic circulation on the site and determining whether the location of the proposed [roads and driveways] would minimize any negative impact of additional traffic to the existing traffic . . . ." *Pansy Road, LLC* v. *Town Plan & Zoning*

Commission, supra, 283 Conn. 380; see also *American Institute for Neuro-Integrative Development, Inc.* v. *Town Plan & Zoning Commission*, 189 Conn. App. 332, 342, 207 A.3d 1053 (2019). In *Pansy Road*, a developer proposed to subdivide land on Pansy Road, a public street in Fairfield, into five lots, and to construct a single-family home on each lot. *Pansy Road, LLC v. Town Plan & Zoning Commission*, supra, 371. The developer planned to build a cul-de-sac named Pansy Circle, to which each lot would have direct access, which would intersect with Pansy Road. Id. The town's planning and zoning commission, citing concerns about existing off-site traffic congestion on Pansy Road, voted unanimously to deny the application. Id., 372–73. The plaintiff appealed the denial of its application, and the trial court dismissed the appeal. Id., 370–71. Our Supreme Court reversed the trial court's decision and concluded that the town's planning and zoning commission "did not consider the existing traffic congestion on Pansy Road for the proper limited, site-specific purpose of addressing traffic flow within the site and entering and exiting the site." Id., 380. The court further stated that "[t]he record reveals no consideration by the defendant of alternate locations for the intersection of Pansy Circle and Pansy Road or other similar, properly limited considerations." Id. In reaching that conclusion, our Supreme Court also quoted from Fuller's treatise for its analysis of *Friedman*. Id.; see R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (3d Ed. 2007) § 49.14, p. 140.

Turning to the present case, the commission, in reviewing the site development plan application, was acting in an administrative capacity that limited its discretion such that it properly could determine only whether the plan complied with the applicable site plan and zoning regulations. The commission stated three grounds for denying the plaintiff's site development

plan application. We first address the commission's conclusions that "[t]he site plan [was] not in conformance with the [p]lan of [c]onservation and [d]evelopment," and that "the proposed plan is unable to protect property values of the neighborhood . . . ." In reaching these two conclusions, the commission relied on §§ 41.2.1 and 41.2.2 of the North Branford Zoning Regulations, which address the plan of conservation and development and concerns about property values, respectively. Section 41.2.1 provides in relevant part: "The site development plan shall be in conformance with the purpose and intent of any plan of development . . . adopted by the [c]ommission and pertaining to the area in which the use is to be located, particularly in regard to but not limited to . . . the provision of streets . . . the setback, bulk and appearance of buildings and other structures; and . . . the provision and location of landscaping features."[9] North Branford Zoning Regs., c. 232, art. IV, § 41.2.1. Section 41.2.2 provides: "The use of land, buildings, and other structures, the location and bulk of buildings and other structures and the development of the lot shall be of a character as to harmonize with the neighborhood, to accomplish a transition in character between areas of unlike character, to protect property values and to preserve and enhance the appearance and beauty of the community." North Branford Zoning Regs., c. 232, art. IV, § 41.2.2.

We reject the commission's argument that *Friedman* permitted it to rely on these criteria to deny the plaintiff's application merely because these criteria are included in the applicable zoning regulations. A conclusive presumption is one "that cannot be overcome by

[9] We note that the commission summarily stated that the site development plan application was not in conformance with the plan of conservation and development without specifying the provisions with which the application failed to comply. Accordingly, we are unable to ascertain which facts support this conclusion.

any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute." Black's Law Dictionary (11th Ed. 2019) p. 1435. The conclusive presumption first set forth in *Beit Havurah* lists traffic, municipal services, property values, and the general harmony of the district as categories into which zoning commissions are not permitted to inquire once the commission has permitted a particular use as of right. *Beit Havurah* v. *Zoning Board of Appeals*, supra, 177 Conn. 443.

As we previously have noted, approximately one month prior to the plaintiff's submission of its site development plan application, the commission amended the zoning regulations to permit the bulk storage of propane as of right in the I-2 industrial district in which the property is located. Doing so established a conclusive presumption that this use did not adversely affect the district. In making its decision, the commission presumably had determined that the use was in conformance with the plan of conservation and development and would not negatively impact property values. Otherwise, it would not have included such a specific use in the regulations.

The holding in *Friedman* is limited to site specific concerns that are related to a permitted use. Under *Friedman*, the commission properly could consider, for example, the placement and location of buildings on the property in order to minimize adverse effects on property values. The commission's decision, however, reflects that it would have denied the site development plan application regardless of the plan's contents because it took issue with *the use* of the property as a place for bulk propane storage, even though the zoning regulations fully permitted that use. Accordingly, §§ 41.2.1 and 41.2.2 of the North Branford Zoning Regulations could not serve as bases for denying the plaintiff's site development plan application.

We next address the commission's decision to consider emergency access to the area in rejecting the site development plan application. The commission cited § 41.2.3 of the North Branford Zoning Regulations in concluding that "Ciro Road is a [dead-end] street which limits access both in and out of the area during an emergency . . . ." Section 41.2.3 is entitled "Access," and provides in relevant part: "Provision shall be made for vehicular access to the lot in such a manner as to safeguard against hazards to traffic and pedestrians in the street and on the lot and to avoid traffic congestion on any street. . . ." North Branford Zoning Regs., c. 232, art. IV, § 41.2.3. This section goes on to list criteria with which a site development plan must comply.[10]

Although the conclusive presumption established in *Beit Havurah* was triggered when the commission permitted this use as of right, the commission was permitted to consider traffic concerns for the limited, site-specific purposes set forth in *Friedman* and its progeny.

[10] Section 41.2.3 provides in relevant part that "[a]ccess shall also conform to the following:

"a. Where reasonable alternate access is available, the vehicular access to the lot shall be arranged to avoid traffic use of existing local residential streets situated in or bordered by [r]esidence [d]istricts.

"b. The street giving access to the lot shall have traffic carrying capacity and shall have suitable paving and other improvements to accommodate the traffic generated by the proposed use as well as other existing traffic on the street.

"c. Provision shall be made for turning lanes and traffic controls within the street as may be necessary to provide safe access and avoid traffic congestion.

"d. Access driveways shall be of a design and have sufficient capacity to avoid back up of entering vehicles within any street.

"e. Driveways into the lot shall not exceed a grade of 8 % and shall conform to [t]own [o]rdinances or regulations of the State of Connecticut as applicable. Driveways connecting to a street shall not exceed a width of 30 feet unless a greater width is required by the [t]own [o]rdinance, the [c]ommission, or the State of Connecticut.

"f. Unless otherwise approved by the [c]ommission, there shall be no more than one (1) driveway entering any lot from any one street, except that there may be one (1) additional driveway for each 300 feet of lot frontage in excess of 150 feet." North Branford Zoning Regs., c. 232, art. IV, § 41.2.3.

Our review of the record reveals that the commission's traffic concerns were not limited to the site itself, but rather encompassed the entire area.

We first note that the present case is distinguishable from *Friedman*. Unlike in *Friedman*, there is no indication that the plaintiff's application was incomplete or that the applicable zoning regulations required the plaintiff to submit a traffic study. Rather, as Duques stated in her February 16, 2017 memorandum, the application "[met] required site plan requirements & all applicable zoning regulations." Furthermore, in *Friedman*, the commission only considered internal traffic on the property and the means of ingress to and egress from the property onto the public road. *Friedman* v. *Planning & Zoning Commission*, supra, 222 Conn. 267–68. In contrast, in the present case, the commission considered access in and out of the *area* of Ciro Road, which is broader than the site itself. In other words, the commission considered traffic on Ciro Road as a whole and access to the entire street, as well as in neighboring areas. Thus, the commission's concerns were not site specific, and, instead, presumably also applied to other properties on Ciro Road. Cf. *Pansy Road, LLC* v. *Town Plan & Zoning Commission*, supra, 283 Conn. 379 ("the consideration of the traffic study in *Friedman* was limited to site-specific issues such as internal traffic circulation within the site and the location of exits and entrances").

Furthermore, as in *Pansy Road, LLC* v. *Town Plan & Zoning Commission*, supra, 283 Conn. 380, the record in the present case reveals that the commission did not consider alternatives to the planned entrances and exits to the property. For example, there was evidence presented that town owned land is located at the end of Ciro Road, and it was suggested that there might exist a way to utilize this land to provide safe access for

evacuations in the event of an emergency. The commission did not inquire as to this possibility.

The commission's concern about the dead-end nature of Ciro Road as a whole belies its prior decision to amend its zoning regulations to permit the bulk storage of propane as of right on *every* property on Ciro Road that is located within the I-2 industrial district. The commission likely would have had similar concerns about emergency accessibility if, for example, the application pertained to a neighboring property on Ciro Road. Yet, § 23.1 of the North Branford Zoning Regulations, which the commission amended to permit this use as of right, *specifically* refers to Ciro Road as a means of specifying where in the I-2 district this use would be permitted. This fact suggests that the commission was aware of the street's location and accessibility when it amended the zoning regulations, and considered these factors when making its decision. The commission could not then walk back this decision once it received an application to use a property on Ciro Road in this manner.

Accordingly, we conclude that the court erred in its application of *Friedman*, and erroneously concluded that the commission properly considered off-site factors when it denied the plaintiff's site development plan application. The plaintiff has demonstrated that the error likely affected the judgment. We conclude that the proper remedy is to remand the case to the trial court with direction to render judgment sustaining the plaintiff's appeal and directing the commission to approve the plaintiff's site plan application.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal and directing the commission to approve the plaintiff's site development plan application.

In this opinion the other judges concurred.

HIGH WATCH RECOVERY CENTER, INC. *v.* DEPARTMENT OF PUBLIC HEALTH ET AL.

(AC 43546)

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

Syllabus

The plaintiff, a substance abuse treatment facility in Kent, appealed from the judgment of the trial court dismissing its administrative appeal from the final decision of the defendant Department of Public Health approving the application of the defendant B Co. for a certificate of need to establish a substance abuse treatment facility in Kent. B Co. submitted its application to the Office of Health Care Access pursuant to statute ((Rev. to 2017) § 19a-638 (a) (1)). The OHCA sent a notice to B Co. stating that it would hold a hearing and that the notice was issued pursuant to a statute ((Rev. to 2017) § 19a-639a (f) (2)), which provides that the OHCA "may" hold a public hearing with respect to any certificate of need application. The plaintiff filed a notice of appearance with the OHCA and submitted a letter requesting to be designated as an intervenor with full rights to participate in the proceeding. The OHCA granted the plaintiff's request and held a hearing on the application. B Co. and the department entered into an agreement in which B Co.'s application was approved subject to specific conditions, which constituted the final order. The plaintiff appealed to the Superior Court, claiming that the department abused its discretion when it approved B Co.'s application. The defendants filed motions to dismiss on the grounds that there was a lack of a final decision in a contested case and that the plaintiff was not aggrieved by the department's decision. The trial court granted the defendants' motions to dismiss on the ground that there was no final decision in a contested case from which the plaintiff could appeal, and concluded, therefore, that it did not have subject matter jurisdiction to consider the plaintiff's appeal. *Held*:

1. The trial court did not err in granting the defendants' motions to dismiss: nothing in the other subsections of § 19a-639a indicates that the legislature intended for the word "may" in § 19a-639a (f) (2) to be interpreted in any other way except as to confer discretion, and, thus, a hearing was not statutorily required on B Co.'s application; thus, the mere opportunity for a hearing, coupled with the holding of a hearing, in the absence of a specific statute or regulation under which the hearing was required to be held, was insufficient to constitute a contested case; moreover, the plaintiff's argument that a mandatory hearing was held because a hearing officer stated at the beginning of the hearing that the proceeding was being conducted as a contested case failed because the hearing officer could not have converted the proceeding into a contested case

by her words alone, especially when the notice plainly stated that it was being issued pursuant to § 19a-639a (f) (2), and, because that statute does not mandate a hearing, the requirements for a contested case were not met under the applicable provision (§ 4-166 (4)) of the Uniform Administrative Procedure Act, and, therefore, there was no final decision from which the plaintiff could have appealed.

2. The plaintiff could not prevail on its claim that the trial court erred in concluding that a letter written by the plaintiff to the OHCA requesting to intervene was insufficient to constitute a request for a public hearing pursuant to statute ((Rev. to 2017) § 19a-639a (e)): although § 19a-639a (e) does not explicitly delineate what the content of the written request for a hearing must include, the plain language of that statute requires that a request be made, in writing, that a public hearing be held on the certificate of need application, and the plaintiff's letter did not make such a request; instead, the plaintiff requested only to intervene and to participate with full rights in the scheduled hearing; moreover, even if the plaintiff's letter could have been construed as a request for a hearing, the requirements of § 19a-639e (e) still would not have been met because, although the plaintiff argued that its letter should be liberally construed, there was nothing in the letter from which this court could infer that the plaintiff met the numerical requirements of § 19a-639a (e).

Argued May 12—officially released September 14, 2021

Procedural History

Appeal by the plaintiff from the decision of the named defendant approving the application of the defendant Birch Hill Recovery Center, LLC, for a certificate of need to establish a substance abuse treatment facility, brought to the Superior Court in the judicial district of New Britain, where the court, *Cohn*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Proloy K. Das, with whom were *Paul E. Knag* and *Emily McDonough Souza*, for the appellant (plaintiff).

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

Jeffrey J. Mirman, with whom, on the brief, was *Alexa T. Millinger*, for the appellee (defendant Birch Hill Recovery Center, LLC).

Opinion

HARPER, J. The plaintiff, High Watch Recovery Center, Inc., appeals from the judgment of the Superior Court dismissing its administrative appeal from the final decision of the defendant Department of Public Health (department) approving the application of the defendant Birch Hill Recovery Center, LLC (Birch Hill), for a certificate of need to establish a substance abuse treatment facility in Kent.[1] On appeal, the plaintiff claims that the court erred in (1) granting the defendants' motions to dismiss after concluding that it lacked subject matter jurisdiction to review the department's approval of Birch Hill's certificate of need application and (2) concluding that a letter written by the plaintiff to the Office of Health Care Access (OHCA) requesting to intervene in the matter concerning Birch Hill's application was insufficient to constitute a request for a public hearing for purposes of General Statutes (Rev. to 2017) § 19a-639a (e).[2] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history, as found by the court or as undisputed in the record, are relevant to this appeal. The plaintiff is a nonprofit substance abuse treatment facility located in Kent. Birch Hill is a Connecticut limited liability company that was formed in 2017. In an effort to establish a substance abuse

[1] The plaintiff also named the department's Office of Health Strategy (OHS) as a defendant in this action. The plaintiff alleged that the OHS was included in its appeal because its executive director "is empowered to . . . exercise independent authority" on all certificate of need applications deemed completed by the Office of Health Care Access. (Internal quotation marks omitted.) In this opinion, we refer to the department, the OHS, and Birch Hill collectively as the defendants and individually by name when necessary.

[2] In this opinion, our references to § 19a-639a (e) are to the 2017 revision of the statute.

treatment facility for the "care of substance abusive or dependent persons located in Kent," Birch Hill submitted a certificate of need application to the OHCA[3] on September 20, 2017, pursuant to General Statutes (Rev. to 2017) § 19a-638 (a) (1).[4] In a letter dated March 6, 2018, the OHCA sent a notice to Birch Hill regarding its application stating that, "[p]ursuant to . . . § 19a-639a (e),[5] [the] OHCA shall hold a hearing upon receiving a properly filed request from the requisite number of members of the public. This hearing notice is being issued pursuant to General Statutes [Rev. to 2017] § 19a-639a (f) (2) . . . ."[6] (Footnote added; internal quotation

[3] Pursuant to General Statutes (Rev. to 2017) § 19a-612d, the deputy commissioner of public health was responsible for directing and overseeing the OHCA at the time that Birch Hill submitted its certificate of need application. Pursuant to No. 18-91, § 1, of the 2018 Public Acts, which became effective May 14, 2018, the statutes pertaining to the OHS were amended to create a Health Systems Planning Unit, in lieu of the OHCA. Thus, when the final order concerning Birch Hill's application for a certificate of need was issued, the OHS was responsible for directing and overseeing the Health Systems Planning Unit and the OHCA was no longer in existence. In this opinion, however, in the interest of simplicity, we refer to the OHCA, instead of the Health Systems Planning Unit, because the OHCA was repeatedly referenced in the record of the underlying proceedings and is referred to by the parties in their appellate briefs.

[4] General Statutes (Rev. to 2017) § 19a-638 (a) provides in relevant part: "A certificate of need issued by the [OHCA] shall be required for: (1) The establishment of a new health care facility . . . ." Our references in this opinion to § 19a-638 (a) are to the 2017 revision of the statute.

[5] General Statutes (Rev. to 2017) § 19a-639a (e) provides in relevant part: "Except as provided in this subsection, the [OHCA] shall hold a public hearing on a properly filed and completed certificate of need application if three or more individuals or an individual representing an entity with five or more people submits a request, in writing, that a public hearing be held on the application. . . . Any request for a public hearing shall be made to the [OHCA] not later than thirty days after the date the [OHCA] determines the application to be complete."

[6] General Statutes (Rev. to 2017) § 19a-639a (f) (2) provides: "The [OHCA] may hold a public hearing with respect to any certificate of need application submitted under this chapter. The [OHCA] shall provide not less than two weeks' advance notice to the applicant, in writing, and to the public by publication in a newspaper having a substantial circulation in the area served by the health care facility or provider. In conducting its activities under this chapter, the [OHCA] may hold hearing[s] on applications of a similar nature at the same time." Our references in this opinion to § 19a-639a (f) (2) are to the 2017 revision of the statute.

marks omitted.) The letter also included a copy of a notice that was to be published in the Waterbury Republican-American newspaper on March 8, 2018, which advised that "[a]ny person who wishe[d] to request status in the . . . public hearing may file a written petition no later than March 23, 2018 . . . pursuant to [§§ 19a-9-26 and 19a-9-27 of] the Regulations of Connecticut State Agencies . . . . If the request for status is granted, such person shall be designated as a [p]arty, an [i]ntervenor or an [i]nformal participant in the . . . proceeding."[7] Thereafter, on March 22, 2018, the plaintiff filed a notice of appearance with the OHCA and also submitted a letter requesting to be designated as an intervenor with full rights, including the right of cross-examination.[8] On March 23, 2018, the OHCA granted the plaintiff's request to intervene pursuant to

[7] Section 19a-9-26 of the Regulations of Connecticut State Agencies concerns the designation of parties to a hearing for a contested case or in actions for declaratory rulings. Section 19a-9-27 of the Regulations of Connecticut State Agencies sets forth the procedures for the designation as an intervenor in a contested case or a declaratory ruling hearing.

[8] The plaintiff's letter requesting to intervene stated in relevant part that it was petitioning the OHCA "to receive intervenor status, with full procedural rights, so that the [i]ntervenor may present its opposition to the . . . [c]ertificate of [n]eed [a]pplication . . . that is to be heard at the public hearing scheduled to commence on March 28, 2018 . . . .

"The [i]ntervenor is a private, [nonprofit], freestanding facility . . . . The [i]ntervenor proposes to participate in the hearing and to present oral and written testimony and evidence establishing grounds for denial of the . . . [certificate of need] [a]pplication. . . .

"The [i]ntervenor's participation in the hearing with full procedural rights will assist [the] OHCA in resolving the issues of the pending contested case, will be in the interest of justice, and will not impair the orderly conduct of the proceedings.

"In addition, the [i]ntervenor respectfully petitions and seeks the right to cross-examine [Birch Hill] and any of its witnesses, experts or other persons submitting oral or written testimony in support of the . . . [certificate of need] [a]pplication at the hearing . . . . As you know, this is a disputed [a]pplication, such that cross-examination will help clarify the pertinent issues and will assist in bringing out all the facts so as to provide for a fully informed decision on the [certificate of need] [a]pplication.

"The undersigned will serve as the contact person for the [i]ntervenor with respect to this matter . . . ."

General Statutes § 4-177a, which sets forth the procedural requirements for conferring intervenor status in contested cases, and directed the plaintiff to submit its prefiled testimony by March 26, 2018.[9] On March 26, 2018, the plaintiff submitted the prefiled testimony of Jerry Schwab, the plaintiff's president and chief executive officer, and Gerald D. Shulman, a deputy editor of the third edition of a textbook published by the American Society of Addiction Medicine. See D. Mee-Lee et al., The ASAM Criteria: Treatment Criteria for Addictive, Substance-Related and Co-Occurring Conditions (3d Ed. 2013).

On March 28, 2018, the OHCA held a public hearing on Birch Hill's application, which was conducted by hearing officer Attorney Micheala Mitchell.[10] At the

[9] General Statutes § 4-177a provides in relevant part: "(a) The presiding officer shall grant a person status as a party in a contested case if that officer finds that: (1) Such person has submitted a written petition to the agency and mailed copies to all parties, at least five days before the date of hearing; and (2) the petition states facts that demonstrate that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency's decision in the contested case.

"(b) The presiding officer may grant any person status as an intervenor in a contested case if that officer finds that: (1) Such person has submitted a written petition to the agency and mailed copies to all parties, at least five days before the date of hearing; and (2) the petition states facts that demonstrate that the petitioner's participation is in the interests of justice and will not impair the orderly conduct of the proceedings. . . .

"(d) If a petition is granted pursuant to subsection (b) of this section, the presiding officer may limit the intervenor's participation to designated issues in which the intervenor has a particular interest as demonstrated by the petition and shall define the intervenor's rights to inspect and copy records, physical evidence, papers and documents, to introduce evidence, and to argue and cross-examine on those issues. The presiding officer may further restrict the participation of an intervenor in the proceedings, including the rights to inspect and copy records, to introduce evidence and to cross-examine, so as to promote the orderly conduct of the proceedings."

[10] We note that, at the time of the March 28, 2018 hearing, the plaintiff still had two days to request a mandatory hearing pursuant to § 19a-639a (e). See General Statutes (Rev. to 2017) § 19a-639a (e) ("[a]ny request for a public hearing shall be made to the [OHCA] not later than thirty days after the date the [OHCA] determines the application to be complete"). Birch Hill's application was deemed complete by the OHCA on March 1, 2018.

beginning of the hearing, Mitchell stated that the hearing was being held "pursuant to . . . [§ 19a-639a], and [would] be conducted as a contested case, in accordance with the provisions of chapter 54 of the Connecticut General Statutes," which contains the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. The hearing was then continued until May 10, 2018, when the OHCA held a second public hearing on Birch Hill's application, which was conducted by hearing officer Attorney Kevin T. Hansted. On November 6, 2018, on the basis of the testimony and evidence presented, Hansted recommended in a proposed final decision that Birch Hill's application to establish a psychiatric outpatient clinic and facility in Kent be denied. Birch Hill thereafter filed a brief in opposition to the proposed final decision and requested oral argument. In March, 2019, after oral argument was conducted and briefs were filed, Birch Hill and the department entered into an agreement in which Birch Hill's application was approved subject to the specific conditions set forth in the agreement. The agreement constituted the final order.

The plaintiff then appealed from the department's final order to the Superior Court pursuant to General Statutes § 4-183, naming the department, Birch Hill, and the OHS as defendants.[11] The plaintiff claimed that the department had abused its discretion and authority when it approved Birch Hill's application. On June 17, 2019, the defendants filed motions to dismiss the plaintiff's complaint on the grounds that there was a lack of a final decision in a contested case, and the plaintiff was not aggrieved by the department's decision. In its motion to dismiss, Birch Hill argued that the plaintiff

[11] General Statutes § 4-183 (a) provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

had not appealed from a final decision in a contested case. Specifically, Birch Hill relied on our Supreme Court's decision in *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156, 164–65, 172–81, 927 A.2d 793 (2007), in which the court articulated that, pursuant to § 4-166 (2)[12] of the UAPA, a contested case does not arise if an agency merely holds a gratuitous hearing and is not required by state statute or regulation to hold a hearing. The department and the OHS made essentially the same argument as to the lack of an appealable final decision. As to the issue of aggrievement, Birch Hill argued that the plaintiff was not aggrieved because the basis of its aggrievement was that it would be impacted negatively by having Birch Hill as a competitor, and precedent from our Supreme Court has established that competition, without more, is insufficient to establish aggrievement. The department and the OHS argued that the plaintiff was not aggrieved because the plaintiff did not fall within the zone of interests covered by § 19a-638 (a).

In its opposition to the defendants' motions to dismiss, the plaintiff argued that Birch Hill's certificate of need proceeding constituted a contested case because it satisfied the three-pronged test articulated by our Supreme Court in *Herman* v. *Division of Special Revenue*, 193 Conn. 379, 382, 477 A.2d 119 (1984). The plaintiff argued that it met the contested case test under the applicable provisions of the UAPA because "there [was] a legal right or privilege at issue by virtue of Birch Hill having filed the [a]pplication . . . that legal right or privilege is statutorily required to be determined by the applicable state agency [pursuant to § 19a-639a (d)] . . . [and] [§] 19a-639a (e) provides an opportunity for

[12] Following the decision in *Middlebury* v. *Dept. of Environmental Protection*, supra, 283 Conn. 156, § 4-166 was amended, and the term "[c]ontested case" is now defined in subsection (4), instead of subsection (2), of § 4-166. See Public Acts 2014, No. 14-187, § 1.

a statutorily required hearing." In essence, the plaintiff argued that the court should consider all of the provisions under § 19a-639a to determine whether it had met the requirements of a contested case, not just § 19a-639a (f) (2). The plaintiff also claimed that, because the hearing was held as a contested case and the OHCA already had scheduled a hearing on the certificate of need application, the plaintiff's letter requesting intervenor status should be construed as meeting the requirements under § 19a-639a (e). As to aggrievement, the plaintiff asserted, inter alia, that it was aggrieved because it was in the zone of interest, as Birch Hill's proposed facility would have a "significant and detrimental impact not only on the statewide health care delivery system generally, but on [the plaintiff] specifically."

A hearing on the defendants' motions to dismiss was held on August 7, 2019. During that hearing, counsel for the department and the OHS asserted that the reason Mitchell conducted the certificate of need hearing as a contested case was "because [Mitchell] [did not] know if in two days [she was] going to [receive] a petition . . . [requesting a hearing]. And [Mitchell] wouldn't want to run a proceeding that's not compliant [on] the first day with [the department's] contested case rules [of procedure and] . . . have to start [the proceedings] over. . . . [I]t's [particularly] . . . appropriate, when [there is] something that allows a subsequent—a change from a gratuitous to a mandatory hearing. [So] [t]hat you comply with [the department's rules of procedure for contested cases]—you use contested case proceedings. . . . In addition, the contested case proceedings meet due process, or exceed due process requirements. So the agency's making sure by merely . . . utilizing [the department's rules of procedure for contested cases]. . . . So . . . the fact that they utilize . . . the contested case manner of operating, doesn't convert it

into a contested case. It's [particularly] . . . important to do so, because you don't know when something would change in these circumstances from a gratuitous to a mandatory hearing."

The court considered only the defendants' first ground for dismissal, namely, that there was no final decision in a contested case from which the plaintiff could appeal, and granted the defendants' motions to dismiss. In so ruling, the court expressly rejected the plaintiff's argument that, so long as the provisions of § 19a-639a, in general, provided an opportunity for a hearing, the contested case requirement was met. Moreover, the court reasoned that the hearing was held pursuant to § 19a-639a (f) (2), as provided in the hearing notice sent by the OHCA, and that statutory provision does not mandate a hearing but, rather, leaves the decision of whether to hold a hearing to the discretion of the administrative agency. The court also noted that the hearing notice stated that § 19a-639a (e) permitted an appropriate request to be filed, and noted that, "[u]nder § 19a-639a (e), a written request for a hearing would have to be filed by three or more individuals or by an individual representing an entity with five or more people," which would convert the discretionary hearing under § 19a-639a (f) (2) into a mandatory hearing. The court underscored the fact that the plaintiff's letter did not state that the plaintiff "was one of three individuals or that the individual [attorney] was representing an entity with five or more people." The court further observed that the plaintiff's letter requesting intervenor status made no reference to § 19a-639a (e), but focused only on asserting its intervenor status for the impending public hearing. Additionally, the plaintiff's letter did not request that the already scheduled public hearing be converted to a mandatory hearing. The court also disregarded Mitchell's statement at the beginning of the hearing on March 28, 2019, that the hearing was being held

as a contested case, because the plaintiff had failed to submit a petition under § 19a-639a (e). Thus, because the court concluded that the hearing was not a contested case under § 4-166 (4) of the UAPA, it determined that there was no final decision, as required by § 4-183 (a). Accordingly, the court concluded that it did not have subject matter jurisdiction to consider the plaintiff's administrative appeal.[13] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the plaintiff first claims that the court erred in granting the defendants' motions to dismiss after concluding that it lacked subject matter jurisdiction to hear the plaintiff's appeal. Specifically, the plaintiff contends that, because § 19a-639a provides an opportunity for a hearing and a hearing was in fact held, the requirements for a contested case pursuant to § 4-166 (4) were met, and, therefore, there was a final decision from which it could appeal. Stated differently, the plaintiff claims that, because "§ 4-166 (4), together with § 19[a]-639a, [provide] a party contesting a [certificate of need] application with the opportunity for a hearing," the legislature intended for "contested" certificate of need applications to be subject to judicial review. (Internal quotation marks omitted.) The plaintiff also claims that a mandatory hearing was held because the hearing officer deemed it a contested case at the beginning of the hearing and conducted the hearing in accordance with the department's rules of procedure for contested cases. In response, the defendants argue that, because the OHCA had stated in the hearing notice that the notice was being issued pursuant to

[13] The court did not address the defendants' contention that the plaintiff was not aggrieved.

§ 19a-639a (f) (2), under which a hearing is not mandatory, the requirements for a contested case were not met. We agree with the defendants.

"We first set forth our standard of review governing an appeal from a judgment granting a motion to dismiss on the ground of a lack of subject matter jurisdiction. A motion to dismiss properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide. . . . Our Supreme Court has determined that when ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Bailey* v. *Medical Examining Board for State Employee Disability Retirement*, 75 Conn. App. 215, 219, 815 A.2d 281 (2003). "Whether the plaintiffs have a statutory right to appeal from the decision of the department is a question of statutory interpretation over which our review is plenary. . . . Relevant legislation and precedent guide the process of statutory interpretation. General Statutes § 1-2z provides that, '[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous

and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.' " (Citation omitted.) *Middlebury* v. *Dept. of Environmental Protection*, supra, 283 Conn. 166

"It is well established that [t]here is no absolute right of appeal to the courts from the decision of an administrative agency. . . . The [UAPA] grants the Superior Court jurisdiction over appeals of agency decisions only in certain limited and well delineated circumstances. . . . *Lewis* v. *Gaming Policy Board*, 224 Conn. 693, 699–700, 620 A.2d 780 (1993). Specifically, a party may appeal to the Superior Court only from a final decision in a contested case as provided in §§ 4-183 and 4-166 [4][14] and [5].[15] . . . Section 4-166 [4] defines a contested case in relevant part as a proceeding . . . in which the legal rights, duties or privileges of a party are required by [state] statute [or regulation] to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held . . . .

"The test for determining contested case status has been well established and requires an inquiry into three criteria, to wit: (1) whether a legal right, duty or privilege is at issue, (2) and is statutorily required to be determined by the agency, (3) through an opportunity for hearing or in which a hearing is in fact held. *Herman* v. *Division of Special Revenue*, [supra, 193 Conn. 382]. . . . Under this test, if an agency is not statutorily required to hold a hearing, but nonetheless holds a hearing gratuitously, a contested case does not arise. See *New England Dairies, Inc.* v. *Commissioner of Agriculture*, 221 Conn. 422, 427–29, 604 A.2d 810 (1992)

[14] See footnote 12 of this opinion.

[15] At the time *Middlebury* was decided, the term "[f]inal decision" was defined in subsection (3) of § 4-166. Following amendments to the statute, it is now defined in subsection (5) of § 4-166. See Public Acts 2014, No. 14-187, § 1.

(no contested case when commissioner of agriculture held hearing on application for milk license, but was not required by statute to do so); *Herman* v. *Division of Special Revenue*, supra, 386–87 (no contested case when division of special revenue held hearing on request to reinstate patron at jai alai fronton, but was not required by statute to do so); *Taylor* v. *Robinson*, 171 Conn. 691, 696–97, 372 A.2d 102 (1976) (no contested case when board of parole held hearing on inmate's request for parole, but was not required by statute to do so) . . . ." (Citations omitted; footnotes added; internal quotation marks omitted.) *Middlebury* v. *Dept. of Environmental Protection*, supra, 283 Conn. 163–64.

Section 4-183 (a) of the UAPA provides in relevant part that "[a] person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court . . . ." Section 4-166 (5) defines a final decision in relevant part as an "agency determination in a contested case . . . a declaratory ruling issued by an agency pursuant to [§] 4-176, or . . . an agency decision made after reconsideration. . . ." As noted previously in this opinion, § 4-166 (4) defines a contested case in relevant part as "a proceeding . . . in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held . . . ."

In *Middlebury*, our Supreme Court construed the definition of a contested case to include a hearing required by state statute or regulation. See *Middlebury* v. *Dept. of Environmental Protection*, supra, 283 Conn. 175–76. The court in *Middlebury* also determined that a contested case does not arise simply because a hearing in fact was held, even though it was not required by state statute or regulation. See id. Moreover, our Supreme

Court has construed § 4-166 (4) "as manifesting a legislative intention to limit contested case status to proceedings in which an agency is required by statute to provide an opportunity for a hearing to determine a party's legal rights or privileges. . . . If a hearing is not statutorily mandated, even if one is gratuitously held, a contested case is not created. . . . Accordingly, if the [hearing officer] conducted the hearing gratuitously and not pursuant to a statutory entitlement to a hearing, the mere fact of the existence of the hearing, alone, would not entitle the applicant to an appeal." (Citations omitted; internal quotation marks omitted.) *Canterbury* v. *Rocque*, 78 Conn. App. 169, 175, 826 A.2d 1201 (2003),[16] quoting *Summit Hydropower Partnership* v. *Commissioner of Environmental Protection*, 226 Conn. 792, 800–801, 629 A.2d 367 (1993). *Middlebury* makes it clear that the threshold inquiry in determining whether a contested case is involved is whether a state statute or regulation requires the agency to provide an opportunity for a hearing to determine the legal rights, duties, or privileges of a party, or if a hearing that is held to determine such rights, duties, or privileges is *required* by state statute or regulation. See *Middlebury* v. *Dept. of Environmental Protection*, supra, 175–76. Moreover, this court has established that, "in order to constitute a contested case, a party to that hearing must have enjoyed a *statutory right* to have his legal rights, duties, or privileges determined by that agency holding the hearing. . . . [W]here no party to a hearing enjoys such a right, the Superior Court is without jurisdiction over any appeal from that agency's determination." (Emphasis added; internal quotation marks omitted.) *Canterbury* v. *Rocque*, supra, 175.

[16] We note that the court in *Canterbury* addressed the definition of a contested case in § 4-166 (2), which has been moved to subsection (4) of § 4-166. See *Canterbury* v. *Rocque*, supra, 78 Conn. App. 174; see also Public Acts 2014, No. 14-187, § 1.

In accordance with the foregoing principles, we first look to the language of the statute under which the hearing notice was issued, § 19a-639a (f) (2), to determine whether that statute requires the OHCA "to determine the legal rights, duties or privileges of a party after an opportunity for hearing or in which a hearing is in fact held . . . ." (Internal quotation marks omitted.) Id., 174. Section 19a-639a (f) (2) provides in relevant part that the OHCA "*may* hold a public hearing with respect to any certificate of need application submitted under this chapter. . . ." (Emphasis added.) "We first note that [t]o determine the intent of the legislature, we first consider whether the statutory language yields a plain and unambiguous resolution. . . . If the words are clear and unambiguous, it is assumed that [they] express the intention of the legislature. . . . The words of a statute must be interpreted according to their ordinary meaning unless their context dictates otherwise. . . . We further note that [i]n construing statutes, we must use common sense and must not interpret statutes to yield bizarre and irrational results." (Citation omitted; internal quotation marks omitted.) *Bona* v. *Freedom of Information Commission*, 44 Conn. App. 622, 632–33, 691 A.2d 1 (1997). The meaning of the statute's language in the present case "appears plain and does not appear amenable to other interpretations by reference to extrinsic sources."[17] *Canterbury* v. *Rocque*, supra, 78 Conn. App. 178.

"[T]he word may imports permissive conduct and the conferral of discretion. . . . Only when the context of legislation permits such interpretation and if the interpretation is necessary to make a legislative enactment effective to carry out its purposes, should the word may be interpreted as mandatory rather than directory." (Internal quotation marks omitted.) *Stone* v. *East Coast Swappers, LLC*, 337 Conn. 589, 601, A.3d

[17] There is no claim by either party that § 19a-639a (f) (2) is ambiguous.

(2020). Additionally, nothing in the other subsections of § 19a-639a indicates that the legislature intended for the word "may" to be interpreted in any other manner except as to confer discretion. For instance, § 19a-639a (c) (1) provides in relevant part that, "[n]ot later than thirty days after the date of filing of the application, the [OHCA] *may* request such additional information as the [OHCA] determines necessary to complete the application. . . ." (Emphasis added.) Moreover, § 19a-639a (d) provides in relevant part that "[u]pon request or for good cause shown, the [OHCA] *may* extend the review period for a period of time not to exceed sixty days. *If* the review period is extended, the [OHCA] shall issue a decision on the completed application prior to the expiration of the extended review period. . . . " (Emphasis added.); cf. *Stone* v. *East Swappers, LLC*, supra, 602 (court held that legislature intended for word "may" to be interpreted as mandatory in relevant statute in light of fact that legislature included words "may, in its discretion" in one subsection of statute but included only word "may" in another subsection of same statute, indicating that discretion was conferred only in subsection that included the words "may, in its discretion" (emphasis omitted; internal quotation marks omitted)). It is clear that the OHCA has discretion under § 19a-639a (f) (2) as to whether to hold a public hearing for a certificate of need application. Accordingly, in the present case, a hearing was not statutorily mandated on Birch Hill's application under § 19a-639a (f) (2). The plaintiff's contention that § 4-166 (4) requires only that there be an opportunity for a hearing under the statutory scheme of § 19a-639a in order to confer contested case status would yield absurd results because, in the case of certificate of need applications, all certificate of need hearings would be conferred contested case status simply by the nature of those proceedings, irrespective of whether the statutory provision under which the hearing is held or the opportunity for a hearing is provided

by the agency actually mandates a hearing. "The law favors a rational statutory construction and we presume that the legislature intended a sensible result." (Internal quotation marks omitted.) *Wiele* v. *Board of Assessment Appeals*, 119 Conn. App. 544, 551–52, 988 A.2d 889 (2010).

We also note that the plaintiff's interpretation of § 4-166 (4) would thwart the legislature's intent to require that there be a contested case before a right to judicial review is triggered. "[T]here is no [common-law] right to judicial review of administrative determinations. Judicial review of an administrative decision is a creature of statute." (Internal quotation marks omitted.) *Canterbury* v. *Rocque*, supra, 78 Conn. App. 174. According to the plaintiff, the requirements for a contested case are satisfied "whenever the [department] holds a hearing on a [certificate of need application] . . . ." If the plaintiff's position were correct, a right to judicial review of an agency decision would exist in every instance in which there was an opportunity for a hearing *and* a hearing was in fact held, which is contrary to our Supreme Court's determination that contested case status is limited to proceedings in which a hearing is mandated by state statute or regulation. See *Middlebury* v. *Dept. of Environmental Protection*, supra, 283 Conn. 175–76; see also id., 164–65 ("'[W]hen § 4-166 [4] is read as a whole, it is evident that the phrase "required by statute to be determined by an agency after an opportunity for hearing" cannot be divorced from the phrase "or in which a hearing is in fact held." If it were otherwise, every time an agency gratuitously conducted a hearing, a "contested case" would be spawned. Such an interpretation of § 4-166 [4] would chill, to the detriment of those [submitting a certificate of need application] . . . [to] the agency, the inclination of an agency to hold any type of an inquiry to gather information when it was not required

by statute to do so. We believe, consequently, that the phrase "or in which a hearing is in fact held" was not intended by the legislature to mean that if a hearing, *not required by statute*, is in fact held by agency dispensation, it will result in a contested case.' " (Emphasis added.)). We fail to see how a mere opportunity for a hearing, coupled with the holding of a hearing, in the absence of a specific statute or regulation under which the hearing is required to be held, are sufficient to constitute a contested case in light of *Summit Hydropower Partnership*, and the aforementioned cases cited in this opinion.[18] See *Summit Hydropower Partnership* v. *Commissioner of Environmental Protection*, supra, 226 Conn. 800 ("[W]e have determined that even in a case where a hearing is in fact held, in order to constitute a contested case, a party to that hearing must have enjoyed a statutory right to have his legal rights, duties, or privileges determined by that agency holding the hearing. . . . In the instance where no party to a hearing enjoys such a right, the Superior Court is without jurisdiction over any appeal from that agency's determination." (Internal quotation marks omitted.)). Accordingly, the plaintiff's contention in that regard fails.

[18] Furthermore, the use of the word "or" in § 4-166 (4) indicates that the legislature does not require that both an opportunity for a hearing be provided *and* for a hearing to be held; instead, the statute requires that a state statute or regulation mandate that the rights, duties or privileges of a party be determined after an opportunity for a hearing or when a hearing is actually held. "Our Supreme Court and this court have likewise construed, in the context of other statutes, the word 'or' to be disjunctive, synonymous with 'in the alternative.' See, e.g., *Giannitti* v. *Stamford*, 25 Conn. App. 67, 75–76, 593 A.2d 140 (declining to 'determine that the word "or" in the statute [at issue] should be read in the conjunctive as "and" rather than in the disjunctive . . .'), cert. denied, 220 Conn. 918, 597 A.2d 333 (1991); *State* v. *Breton*, 212 Conn. 258, 279, 562 A.2d 1060 (1989) ('[i]t is clear that by the use of the word "or," the legislature intended the separate terms in [the subsection of the statute at issue] to apply in the alternative')." *U.S. Bank National Assn.* v. *Karl*, 128 Conn. App. 805, 810 n.4, 18 A.3d 685, cert. denied, 302 Conn. 909, 23 A.3d 1249 (2011).

Likewise, the plaintiff's argument that a mandatory hearing was held because Mitchell stated at the beginning of the hearing that the proceeding was being conducted as a contested case fails, because "[a]lthough the ['hearing'] exhibited the characteristic elements of a hearing in that evidence was presented, witnesses were heard, and testimony was taken in an adversarial setting, the plaintiff has failed to demonstrate that the [agency] was statutorily required . . . [to hold a hearing on the certificate of need application]. Therefore, the proceeding, lacking the essential element of a 'right to be heard,' remained gratuitous . . . . Consequently, there was no contested case to which the provisions of the UAPA might apply." (Footnote omitted.) *Herman* v. *Division of Special Revenue*, supra, 193 Conn. 386–87. In the present case, the hearing officer could not have converted the proceeding into a contested case by her words alone, especially when the notice advised that the hearing was being held pursuant to § 19a-639a (f) (2).

The hearing notice in this case plainly stated that it was being issued pursuant to § 19a-639a (f) (2). As such, the plaintiff's argument that the requirements for a contested case under § 4-166 (4) are met simply because other provisions in § 19a-639a provide an opportunity for a hearing is untenable. Irrespective of whether the opportunity for a hearing was afforded and a hearing was in fact held, because the public hearing in the present case was held under § 19a-139a (f) (2), which does not mandate a hearing, the requirements for a contested case were not met under § 4-166 (4), and, therefore, there was no final decision from which the plaintiff could have appealed for purposes of § 4-183. Accordingly, the plaintiff's first claim fails.

II

The plaintiff next claims that the court erred by concluding that its March 22, 2018 letter setting forth its

request to intervene was insufficient to constitute a request for a public hearing for purposes of § 19a-639a (e). Specifically, the plaintiff claims that its letter should have been liberally construed because § 19a-639a (e) does not specify what is required in a written request for a hearing. Birch Hill, in response, contends that the plaintiff's letter did not conform to requirements under § 19a-639a (e) because the letter was merely a request for intervenor status, did not include a request for a hearing, made no mention of § 19a-639a (e), and did not meet the numerical requirement under § 19a-639a (e). Similarly, the department and the OHS contend, inter alia, that the language in the statute clearly demonstrates that the "legislature . . . intended [that] the written document expressly state a request for a public hearing," because doing so provides "notice to [the] OHCA that a mandatory public hearing is being sought by the requester" under § 19a-639a (e). We conclude that the court did not err in concluding that the plaintiff's letter requesting intervenor status was insufficient to satisfy the requirements under § 19a-639a (e).

We first set forth the applicable standard of review. Because we are addressing whether the plaintiff's letter requesting intervenor status complied with the requirements under § 19a-639a (e), our review is plenary. "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).

After the court determined that a contested case did not arise because the plaintiff had failed to establish that the hearing held was statutorily required under § 19a-639a (f) (2), the court noted that the plaintiff could have invoked a mandatory hearing by way of satisfying the requirements under § 19a-639a (e), as articulated in

the March 6, 2018 hearing notice. Section 19a-639a (e) provides in relevant part that "the [OHCA] *shall* hold a public hearing on a properly filed and completed certificate of need application if *three or more individuals or an individual representing an entity with five or more people submits a request, in writing*, that a public hearing be held on the application. . . ." (Emphasis added.) The court found that the plaintiff's letter did not satisfy the requirements under § 19a-639a (e) because the letter addressed only its request to intervene and "merely mentioned that the hearing had been set . . . ."

At the outset, we note that, although § 19a-639a (e) does not explicitly delineate what the content of the written request for a hearing must include, the plain language of the statute requires that a request be made "*in writing*, that a public hearing be held on the [certificate of need] application." (Emphasis added.) Notably, as stated previously in this opinion, the notice sent by the OHCA on March 6, 2018, stated that, "[p]ursuant to . . . § 19a-639a (e), [the] OHCA shall hold a hearing upon receiving a properly filed request from the requisite number of members of the public. This hearing notice is being issued pursuant to . . . § 19a-639a (f) (2)." Our review of the plaintiff's letter requesting intervenor status reveals that no such request was made; instead, the plaintiff requested only to intervene and *participate* with full rights in the hearing that the OHCA had already scheduled. See footnote 8 of this opinion. Additionally, the plaintiff titled its letter "Petition of [High Watch Recovery, Inc.] To Be Designated as an Intervenor With Full Rights Including [Cross-Examination]," which is simply language adopted from § 4-177a. See footnote 8 of this opinion. A request to intervene, such as the one that the plaintiff submitted, without additional language also indicating a request for a hearing, cannot be deemed to meet the requirements of § 19a-639a (e).

Even if the plaintiff's letter could be construed as a request for a hearing, the requirements of § 19a-639a (e) still would not have been met because the letter did not set forth the requisite number of individuals as required under the statute. When an individual is relying on a request to intervene to support a claim that the numerical requirement under § 19a-639a (e) has been satisfied, there must be some indication in that request that the entity the individual is representing consists of five or more people or that there are three or more individuals requesting a hearing. Otherwise, the agency would not be able to determine whether the numerical requirements under § 19a-639a (e) are met upon the filing of a petition to request a hearing.

The plaintiff contends that it met the numerical requirement because it is a seventy-eight bed, inpatient treatment center that is "regulated by its number of beds." The plaintiff claims that, on the date it filed its request to intervene, more than five of its beds were occupied. Moreover, the plaintiff asserts that it had a nineteen member executive staff, seven directors, and ninety-five employees on the date that it submitted its request to intervene. The plaintiff's argument concerning the numerical requirement is unavailing because the information regarding how many beds were occupied or the composition of the company was not included in the plaintiff's letter.[19] The only description of the plaintiff in the letter stated: "The [i]ntervenor is a private, [nonprofit], freestanding facility that is located . . . seven . . . miles away from the site of the proposed [f]acility. The [i]ntervenor is licensed by the [department] to provide several services including, those to treat substance abusive or dependent persons.

[19] We assume, without deciding, that the plaintiff's contention that the numerical requirement would be satisfied if an individual filed a request to intervene on behalf of a health facility that had at least five of its beds occupied is correct.

Such persons are the same service population that the proposed [f]acility intends to serve." The plaintiff merely provided a description of the facility in its request and the reasons it should be granted intervenor status, as well as its desire to *participate* in the already scheduled hearing. See footnote 8 of this opinion. The OHCA would not have been able to determine whether it needed to convert the proceedings into a contested proceeding by virtue of § 19a-639a (e), as provided in the hearing notice, without the plaintiff explicitly delineating in its letter how it met the requisite number of individuals under § 19a-639a (e).

If a request for intervenor status that makes no mention of any of the requirements under § 19a-639a (e) is granted and deemed to be sufficient to meet the standards set forth in § 19a-639a (e), then, in essence, the grant of intervenor status alone would be sufficient to convert a gratuitous hearing under § 19a-639a (f) (2) into a mandatory hearing under § 19a-639a (e). That result potentially would confer contested case status on every individual who is granted intervenor status in a proceeding conducted under § 19a-639a (f) (2), even when that individual does not explicitly request a hearing or does not set forth how it meets one of the numerical requirements.[20] Such a result would contravene the

[20] Without clear language in a letter requesting intervenor status that a hearing also is being requested and a showing that the requisite numerical requirement is met, the requirements of § 19a-639a (e) have not been satisfied. For a hearing officer to grant contested case status to an individual under such circumstances would be contrary to the statutory requirements and would, in essence, amount to conferring the right to an administrative appeal against the authority of the statute, which is not within the authority of a hearing officer to do. See *Middlebury* v. *Dept. of Environmental Protection*, supra, 283 Conn. 170 ("[T]he underlying purpose of the required by statute provision in § 4-166 [4] . . . rests on the desirability of ensuring that the legislature, rather than the agencies, has the primary and continuing role in deciding which class of proceedings should enjoy the full panoply of procedural protections afforded by the [UAPA] to contested cases, including the right to appellate review by the judiciary. Deciding which class of cases qualif[ies] for contested case status reflects an important matter of public policy and the primary responsibility for formulating public policy

legislature's intent of requiring, in most cases, that there be a sufficient showing of public interest before requiring that a hearing be held on a certificate of need application.[21] See 46 H.R. Proc., Pt. 6, 2003 Sess., pp. 1709–17, remarks of Representative Arthur J. Feltman (In instances when it is in the commissioner's discretion to have a hearing on a certificate of need, "[there is] . . . one case in which we do ask that the hearings be mandatory. In addition to whenever the public requests it, it's if the capital costs of a new improvement would exceed 20 million dollars or a new piece of equipment exceed a million dollars. . . . But in any case, if there is a public expression of interest, the public hearing will be held."); see also Report on Bills Favorably Reported by Committee, Public Health, House Bill No. 6452 (March 18, 2003) ("[t]his bill would allow for greater opportunity for the public to comment about certificates of need and requiring public hearings on them, *if requested by the public*" (emphasis added)).

Although the plaintiff argues that, if its letter is liberally construed, it meets the requirements under § 19a-639a (e), there is nothing in the letter from which we

must remain with the legislature." (Internal quotation marks omitted.)); see also *New England Rehabilitation Hospital of Hartford, Inc.* v. *CHHC*, 226 Conn. 105, 132–33, 627 A.2d 1257 (1993) ("[i]f designation as a party in an agency proceeding were construed to be the equivalent of the right to be a party in a judicial proceeding, an agency's presiding officer would be vested with the authority to decide not only who could appear before the agency and what rights they would have during that proceeding, but also who could challenge an adverse decision of the agency in court").

[21] The plaintiff concedes that the "hearing officer's statement alone cannot confer jurisdiction on this court" but posits that the hearing officer's statement is relevant because any person would conclude that he or she did not need to request a hearing on the basis of the fact that the hearing officer understood that the applicable statutes provided an opportunity for a public hearing, the plaintiff intervened after the OHCA declared that it was holding a public hearing, and "the [thirty day] time period to demand a public hearing had not yet run . . . when [the hearing officer] . . . opened the proceeding by announcing that it was a contested case." (Emphasis omitted.) We fail to see how the hearing officer's statement at the beginning of the hearing can override the requirements set forth by the legislature in § 19a-639a (e)

can infer that the plaintiff met the numerical requirement under the statute. As such, the court did not err in determining that the plaintiff's letter was insufficient to satisfy § 19a-639a (e). Accordingly, the plaintiff's second claim fails.[22]

The judgment is affirmed.

In this opinion the other judges concurred.

BRASS CITY LOCAL, CONNECTICUT ALLIANCE OF CITY POLICE *v.* CITY OF WATERBURY ET AL.
(AC 43328)

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

Syllabus

The plaintiff police union sought to vacate an arbitration award in its favor issued in connection with the defendant city's alleged breach of a collective bargaining agreement. Although the plaintiff had proposed a remedy for the violation of the agreement to include back pay and benefits, the arbitration panel did not include an award of damages. Initially, in a first memorandum of decision, the trial court determined that, although it could not vacate the arbitration award, the matter should be remanded to the arbitration panel for further proceedings because it appeared that the panel may have ignored important evidence in the record. Following a response and clarification from the panel, the trial court, in a second memorandum of decision, granted the plaintiff's motion to vacate the arbitration award, and the defendant appealed to this court. *Held* that the trial court erred by granting the plaintiff's motion to vacate the arbitration award: in light of the trial court's conclusions in its first memorandum of decision, that the conclusion of the panel to deny an award of damages was neither inconsistent with the plain language of the parties' agreement nor was it inconsistent with logic and reason to deny payment for work not performed, and its determination that the

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and confer contested status when an individual has not taken action to trigger a hearing under § 19a-639a (e).

[22] We do not find it necessary to address the alternative ground for dismissal raised by the department and the OHS, namely, that the plaintiff is not aggrieved, because we conclude that the court did not err in dismissing the plaintiff's appeal for lack of subject matter jurisdiction on the ground that there was no final decision from which the plaintiff could appeal.

panel did not violate clear public policy to warrant vacating the arbitration award, the panel's award was a mutual, final and definite award and there was no basis for the court to remand the matter for further consideration of the evidence or the legal questions involved; accordingly, the court should have denied the plaintiff's motion to vacate in light of the conclusions set forth in its first memorandum of decision.

Argued April 14—officially released September 14, 2021

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Waterbury, where the matter was tried to the court, *M. Taylor*, *J.*; judgment granting the application to vacate, from which the defendant appealed to this court. *Reversed*; *judgment directed*.

Daniel J. Foster, corporation counsel, for the appellant (named defendant).

Marshall T. Segar, for the appellee (plaintiff).

Opinion

ALVORD, J. This appeal arises out of an action by the plaintiff, the Brass City Local, Connecticut Alliance of City Police, in which a three member panel of the State Board of Mediation and Arbitration (panel) rendered an arbitration award in favor of the plaintiff. The plaintiff filed a motion to vacate the arbitration award, which was granted by the trial court. The defendant city of Waterbury[1] appeals from the judgment of the trial court vacating the arbitration award. On appeal, the defendant claims that the trial court erred in granting the plaintiff's motion to vacate the arbitration award. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

[1] The State Board of Mediation and Arbitration was also named as a defendant in the underlying action but is not participating in this appeal. All references to the defendant in this opinion are to the city of Waterbury.

The following facts and procedural history are relevant to this appeal. The plaintiff and the defendant entered into a collective bargaining agreement (agreement). Article III § 2 (b) of the agreement authorized the superintendent of police to make vacancy appointments of eligible persons "to positions on an acting basis, due to the non-existence of a civil service promotional list . . . for a period no longer than nine (9) months." Subsection (b) of § 2 further provided that the defendant "may allow a person to continue in such a position for more than nine (9) months only if all eligible persons have already held the position for nine (9) months or have refused assignment to the position after it has been offered."

On May 16, 2016, the plaintiff filed a class action grievance alleging that the defendant had violated Article III § 2 (b) of the agreement on the ground that it failed to replace police officers holding acting basis appointments after nine months of service. Specifically, the grievance stated that "[t]here are several employees filling acting positions in excess of nine months . . . [in] violation of [Article III § 2 (b) of the agreement] between the [defendant] and the [plaintiff]." The defendant denied the grievance. Pursuant to the grievance procedures set forth in the agreement, the matter was submitted to the panel. The agreement provided that the authority of the panel as arbitrators was "limited to the interpretation and application of the provisions" of the agreement and that the panel did not have "authority to add to, or subtract from, or otherwise modify" the agreement. The issue submitted to the panel was: "Did the [defendant] violate Article III § 2 (b) of the [agreement] when [it] failed to appoint acting positions for less than [nine] months and if so, what shall the remedy be?"

On February 28, 2017, the parties were heard and presented evidence before the panel.[2] Thereafter, at the request of the panel, the parties submitted posthearing briefs proposing remedies for the alleged violation of the agreement. In its July 31, 2017 posthearing brief, the plaintiff proposed the remedy of "back pay and benefits for those members affected [by the defendant's alleged violation of the agreement] on or after May 16, 2016, and not before." In its July 31, 2017 posthearing brief, the defendant proposed that, "if the grievance were sustained, it would be appropriate to order [it] (1) to cease and desist from the practice of maintaining persons in acting positions for more than nine months; and (2) to provide the [plaintiff] with written evidence of its cessation of this practice, including the names of all persons who held acting positions for longer than nine months, the positions held, and the beginning and end dates of their service in an acting capacity. . . . However, awarding back pay to all persons who, by reason of rank alone, would have been eligible to apply for the open budgeted positions would constitute a total payment to [the plaintiff's] members far in excess of the total that those members could actually have earned in acting positions." Ultimately, the defendant maintained that, "even if the grievance were sustained, any financial remedy would be an unwarranted punitive penalty and would constitute an improper windfall to the [plaintiff] and its members."

On September 5, 2017, the panel sustained the plaintiff's grievance. Specifically, the panel decided: "The [defendant] did violate Article III [§] 2 (b) of the collective bargaining agreement when it failed to appoint acting positions for less than nine months. The [defendant] is ordered to stop the practice of maintaining persons in acting basis positions for more than nine

[2] On July 6, 2017, the panel denied the defendant's motion to open the arbitration hearing to present additional evidence.

months consistent with the terms of Article III [§] 2 (b). The [defendant] is further ordered to provide the [plaintiff] with written evidence that its practice has ended, including the names of all persons who have held acting basis positions for longer than nine months, the positions held, and the beginning and end dates of their service in an acting capacity." The panel found that "[a]n award of [monetary] damages is inappropriate."[3]

On October 4, 2017, the plaintiff filed in the Superior Court a one count complaint and a motion to vacate the arbitration award. The plaintiff's complaint alleged that the panel had "exceeded [its] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made" in violation of General Statutes § 52-418 (a) (4).[4] Specifically, the plaintiff maintained that "the . . . panel issued [its] award which chose a nonfinancial remedy stating that the privilege of working in a higher classification was the reward in this case." The plaintiff further maintained that "[t]he award issued by the panel . . . did not address the gravamen of the grievance filed or evidence presented as remedy was not being sought for those who acted in a higher pay class but rather those that did not." Accordingly, the plaintiff requested that the arbitration award be vacated. The defendant filed an objection to the plaintiff's motion to vacate the arbitration award, in which it disagreed with the plaintiff's

[3] Specifically, the panel found that "[a] prospective order of relief without back pay will enable those serving on an acting basis to gain both the desired experience and also the additional compensation for acting service for nine months. Relief representing more than nine months of acting service is a modification of the contract prohibited by [the agreement]."

[4] General Statues § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects . . . (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

characterization of the arbitration award and argued that the panel "did decide the issues presented to them, they just didn't give the plaintiff the remedy it desired."

Thereafter, the parties submitted additional briefing in support of their respective positions. The plaintiff maintained that a financial remedy was appropriate because the agreement expressly provides: "When an employee performs, with the authorization of the Chief/Superintendent or his or her designee, a substantial portion of the duties of a higher classification for a day, or a major portion thereof, he or she shall receive a normal day's pay for the higher classification." The defendant responded that this provision of the agreement was inapplicable because "[w]hat the plaintiff is seeking . . . is not increased pay for officers who performed the duties of a higher classification . . . [but] increased pay for all officers who did not perform the duties of a higher classification . . . but were eligible to do so." (Emphasis added.) With respect to determining the applicable standard of judicial review of the panel's decision, the plaintiff argued that the submission to the panel was restricted and, thus, the panel's decision was subject to de novo review.[5]

In a February 27, 2019 memorandum of decision, the court, *M. Taylor*, *J.*, first concluded that the submission to arbitration was unrestricted because "there was no agreement in the submission of the parties to restrict the scope of the remedy imposed by the [panel]." As such, the court recognized three grounds for vacating an arbitration award, as set forth by our Supreme Court in *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 94, 868 A.2d 47 (2005): "(1) the award rules on the constitutionality of

[5] See *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 81, 881 A.2d 139 (2005) ("[t]he determination by a court of whether the submission was restricted or unrestricted tells the court what its scope of review is regarding the arbitrators' decision" (internal quotation marks omitted)).

a statute . . . (2) the award violates clear public policy . . . [and] (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Internal quotation marks omitted.) The court further noted that § 52-418 (a) (4) provides that an arbitration award shall be vacated if "the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." General Statutes § 52-418 (a) (4). The court then proceeded to consider the plaintiff's arguments that the second and third grounds for vacating an arbitration award apply.

With respect to the third ground for vacating an arbitration award pertaining to the statutory proscriptions of § 52-418, the court stated that it "[could not] determine that the decision of the [panel] . . . manifests an egregious or patently irrational application of the law [and] is an award that should be set aside pursuant to § 52-418 (a) (4)." (Internal quotation marks omitted.) Specifically, the court determined that "the conclusion of the panel to deny an award of damages was neither inconsistent with the plain language of the [agreement] nor was it inconsistent with logic and reason for it to deny payment for work not performed . . . ." With respect to the second ground for vacating an arbitration award pertaining to public policy, the court concluded that "ignoring relevant evidence should not form the basis of a violation of public policy." Specifically, the court stated that it "[could not] identify case law that would suggest that ignoring evidence in the record, absent misconduct, forms the basis for vacating an arbitration award."

Notwithstanding these conclusions, however, the court remanded the matter to the panel for further proceedings. The court determined: "It appears that the panel

in this matter may have ignored important evidence[6] in the record leading the panel to a conclusion that was, ostensibly, disassociated from its stated rationale and it, therefore, may have reached a different conclusion. Although the conclusion of the panel to deny an award of damages was neither inconsistent with the plain language of the [agreement] nor was it inconsistent with logic and reason for it to deny payment for work not performed, the panel's rationale is either not fully explained or, alternatively, is inconsistent with the facts in the record." (Footnote added.) Accordingly, the court remanded the decision to the panel for clarification of the following questions: (1) "Did the panel take into consideration the fact that the [defendant] had reestablished the promotions list and, therefore, the rotation of acting positions for nine months pursuant to Article III § 2 (b) had ended at the time of its award?"; (2) "If the answer to question number [one] is yes, would the panel explain in greater detail its rationale for denying damages?"; And (3) "If the answer to question number [one] is no, would consideration of this fact have changed the conclusion of the panel in denying damages?"

On April 12, 2019, the panel issued a response. With respect to the first and third questions posed by the court, the panel stated that it "did not take into consideration the fact that the [defendant] had reestablished the promotions list and, therefore, the rotation of acting

[6] The court noted that, "[v]ery importantly, during the period between the [plaintiff's] filing of its posthearing brief and the decision of the panel, a civil service promotional list was generated and police officer promotions were made by the [defendant] on a permanent basis, thereby eliminating the need to appoint acting personnel pursuant to [Article III] § 2 (b) of the [agreement]. In doing so, the first part of the [plaintiff's] recommended remedy became moot. The only remedy remaining was the [plaintiff's] request for back pay and benefits for eligible officers who were not placed into the nine month promotion rotations by the [defendant], in order to make them whole."

positions for nine months pursuant to Article III § 2 (b) had ended at the time of the award.[7] Consideration of this fact would have resulted in an award making all eligible employees whole due to the failure to replace those holding acting basis positions." (Footnote added.) Following the panel's response to the court's order, the parties submitted supplemental briefing on the motion to vacate the arbitration award.

In an August 7, 2019 memorandum of decision, the court reversed its earlier decision with respect to the third ground for vacating an arbitration award and agreed with the plaintiff that the arbitration award was "so imperfectly executed that a mutual, final and definite award upon the subject matter was not made," in violation of § 52-418 (a) (4). Specifically, the court concluded that "[t]he remedy provided by the panel is a nullity because it presupposed a remedy that no longer existed. Importantly, had it been aware of the fact that the promotions list had been reinstituted, it would have provided a far different and substantive remedy than the one improvidently imposed." Accordingly, the court granted the plaintiff's motion to vacate the arbitration award. This appeal followed.

On appeal, the defendant claims that the court erred by granting the plaintiff's motion to vacate the arbitration award. In light of the court's determination that (1) the submission to arbitration was unrestricted, (2) the panel's award was not illogical or inconsistent with the plain language of the agreement, and (3) the panel did not violate clear public policy to warrant vacating the arbitration award, the defendant argues that "controlling law required that the motion to vacate the award be denied" and that "further inquiry [on remand] was neither required nor permitted . . . ." We agree with the defendant.

[7] The panel clarified that it "was not made aware that appointment had become moot" despite the plaintiff's claims to the contrary.

We first set forth our standard of review. "The well established general rule is that [w]hen the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . Furthermore, in applying this general rule of deference to an arbitrator's award, [e]very reasonable presumption and intendment will be made in favor of the [arbitral] award and of the arbitrators' acts and proceedings. . . .

"When the parties have agreed to a procedure and have delineated the authority of the arbitrator, they must be bound by those limits. . . . An application to vacate or correct an award should be granted where an arbitrator has exceeded his power. In deciding whether an arbitrator has exceeded his power, we need only examine the submission and the award to determine whether the award conforms to the submission. . . .

"A challenge of the arbitrator's authority is limited to a comparison of the award to the submission. . . . Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that the construction placed upon the facts or the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved.

. . . The party challenging the award bears the burden of producing evidence sufficient to demonstrate a violation of § 52-418." (Citations omitted; internal quotation marks omitted.). *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 114–15, 779 A.2d 737 (2001).

The issue submitted to the panel was: "Did the [defendant] violate Article III § 2 (b) of the [agreement] when [it] failed to appoint acting positions for less than [nine] months and if so, *what shall the remedy be*?" (Emphasis added.) With respect to the appropriate remedy, the panel determined that "[a]n award of [monetary] damages is inappropriate" and, instead, ordered the defendant to discontinue the improper practice and to provide the plaintiff with evidence of its discontinuation. This award conforms to the submission. Thus, it is clear that the panel did not exceed its authority. *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 258 Conn. 115.

In its February 27, 2019 memorandum of decision, the court specifically determined that "the conclusion of the panel to deny an award of damages was neither inconsistent with the plain language of the [agreement] nor was it inconsistent with logic and reason for it to deny payment for work not performed . . . ." Moreover, the court determined that the panel did not violate clear public policy to warrant vacating the arbitration award. In light of these conclusions, with which we agree, applying the general rule of deference to an arbitrator's award, and making every reasonable presumption and intendment in favor of the arbitral award and of the panel's acts and proceedings, we conclude that the court erred when it thereafter granted the plaintiff's motion to vacate the arbitration award. The panel's award was a mutual, final and definite award and there was no basis for the court to remand the matter for

further consideration of the evidence or the legal questions involved. See *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 258 Conn. 115. Rather, the court should have denied the plaintiff's motion in light of the conclusions set forth in its February 27, 2019 memorandum of decision.

The judgment is reversed and the case is remanded with direction to deny the plaintiff's motion to vacate the arbitration award.

In this opinion the other judges concurred.

IN RE PROBATE APPEAL OF DOUGLAS MCINTYRE
(AC 43751)

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

Syllabus

The plaintiff, individually and as custodian of an account created for the benefit of his son, D, pursuant to the Connecticut Uniform Transfers to Minors Act (§ 45a-557 et seq.), appealed to the trial court from the decree of the Probate Court removing him as the custodian of the account and naming the defendant, the plaintiff's former wife and D's mother, as the successor custodian. Prior to the dissolution of the parties' marriage, the plaintiff withdrew funds from D's UTMA account and deposited them into a transfer on death account, which the plaintiff owned and which named D as the primary beneficiary. The plaintiff also withdrew funds from a UTMA account naming another one of the parties' sons, R, as the beneficiary and, with those funds and certain other funds that he contributed, established two additional transfer on death accounts, which the plaintiff owned and which named R and the parties' third son, respectively, as beneficiaries. Acting on the advice of counsel, the plaintiff thereafter withdrew funds from each of the transfer on death accounts to pay personal legal expenses relating to the parties' postdissolution proceedings. The defendant filed a petition in Probate Court requesting that the funds the plaintiff removed from D's UTMA account be restored, that the plaintiff be removed as the custodian of the account, and that the defendant be appointed as the successor custodian. The Probate Court decreed that the plaintiff be removed as the custodian of the account and that the defendant be named as the successor custodian. The defendant also filed a separate petition with respect to R's UTMA account and the Probate Court rendered a similar

decree. The plaintiff appealed to the trial court only from the decree relating to D's UTMA account. The trial court affirmed the decree of the Probate Court to remove the plaintiff as custodian of D's UTMA account and further ordered that the defendant should continue as the successor custodian for the accounts benefitting all three of the parties' children. On the plaintiff's appeal to this court, *held*:

1. The trial court lacked subject matter jurisdiction to make its orders relating to the custodial arrangements for the UTMA accounts that were created for the benefit of R and the parties' third son: because the plaintiff appealed to the trial court only from the decree of the Probate Court that related to D's UTMA account, in determining that the plaintiff be removed as custodian and that the defendant be allowed to continue as custodian for the UTMA accounts for the benefit of the parties' other two children, the trial court considered issues that were beyond the scope of the decree of the Probate Court from which the plaintiff appealed.
2. The trial court improperly placed the burden of proof on the plaintiff to demonstrate that his removal as custodian was not warranted: pursuant to *Cadle Co.* v. *D'Addario* (268 Conn. 441), the burden was on the party seeking removal to establish that removal was required to prevent continuing harm to the interests of the beneficiary, and the trial court's attempt to distinguish the present case from *Cadle Co.* was improper because D, as the beneficiary of the UTMA account, was in a position similar to the beneficiaries in *Cadle Co.*, in that he did not have the right to dictate the identity of the custodian, and the fact that he was in a position dissimilar to that of the decedent in *Cadle Co.*, who was able to select the custodian, was irrelevant; moreover, the defendant's claim that the trial court determined that she had met her burden and that the plaintiff failed to produce evidence to refute that which she had produced was unavailing, as the argument was contrary to the trial court's decision, which did not address the defendant's burden of proof; furthermore, it was not clear that the trial court's application of the incorrect burden of proof was harmless, as its focus in determining that removal was required was almost entirely on the plaintiff's past breach of fiduciary duty and, therefore, it was not clear that the trial court would have reached the same decision if it had applied the burden of proof correctly.

Argued April 20—officially released September 14, 2021

Procedural History

Appeal from the decree of the Probate Court for the district of Northern Fairfield County removing the plaintiff Ian McIntyre as the custodian of an account created for the benefit of his minor son pursuant to the Connecticut Uniform Transfers to Minors Act, brought

to the Superior Court in the judicial district of Danbury and tried to the court, *D'Andrea, J.*; judgment affirming the Probate Court's decree, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Andrew S. Knott, with whom, on the brief, was *Robert J. Santoro*, for the appellant (plaintiff).

Vincent N. Amendola, Jr., for the appellee (defendant Janine Carbonaro).

Opinion

BRIGHT, C. J. The plaintiff, Ian McIntyre, individually and as the custodian of an account created pursuant to the Connecticut Uniform Transfers to Minors Act (UTMA), General Statutes § 45a-557 et seq.[1] for the benefit of his son, Douglas McIntyre, appeals from the judgment of the Superior Court denying his appeal from a decree of the Probate Court removing him as the custodian of the account and naming the defendant[2] Janine Carbonaro as the successor custodian. On appeal, the plaintiff claims that the Superior Court (1) lacked subject matter jurisdiction to make certain orders and (2) improperly placed the burden of proof on him to prove that his removal as custodian was not warranted.[3] We agree with both claims.

[1] The UTMA provides for the transfer of multiple types of property to be managed by a custodian, whom the transferor may designate, for the benefit of the minor until the minor attains twenty-one years of age. See General Statutes §§ 45a-557 though 45a-560b. "[T]he overriding goal of the [UTMA] is to preserve the property of the minor who, due to her age, [is] unable to protect her interests fully. To further that goal, the legislature granted the custodian control over the property of the minor and placed the custodian under a specific duty to act for the benefit of that minor." *Mangiante* v. *Niemiec*, 82 Conn. App. 277, 282, 843 A.2d 656 (2004).

[2] Douglas McIntyre also was named as a defendant, but he did not participate in this appeal. We therefore refer to Janine Carbonaro as the defendant.

[3] The plaintiff also claims that the Superior Court improperly failed to appoint as the successor custodian the individual whom he had designated as such. We do not review this claim because it is unclear whether the Superior Court will reach this issue on remand, and we will not speculate on how the issue will be addressed if it is reached.

The plaintiff further claims that the Superior Court failed to apply a de novo standard of review to his claims. Both parties agree and we recognize

The following facts, as found by the Superior Court, and procedural history are relevant to our resolution of this appeal. The parties were divorced in 2013, and have three children. The plaintiff was the custodian of a UTMA account that named the parties' middle child, Douglas McIntyre, as the beneficiary (account). In March, 2010, prior to the dissolution of the parties' marriage, the plaintiff withdrew funds totaling $16,424.76 from the account and deposited those funds into a transfer on death account,[4] which the plaintiff owned and which named Douglas McIntyre as the primary beneficiary. The plaintiff also withdrew funds from the UTMA account of the parties' eldest child, Rolt McIntyre. With these funds and additional funds that he contributed, the plaintiff opened two additional transfer on death accounts, each of which named as the beneficiary, respectively, one of the parties' remaining two children.

The plaintiff, acting on the advice of his counsel, thereafter withdrew a total of $22,928 from the transfer on death accounts, $7463 of which was withdrawn from Douglas McIntyre's transfer on death account, to pay personal legal expenses relating to postdissolution proceedings that had been initiated by the defendant. Pur-

that a de novo standard is the proper standard of review to be applied by a Superior Court when reviewing an order or decree of the Probate Court. See *Kerin* v. *Stangle*, 209 Conn. 260, 264, 550 A.2d 1069 (1988) ("[t]he function of the Superior Court in appeals from a Probate Court is to take jurisdiction of the order or decree appealed from and to try that issue de novo"). Because we are reversing and remanding the matter for a new trial, we need not address the issue of whether the Superior Court had applied a de novo standard of review in its memorandum of decision in the present case.

[4] Unlike a UTMA account wherein the custodial property is indefeasibly vested in the minor following a valid transfer of custodian property; General Statutes § 45a-558h; and wherein the custodian of the UTMA account takes control of the custodian property and manages it for the benefit of the minor; see General Statutes § 45a-558i; the property in a transfer on death account passes to the beneficiary on the death of the account holder. See R. Folsom & L. Beck, Revocable Trusts and Trust Administration in Connecticut (2021) § 9.7 p. 110.

suant to General Statutes § 45a-557b (a),[5] the defendant filed a petition in the Probate Court, requesting that the funds that the plaintiff had removed from the account be restored, that the plaintiff be removed as custodian of the account, and that she be appointed as the successor custodian.[6] She also filed a petition in the Probate

[5] General Statutes § 45a-557b (a) provides in relevant part: "Courts of probate in any district in which the transferor, the minor or the custodian is resident, or in which the custodial property is located shall have jurisdiction of any disputes or matters involving custodianship under sections 45a-557 to 45a-560b, inclusive. . . ."

[6] Prior to filing her petition in the Probate Court, the defendant, in the dissolution action between the parties, sought to open the judgment of dissolution on the basis of the alleged failure of the plaintiff to disclose on his financial affidavit three custodial accounts, each of which were held in the name of one of the parties' three children and the plaintiff. See *McIntyre* v. *McIntyre*, Superior Court, judicial district of Ansonia-Milford, Docket No. FA-11-4014913-S (May 2, 2017). The defendant sought to manage the accounts and to have the plaintiff replenish to the accounts the funds that he had removed and used for litigation expenses. Id. In its May, 2017 decision denying the motion to open, the trial court, *Grossman*, *J.*, determined that each party "took every opportunity to criticize the other" and that "their testimony is not reliable or credible." Id. The defendant thereafter filed an appeal from the dissolution court's denial of her motion to open. *McIntyre* v. *McIntyre*, Connecticut Appellate Court, Docket No. AC 40454 (appeal filed May 18, 2017). In her preliminary statement of issues in that appeal, the defendant contended, inter alia, that the dissolution court erred in determining that she had not proven that the plaintiff's failure to disclose on his financial affidavit the existence of the three transfer on death accounts that he had owned at the time of dissolution was fraudulent and that she had not proven fraud despite the fact that the plaintiff had liquidated the UTMA accounts and placed the funds into transfer on death accounts.

During the pendency of her appeal in the dissolution matter, the defendant filed the petitions in the Probate Court regarding the plaintiff's actions as to Douglas' and Rolt McIntyre's accounts. In the present appeal, the defendant's counsel stated at oral argument before this court that he did not bring to the attention of the Probate Court the dissolution court's denial of the motion to open. In her motion to extend time to file her appellate brief in her appeal from the judgment of the dissolution court denying her motion to open, the defendant stated that if the Probate Court were to determine that she had proven her UTMA claims, then her appeal from the dissolution court's denial of her motion to open would be rendered moot. Following the October 12, 2017 decree of the Probate Court naming the defendant as the successor custodian of the account, the defendant withdrew her appeal on December 7, 2017, from the judgment of the dissolution court denying her motion to open.

Court seeking similar relief as to the parties' eldest child, Rolt McIntyre. Following the filing of those petitions, the plaintiff returned to Douglas McIntyre's UTMA account the funds he had withdrawn to fund Douglas McIntyre's transfer on death account. On October 12, 2017, the Probate Court decreed that the plaintiff be removed as the custodian of the account and that the defendant be named as the successor custodian. The Probate Court rendered a similar decree with regard to the account for Rolt McIntyre.

The plaintiff appealed to the Superior Court pursuant to General Statutes § 45a-186[7] from the decree of the Probate Court with respect to Douglas McIntyre only. He claimed that (1) he did not mismanage the assets, (2) he should not be removed as the custodian of the account, and (3) even if he were removed, then the successor custodian should be the individual whom he had designated, even though he did not make that designation until after the Probate Court rendered its decree. The Superior Court, *D'Andrea*, *J.*, affirmed the decree of the Probate Court to remove the plaintiff as the custodian of the account and determined that the defendant should continue as the successor custodian "under the UTMA for the three children . . . ." This appeal followed. Additional facts will be set forth as necessary.

The timing and sequence of the events described in the preceding paragraphs raise the specter that the defendant has engaged in forum shopping by seeking a second bite of the apple before the Probate Court because she was dissatisfied with the judgment of Judge Grossman finding her not credible and denying her motion to open. Our courts have long discouraged the practice of forum shopping. See, e.g., *Kleen Energy Systems, LLC* v. *Commissioner of Energy & Environmental Protection*, 319 Conn. 367, 393 n.25, 125 A.3d 905 (2015) (forum shopping results in waste of judicial resources).

[7] General Statutes § 45a-186 (b) provides in relevant part that "[a]ny person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . ."

I

The plaintiff first claims that, because he had appealed to the Superior Court from the decree of the Probate Court with respect to the account of Douglas McIntyre only, the Superior Court lacked subject matter jurisdiction with respect to the custodial arrangement for the UTMA accounts of the parties' remaining two children. The defendant agrees that the Superior Court only had subject matter jurisdiction to consider the plaintiff's removal and her appointment as the successor custodian of Douglas McIntyre's UTMA account. We agree.

The plaintiff's claim, which raises the issue of subject matter jurisdiction for the first time on appeal, is reviewable. See *Premier Capital, LLC* v. *Shaw*, 189 Conn. App. 1, 5, 206 A.3d 237 (2019) ("subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal" (internal quotation marks omitted)). "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] judgment rendered without subject matter jurisdiction is void." (Citation omitted; internal quotation marks omitted.) *Labissoniere* v. *Gaylord Hospital, Inc.*, 199 Conn. App. 265, 275–76, 235 A.3d 589, cert. denied, 335 Conn. 968, 240 A.3d 284 (2020), and cert. denied, 335 Conn. 968, 240 A.3d 285 (2020).

Notwithstanding the fact that the plaintiff appealed from the decree of the Probate Court *only* as to Douglas McIntyre, the Superior Court concluded that the plaintiff be removed as custodian and the defendant "be allowed to continue as custodian under the UTMA for the *three* children . . . ." (Emphasis added.) In so con-

cluding, the Superior Court considered issues beyond the scope of the decree of the Probate Court from which the plaintiff had appealed. "[A] probate appeal . . . brings to the Superior Court *only* the order appealed from. The order remains intact until modified by a judgment of the Superior Court after a hearing de novo on the issues presented for review by the reasons of appeal. . . . The Superior Court may not consider or adjudicate issues beyond the scope of those proper for determination by the order or decree attacked. . . . The Superior Court, therefore, cannot enlarge the scope of the appeal." (Emphasis added; internal quotation marks omitted.) *Marshall* v. *Marshall*, 71 Conn. App. 565, 569–70, 803 A.2d 919, cert. denied, 261 Conn. 941, 808 A.2d 1132 (2002).

Accordingly, the Superior Court had subject matter jurisdiction only over the matter of the Probate Court with respect to Douglas McIntyre because that was the only matter from which the plaintiff had appealed. The Superior Court did not have jurisdiction to determine the custodian of any existing UTMA accounts of the parties' remaining two children because there was no appeal before the Superior Court concerning any UTMA accounts of those children.[8] Consequently, the judgment of the Superior Court as to those accounts is reversed.

II

The plaintiff next claims that the Superior Court improperly placed the burden of proof on him, rather than on the defendant who sought his removal as the custodian of the account. He contends that in doing so the Superior Court improperly failed to follow the precedent of our Supreme Court in *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 844 A.2d 836 (2004) (*Cadle*). We agree.

[8] In fact, no UTMA account for the parties' youngest son was ever the subject of a petition in the Probate Court.

"When a party contests the burden of proof applied by the trial court, the standard of review is de novo because the matter is a question of law." Id., 455.

Our analysis is controlled by the decision of our Supreme Court in *Cadle*. In that case, the plaintiff, an unsecured creditor of the estate of the decedent, appealed to the Superior Court from the denial by the Probate Court of its motion for an order seeking, inter alia, the removal of both coexecutors of the decedent's estate. Id., 442–43. On appeal, the plaintiff creditor claimed that the trial court improperly had placed the burden of proof on it to show why removal of the coexecutors was warranted. Id., 449. Our Supreme Court examined whether the following common-law burden shifting scheme was applicable: "Generally . . . when a breach of fiduciary duty is alleged, and the allegations concern fraud, self-dealing or a conflict of interest, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence." Id., 457. After citing General Statutes § 45a-242,[9] which concerns the removal of fiduciaries by the Probate Court, our Supreme Court explained: "Our case law recognizes that [r]emoval of an executor is an extraordinary remedy designed to protect against harm caused

[9] General Statutes § 45a-242 provides in relevant part: "(a) The Probate Court having jurisdiction may, upon its own motion or upon the petition of any person interested or of the surety upon the fiduciary's probate bond, after notice and hearing, remove any fiduciary if: (1) The fiduciary becomes incapable of executing such fiduciary's trust, neglects to perform the duties of such fiduciary's trust, wastes the estate in such fiduciary's charge, or fails to furnish any additional or substitute probate bond ordered by the court, (2) lack of cooperation among cofiduciaries substantially impairs the administration of the estate, (3) because of unfitness, unwillingness or persistent failure of the fiduciary to administer the estate effectively, the court determines that removal of the fiduciary best serves the interests of the beneficiaries, or (4) there has been a substantial change of circumstances or removal is requested by all of the beneficiaries, the court finds that removal of the fiduciary best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the governing instrument and a suitable cofiduciary or successor fiduciary is available. . . ."

by the continuing depletion or mismanagement of an estate. . . . In the absence of continuing harm to the interests of the estate and its beneficiaries, removal is not justified merely as a punishment for a fiduciary's past misconduct." (Internal quotation marks omitted.) Id.

In considering the issue of first impression, our Supreme Court noted that "it is useful to examine the policies underlying the apparently conflicting rules that: (1) the burden of proof is ordinarily shifted to the fiduciary when breach of fiduciary duty is alleged; and (2) removal of an estate's fiduciary will not be ordered except in extraordinary cases to avoid continuing harm to the interests of the estate. Underlying the former rule is the recognition that the fiduciary's principal has voluntarily placed a unique degree of trust and confidence [in the fiduciary, who] has superior knowledge, skill or expertise that is to be exercised on behalf of the principal. . . . Accordingly, when the fiduciary has a dominant and controlling force or influence over his principal, or the transaction at issue, the burden shifts to the fiduciary to prove the fairness, honesty and integrity in the transaction . . . . In contrast, underlying the rule that removal is an extraordinary remedy to be applied sparingly is the recognition that the decedent has specifically chosen the fiduciary for the specific purpose of administering his estate and managing the claims of persons with conflicting interests in the estate." (Citations omitted; internal quotation marks omitted.) Id., 459–60.

Our Supreme Court reasoned that, "although the decedent has voluntarily entrusted the management of his estate into the hands of the executor because of his expertise, knowledge or skill, the creditor has not voluntarily entrusted the executor with managing its claim. Thus, the executor's primary duty is to the estate itself, and to fulfilling the intentions of the decedent

with respect to the estate. Only secondarily is the executor's duty to those with conflicting interests in the estate, vis-à-vis the decedent, with whom, nevertheless, the fiduciary is obligated to deal fairly. Thus, although we have recognized that the executor of an estate has a fiduciary duty to its creditors . . . that duty does not rise to the level of the duty owed by a fiduciary to a principal who voluntarily has placed his confidence and trust in the fiduciary for a specific purpose." (Citation omitted.) Id., 460–61. The court concluded that "the burden shifting that ordinarily is employed when a plaintiff has alleged a breach of fiduciary duty does not apply in removal proceedings. Instead, the burden is on the party seeking removal to establish that removal is required to prevent continuing harm to the interests of the estate." Id., 461.

In the present case, the Superior Court determined: "After review of all the pleadings, live witness testimony, submitted exhibits, and parties' posttrial memoranda, it is, therefore, the decision of this court that the plaintiff/appellant has not maintained his burden of proof on this appeal, therefore, the [Probate Court's] decision to remove him as custodian under the UTMA is affirmed . . . ." The Superior Court reached this conclusion despite the clear holding in *Cadle* that the burden of proof rests on the party seeking removal. *Cadle Co.* v. *D'Addario*, supra, 268 Conn. 461; see also *In re Probate Appeal of Cadle Co.*, 152 Conn. App. 427, 442–43, 100 A.3d 30 (2014). The Superior Court placed the burden of proof on the plaintiff apparently because it concluded that "*Cadle* is factually so different, as to make it inapplicable."

In particular, the Superior Court stated that "*Cadle* involved the removal of the executor, handpicked by the decedent, to control his estate, a decision showing the decedent's faith in the selection of executor. That is a significant difference than what occurred here. Not

only did [Douglas McIntyre] in 2010 not personally select the plaintiff . . . [he] most certainly had no knowledge of even the existence of [the UTMA account]. [His] wishes, unlike that of [the] decedent in *Cadle*, could not have been involved in the selection of the plaintiff . . . [as the custodian]." The plaintiff argues that the Superior Court improperly "attempts to distinguish *Cadle* . . . by arguing that [the beneficiary of the account] did not choose the plaintiff to be his UTMA custodian; therefore, the plaintiff should not be entitled to any special protection of the high burden of removing a fiduciary." We agree that the Superior Court improperly distinguished *Cadle*.

The fact that the beneficiary of the UTMA account is in a position dissimilar to that of the decedent in *Cadle* because the beneficiary did not create the account or voluntarily select the custodian is irrelevant. Douglas McIntyre's interest in the UTMA account is akin to that of the beneficiaries of the estate in *Cadle*. Like the beneficiary of a UTMA account, the beneficiaries of an estate do not have a right to dictate who the fiduciary is. That decision is left to the decedent of the estate or the person who funds the UTMA account. In the present case, it was decided when the account was created that the plaintiff would be the custodian.[10] The plaintiff, as the person who established the account, is in a position similar to that of the decedent testator in *Cadle*. In both situations, the person creating the corpus that would ultimately benefit others chose a person they trusted

[10] The court heard conflicting evidence regarding how the account was funded. The plaintiff testified that the money with which he started the account came from his grandparents and that the "vast majority" of the money in the account came from his family. The defendant testified that her parents may have contributed to the account but expressed a lack of certainty due to the passage of time. She also testified, referring to her and the plaintiff, that "we" started the account. Regardless of who contributed funds to the account, there is no question that the plaintiff was named the custodian of the account.

to manage those funds. By choosing to create a UTMA account for Douglas McIntyre, as to which he was the custodian, as opposed to some other vehicle such as a trust managed by a third party, the plaintiff, as transferor, voluntarily chose to subject the account he and his family members funded to the requirements of the UTMA, including those pertaining to the obligations of and the removal of the custodian. See General Statutes § 45a-557 et seq. It follows, then, that the transferor selects the custodian for the specific purpose of fulfilling the requirements of the UTMA, the goal of which is to preserve the property of the minor beneficiary. See *Mangiante* v. *Niemiec*, 82 Conn. App. 277, 282, 843 A.2d 656 (2004) (discussing goal of UTMA). The custodian does not owe an obligation to an individual in his or her capacity as a party seeking removal[11] that is higher than the duty that the custodian has to abide by under UTMA and, thereby, has to the minor beneficiary. See id., 282–83 (custodian of UTMA account owes fiduciary duty to beneficiary). Therefore, placing the burden of proof on the party who seeks the removal of the custodian of a UTMA account is consistent with the rule that removal is an extraordinary remedy. Accordingly, we conclude that the Superior Court improperly placed the burden of proof on the plaintiff custodian. See *Cadle Co.* v. *D'Addario*, supra, 268 Conn. 461 (party seeking removal has burden to establish that removal is required); see also *In re Taylor's Estate*, 5 Ariz. App. 144, 147, 424 P.2d 186 (1967) (party seeking removal of trustee has burden of proof); *Matter of Rose BB.*, 243 App. Div. 2d 999, 1000, 663 N.Y.S.2d 415 (1997)

[11] General Statutes § 45a-559c (f) provides: "A transferor, the legal representative of a transferor, an adult member of the minor's family, a guardian of the person of the minor, the guardian of the minor or the minor if the minor has attained the age of twelve years may petition the court to remove the custodian under section 45a-242 and to designate a successor custodian other than a transferor under section 45a-558a or to require the custodian to give appropriate bond."

(same); *Tomazic* v. *Rapoport*, 977 N.E.2d 1068, 1074 (Ohio App. 2012) (same), review denied, 134 Ohio St. 3d 1485, 984 N.E.2d 29 (2013); *Guerra* v. *Alexander*, Docket No. 04-09-00004-CV, 2010 WL 2103203, *6 (Tex. App. May 26, 2010) (same), review denied, Texas Supreme Court, Docket No. 10-0982 (October 21, 2011); 1 Restatement (Third), Trusts § 1, comment (a), p. 6 (2003) (referring to minors' custodianships as virtual trusts). Contrary to the Superior Court's conclusion, the plaintiff had no burden of proof to maintain.

Significantly, the defendant does not dispute this conclusion. She concedes on appeal that it was her burden to prove that the plaintiff should be removed as the custodian of the account. She argues that she met her burden and that the court's findings make that clear. In particular, the defendant points to the court's findings that the plaintiff's withdrawal of funds from the account in 2010, his personal use of the funds for years, and his failure to return the funds until ordered to do so by the Probate Court "can be described in [no] other way than self-serving, intentional acts that '[waste] the estate in such fiduciary's charge.' Any other interpretation strains logic and credulity. Based on this ground alone, the Probate Court was justified in removing the [plaintiff] as custodian of the [account]." The Superior Court also described the plaintiff's conduct as "self-serving intentional acts that display a persistent failure to administer the estate effectively." The court also stated that removal as the custodian of the account was not " 'punishment for a fiduciary's past misconduct' because the conduct never ended, and would not have ended, until it was terminated involuntarily by the [Probate Court's] order." In addition, the Superior Court held: "Even assuming, arguendo, that *Cadle* is applicable, the criteria to approve removal of a fiduciary to protect against harm caused by the continuing depletion or mismanagement of an estate is clearly satisfied. [The

plaintiff], for seven and one-half years, until discovered, brought to the [Probate Court], and then stopped only by an order of the [Probate Court], had unfettered access to the funds in his name, to use however he chose, and after showing that he had no hesitancy in using the same for his own benefit. The only logical conclusion that can be reached is that removal was required. Any other interpretation strains logic and credulity. Therefore, *Cadle* is not controlling [on] this matter." (Internal quotation marks omitted.)

The defendant argues that, read as a whole, the court's memorandum of decision makes clear that the court concluded that the defendant met her burden to prove that removal of the plaintiff as custodian was warranted. She argues that the court's statement that the plaintiff "has not maintained his burden of proof on this appeal" meant that "the plaintiff did not meet his burden of proof when he failed to produce evidence to refute or rebut that of the [defendant]." She, therefore, concludes that "[t]here are no grounds to support the claim that the court shifted the burden of proof upon the plaintiff in this case." We are not persuaded.

First, we disagree with the defendant that the court's conclusion that the plaintiff failed to maintain his burden of proof reasonably can be read to mean only that the plaintiff failed to produce evidence to rebut the defendant's evidence. That is not what the court said. Furthermore, the court, in its memorandum of decision, never mentioned that the defendant bore or met any burden of proof. Finally, the Superior Court took great pains to distinguish the present case from *Cadle*. Given that the key holding at issue in *Cadle*, as it relates to the present case, is who bore the burden of proof, we conclude that the Superior Court, in holding that *Cadle* was inapplicable and not controlling, decided that, on the basis of the facts of the present case, the plaintiff bore the burden of proof.

Second, we are not convinced that the court's application of an incorrect burden of proof was harmless. See *Papallo* v. *Lefebvre*, 172 Conn. App. 746, 756, 161 A.3d 603 (2017) (applying harmless error analysis to incorrect assignment of burden of proof in breach of fiduciary duty case). There is no dispute in the present case that the plaintiff breached his fiduciary duty to Douglas McIntyre when he removed funds from the account and used them for his personal legal expenses. The question for the court then was whether the defendant proved that the extraordinary remedy of removal was required "to protect against harm caused by the *continuing depletion or mismanagement of an estate*. . . . In the absence of continuing harm to the interests of the estate and its beneficiaries, removal is not justified merely as a punishment for a fiduciary's past misconduct." (Emphasis added; internal quotation marks omitted.) *Cadle Co*. v. *D'Addario*, supra, 268 Conn. 457. The Superior Court's focus in determining that removal was required was almost entirely on the plaintiff's past breach of fiduciary duty. The court did not discuss the significance of its factual finding that the plaintiff used funds from the account for his personal legal expenses based on the advice of his counsel. The court also did not discuss whether the plaintiff had properly managed the account in all other respects. Nor did the court discuss the evidence establishing that the defendant was aware of and consented to the withdrawal from the account while the parties were still married or that the plaintiff made the withdrawal based on the advice of his financial advisor.[12] Finally, there was evidence

[12] In the section of its memorandum of decision entitled "Plaintiff/Appellant's Position," the Superior Court stated that "[c]learly, the plaintiff/appellant violated the UTMA statutes by closing the accounts and opening the [transfer on death] account, even when done with the knowledge and consent of the defendant/appellee and upon the advice of their financial advisor." Although that statement is true and undisputed by the plaintiff, it says nothing as to whether those circumstances militate against the exercise of the extraordinary remedy of removal. In rendering judgment ordering

that the plaintiff returned to the account all funds he had previously withdrawn.

By referencing these facts and evidence, we do not mean to suggest that the plaintiff's breach of fiduciary duty was not significant or egregious. Rather, we are not persuaded that the Superior Court would have reached the same conclusion had it applied the burden of proof correctly. Given that removal is an extraordinary remedy and in light of the countervailing evidence submitted by plaintiff, "[t]he court's error was simply of such a fundamental nature that the only proper remedy is to reverse the judgment . . . and remand the case for a new trial . . . ." *Papallo* v. *Lefebvre*, supra, 172 Conn. App. 756.

The judgment is reversed and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

TALIB SHAHEER *v.* COMMISSIONER OF CORRECTION (AC 43685)

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

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of the crimes of robbery in the second degree and tampering with physical evidence, sought a writ of habeas corpus, claiming that his trial counsel rendered ineffective assistance by, inter alia, failing to provide timely notice of his intention to use expert testimony in support of a duress defense. The habeas court rejected the petitioner's ineffective assistance of counsel claims and, with respect to his assertion that trial counsel failed to timely raise a defense of duress, the court found it to be without merit. Thereafter, the habeas court rendered judgment denying the habeas petition, and the petitioner, on the granting certification, appealed to

removal, the court did not discuss the evidence submitted as to those circumstances.

this court. *Held* that the judgment of the habeas court denying the petition for a writ of habeas corpus was affirmed; the habeas court having thoroughly addressed the petitioner's argument that his counsel's representation was constitutionally ineffective, this court adopted the habeas court's well reasoned decision as a proper statement of the relevant facts and applicable law on that issue.

Argued February 16—officially released September 14, 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, *Seeley*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

J. Christopher Llinas, assigned counsel, for the appellant (petitioner).

Linda F. Currie, senior assistant state's attorney, with whom, on the brief, were *Sharmese Hodge*, state's attorney, *Leah Hawley*, senior assistant state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Talib Shaheer, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly rejected his claim of ineffective assistance of trial counsel. We affirm the judgment of the habeas court.

The defendant was charged in a nine count information with one count of felony murder in violation of General Statutes § 53a-54c; one count of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B); one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (1); two counts of tampering with physical evidence in violation of General Statutes (Rev. to 2013) § 53a-155 (a) (1); one count of hindering prosecution in the second degree in

violation of General Statutes § 53a-166; one count of false statement in the second degree in violation of General Statutes (Rev. to 2013) § 53a-157b; one count of interfering with an officer in violation of General Statutes § 53a-167a; and one count of tampering with a witness in violation of General Statutes § 53a-151. On April 16, 2015, the state filed a substitute information, and the petitioner entered pleas under the *Alford* doctrine[1] to one count of robbery in the second degree in violation of General Statutes § 53a-135 (a) (1) (B) and one count of tampering with physical evidence in violation of § 53a-155 (a) (1). He was sentenced to a total effective term of fifteen years of incarceration.

The petitioner initiated this matter by filing a petition for a writ of habeas corpus. In his operative petition, the petitioner alleged that his trial counsel, Attorney Bruce Lorenzen, rendered ineffective assistance in violation of his state and federal constitutional rights. Specifically, he claimed that Lorenzen's performance was deficient for, inter alia, failing to investigate certain witnesses, failing to timely raise a defense of duress, failing to provide critical information and/or correct information to the petitioner, and failing to review the strengths and weaknesses of the state's evidence.[2] Following a habeas trial, the court denied the petition for

[1] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt, but consents to being punished *as if he were guilty* to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." (Emphasis in original; internal quotation marks omitted.) *State* v. *Simpson*, 329 Conn. 820, 824 n.4, 189 A.3d 1215 (2018).

[2] The court addressed only those claims for which the petitioner had presented evidence and provided a legal analysis in his posttrial brief. All other claims raised by the petitioner in his operative petition for a writ of habeas corpus were deemed abandoned.

a writ of habeas corpus. With respect to the petitioner's claim that Lorenzen was ineffective for failing to timely raise a defense of duress, the court found it to be without merit. Specifically, it determined that, "to the extent the petitioner is asserting a claim that he pleaded guilty because he felt his duress defense was not going to be presented to the jury due to late disclosure, his claim is not credible." On November 1, 2019, the court granted the petition for certification to appeal.

The principal issue raised by the petitioner in this appeal is that the court improperly rejected his claim that Lorenzen provided ineffective assistance by failing to provide timely notice of his intention to use the expert testimony of Andrew W. Meisler, a psychologist, in support of a duress defense pursuant to Practice Book § 40-18.[3] The petitioner contends that, as a result of Lorenzen's alleged ineffective assistance, "the *possibility* existed that [the court] could exclude . . . Meisler's expert testimony, leaving the petitioner with the sole option of testifying himself in support of his duress defense." (Emphasis added.) The petitioner further contends that, but for his "*potential* inability to present . . . Meisler's expert testimony in support of his duress defense," he would not have pleaded guilty and would have proceeded to trial. (Emphasis added.)[4]

[3] Practice Book § 40-18 provides in relevant part: "If a defendant intends to introduce expert testimony relating to the affirmative defenses of mental disease or defect . . . or another condition bearing upon the issue of whether he or she had the mental state required for the offense charged, the defendant shall . . . notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. . . ."

[4] The petitioner also claims that the following two factual findings of the habeas court were clearly erroneous: (1) "the trial court was not going to exclude . . . Meisler's expert testimony because it granted the state's motion to have the petitioner evaluated by its own expert, and because the petitioner was scheduled to meet with the state's expert on the day of his plea," and (2) "the petitioner . . . lack[ed] credibility in claiming concern that his duress defense may suffer due to [Lorenzen's] [alleged] untimely filing of the expert notice because the petitioner was in the courtroom and heard [the court grant the state's motion to have the petitioner evaluated by its own expert]."

"[T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous

We have examined the record on appeal, the briefs and arguments of the parties, and conclude that the judgment of the habeas court, *Seeley*, *J.*, should be affirmed. Because the court thoroughly addressed the petitioner's argument raised in this appeal that Lorenzen's representation was constitutionally ineffective, we adopt its well reasoned decision as a proper statement of the relevant facts and the applicable law on that issue. See *Shaheer* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-17-4009009-S (October 21, 2019) (reprinted at 207 Conn. App. 454, A.3d). Any further discussion by this court would serve no useful purpose. See, e.g., *Anderson* v. *Commissioner of Correction*, 205 Conn. App. 173, 189, A.3d (2021).

The judgment is affirmed.

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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." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 784, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009). In the present case, there is evidence in the record that substantiates the findings in question. Moreover, our review of the record and the reasonable inferences drawn therefrom does not leave us with a definite and firm conviction that a mistake has been committed.

APPENDIX

TALIB SHAHEER *v.* COMMISSIONER OF CORRECTION*

Superior Court, Judicial District of Tolland
File No. CV-17-4009009-S

Memorandum filed October 21, 2019

Proceedings

Memorandum of decision on petition for writ of habeas corpus. *Petition denied.*

Robert J. McKay, assigned counsel, for the petitioner.

Leah Hawley and *Tamara Grosso*, assistant state's attorneys, for the respondent.

Opinion

SEELEY, J. The petitioner, Talib Shaheer, brings this petition for a writ of habeas corpus claiming that his trial counsel provided him ineffective assistance in violation of the state and federal constitutions. The petitioner is seeking to have his convictions vacated and the matter be returned to the trial court for further proceedings.

Based on the credible evidence presented and for the reasons stated, the petition is denied.

I

PROCEDURAL HISTORY

The petitioner was a criminal defendant in the matter of *State* v. *Shaheer*, Docket No. CR-13-0670827-T, in the judicial district of Hartford. He was charged in a nine count information with the following offenses: felony

* Affirmed. *Shaheer* v. *Commissioner of Correction*, 207 Conn. App. 449, A.3d (2021).

murder in violation of General Statutes § 53a-54c, kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B), robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), two counts of tampering with physical evidence in violation of General Statutes (Rev. to 2013) § 53a-155 (a) (1), hindering prosecution in the second degree in violation of General Statutes § 53a-166, false statement in the second degree in violation of General Statutes (Rev. to 2013) § 53a-157b, interfering with police in violation of General Statutes § 53a-167a and tampering with a witness in violation of General Statutes § 53a-151. Attorney Bruce Lorenzen represented the petitioner in the criminal proceedings.

On April 16, 2015, the state filed a substitute information, and the petitioner pleaded guilty pursuant to the *Alford* doctrine to robbery in the second degree in violation of General Statutes § 53a-135 (a) (1) (B) and he pleaded guilty to tampering with evidence in violation of General Statutes § 53a-155 (a) (1). The state summarized the underlying facts at the change of plea hearing as follows: "Your Honor, the [petitioner] went to buy marijuana from the victim, Christopher Jefferson, on September 5, 2013, on Bond Street in the city of Hartford. He invited the female codefendant, Madelyne Martinez-Mercado, along for the ride. They had just met the day before. He drove the Mercedes that his girlfriend, Lourdes Tones, had rented for him to the location. Upon arrival, the victim was told to get in the backseat of the car. At this time, the [petitioner] pulled a gun from . . . under his seat, the driver seat, pointed it at the victim with the intent of robbing him. The [petitioner] claims that it was the female codefendant who pulled the gun and pointed it at the victim. The [petitioner] then took off, causing the car doors to lock. The victim tried to get out of the car . . . but he also tried to pound on the glass to signal his friends that he was

being kidnapped. He then grabbed . . . hold of the [petitioner], but then [the] petitioner yelled for the codefendant to take the gun, which she did. She put it to the victim's head and shot him. They then drove to Portland, Connecticut, to dump the body, stopping for gas along the way in Cromwell. The [petitioner] removed the victim's body from the car in Portland and dumped it in the woods . . . . He then drove to a car wash in Hamden where they cleaned the blood out of the car. He then drove to a dumpster in a housing project . . . in Hamden and disposed of the gun in a book bag that he had in the car. The gun was never recovered. . . . A passerby found the victim's body in Portland a very short time after it was dumped and called the police. The victim died the next day as a result of the gunshot wound at Hartford Hospital."

On June 16, 2015, the court, *Alexander*, *J.*, sentenced the petitioner to a total effective sentence of fifteen years to serve. Thereafter, on or about August 9, 2017, the petitioner filed a petition for a writ of habeas corpus. After counsel was appointed, the petition was amended several times. The operative pleading is the second revised petition dated February 4, 2019, and filed on February 13, 2019, which alleges he was denied the effective assistance of trial counsel in violation of his state and federal constitutional rights. Specifically, he claims the performance of his trial counsel was deficient in numerous ways, namely, failing to investigate certain witnesses, failing to timely raise a defense of duress, failing to provide critical information and/or correct information to the petitioner, and failing to review the strengths and weaknesses of the state's evidence.[1]

[1] While the petitioner detailed numerous allegations against trial counsel in the operative petition, the court will address only those claims for which the petitioner presented evidence and provided a legal analysis in his posttrial brief. All other claims are deemed abandoned. See *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 857, 171 A.3d 525 (2017) ("[i]n light of the petitioner's failure to brief the due process claim, we conclude

The court heard the trial on this matter on February 27, 2019. The petitioner called five witnesses: himself, Attorney Bruce Lorenzen (trial counsel), Attorney John Stawicki (cocounsel), Andrew W. Meisler, PhD (an expert witness who examined the petitioner and supported the petitioner's general defense of duress), and Jamal Pilgrim (a lay witness). The petitioner also introduced numerous exhibits, including a copy of the certified clerk's file, transcripts of the change of plea hearing and sentencing hearing, various witness statements and police reports, and an evaluation prepared by Dr. Meisler. The respondent did not call any witnesses or introduce any exhibits.

II

FINDINGS OF FACT

The court has reviewed all of the evidence presented and makes the following findings of fact:

The petitioner's trial counsel in the criminal case was Lorenzen, an experienced criminal defense attorney who graduated law school in 1984. He has served as a public defender exclusively since 1989.[2] In 2013, as the public defender for the judicial district of Hartford, he was a supervisor, and he assigned himself to represent the petitioner. During his representation, he obtained discovery, including the police reports, witness statements, the arrest warrant affidavit, the petitioner's statement to the police, the 9-1-1 call to the police, and

that the habeas court properly deemed it abandoned"); *Raynor* v. *Commissioner of Correction*, 117 Conn. App. 788, 796, 981 A.2d 517 (2009) ("[t]he petitioner's failure to brief his first claim to the habeas court, namely, improper preparation and investigation by trial counsel, resulted in an abandonment of that claim"), cert. denied, 294 Conn. 926, 986 A.2d 1053 (2010).

[2] Attorney Stawicki, another experienced public defender who has tried over 100 murder cases, served as cocounsel with Attorney Lorenzen during jury selection and the change of plea proceedings. The petitioner's habeas petition alleges ineffective assistance of counsel only as to Attorney Lorenzen.

the search warrant affidavits. Attorney Lorenzen met with the petitioner numerous times and reviewed the discovery with him. He also interviewed and counseled the petitioner, discussed the state's evidence with the petitioner, pursued a general defense of duress by hiring a psychologist to conduct an evaluation, and engaged in pretrial negotiations with the prosecutor. Attorney Lorenzen received an offer from the state that was discussed with the petitioner and subsequently rejected by the petitioner. Based on the discovery provided and the information provided to him by the petitioner, Attorney Lorenzen had formulated a trial strategy, which he discussed with the petitioner, and he was prepared to try the case before a jury.

Both the petitioner and his codefendant, Martinez-Mercado, spoke with law enforcement and made certain admissions in sworn statements. In a statement dated December 17, 2013, Martinez-Mercado admitted that she drove with the petitioner in his vehicle to Hartford to buy drugs. She claimed that the petitioner had given her the gun to hold and, after the dealer got into the backseat of the vehicle, the petitioner drove off and the car doors locked. She stated that the petitioner and the dealer began arguing and she shot the victim in the head. She indicated that the petitioner drove on the highway and got off in a town where the petitioner found a quiet area and then pulled the victim out of the car. She further claimed that the petitioner went through the victim's pockets and took money and marijuana. She admitted to going to the car wash and cleaning the car with the petitioner. She also indicated that the petitioner placed the gun into a bag and then threw the bag into a dumpster near an apartment complex.

The petitioner also provided a statement to the police on December 17, 2013. He admitted that he drove to Hartford with the codefendant in order to buy marijuana from someone she knew. He told the police that, when

they arrived at a location on Bond Street in Hartford, the dealer got into the backseat of the car. According to the petitioner, they were discussing the drug transaction when his codefendant pulled out a gun from her purse, pointed the gun at the drug dealer and told him she wanted everything. The petitioner drove off, the doors locked, and the drug dealer began grabbing at the petitioner. The petitioner claimed that his codefendant shot the drug dealer. He told the police that he wanted to bring the drug dealer to the hospital, but his codefendant refused to do so. Instead, he claimed that she pointed the gun at the petitioner, so he continued to drive. He stated that, when he stopped for gas in Cromwell, his codefendant went into the store and paid for the gas, and that she pumped the gas. He further stated that he knew the victim was alive because he could hear him snoring.

The petitioner told the police that, when he found a wooded area in Portland, he pulled the victim from the car, who was still alive, and dumped him on the side of the road. Prior to doing so, the petitioner claimed that his codefendant went through the victim's pockets and took the marijuana and $500 in cash. According to the petitioner, his codefendant gave him the marijuana and $150 in cash. The petitioner stated that he drove to a car wash in Hamden where they cleaned the blood from the interior of the car, and then he drove to a condominium complex where the codefendant threw a bag containing the gun into a dumpster.

Initially, Patricia Jennings, a friend of the petitioner, provided an alibi for him. She gave a sworn statement to the police on September 6, 2013, and claimed that the petitioner was with her at her house during the time period that the shooting incident occurred. After the police obtained cell phone records of the petitioner and Jennings that contradicted her claim that the petitioner was present with her at her house all day, Jennings was

charged with the offense of giving a false statement. On December 8, 2013, after she was arrested,[3] Jennings recanted her prior statement. She told the police that the petitioner stopped by her house during the morning of September 5, 2013, but that he left later in the morning and he was not with her all day. In his statement to the police, the petitioner admitted that he had called Jennings and told her to tell the police he was with her on the day of the shooting. Attorney Lorenzen was aware of both statements provided by Jennings and that she had recanted the alibi.[4] Lorenzen did not interview Jennings since his theory of defense was not based on the petitioner having an alibi but, rather, it was based on the version of events provided by the petitioner to the police.

On February 25, 2015, Martinez-Mercado entered a plea of guilty pursuant to the *Alford* doctrine to the charge of murder. In the recitation of the factual basis for the plea, the prosecutor stated that, after the victim got into the backseat of the car that was being driven by the petitioner, Martinez-Mercado, who was sitting in the front passenger seat, "pulled a gun and told the victim to give her all his stuff." According to the prosecutor, the victim began to struggle with the petitioner, and Martinez-Mercado then shot the victim. Martinez-Mercado was sentenced to a period of thirty-five years of incarceration.

On March 31, 2015, the first day of jury selection in the petitioner's case, the state filed a long form information,

[3] Jennings pleaded guilty to the offense of giving a false statement in the second degree in violation of § 53a-157b on May 29, 2014.

[4] Attorney Stawicki also recalled that Jennings had provided two versions and that her second statement was inconsistent with her initial statement. The petitioner testified that he never saw or received a copy of Jennings' second statement in which she recanted the alibi she originally provided to the petitioner. He also testified that he was never aware of it. The court does not find credible the petitioner's testimony that he was not aware that Jennings had recanted her original statement.

which informed the petitioner that the state was proceeding to trial on nine counts, including the charge of felony murder.[5] The defense theory that was going to be presented to the jury, and communicated to the petitioner, was that the petitioner was unaware that his codefendant was going to rob the victim, and he was not aware that she had a gun. The petitioner intended to explain that his conduct following the shooting was the result of being under duress.[6] In other words, it was the shock of seeing the codefendant shoot the victim and then point the gun at the petitioner that caused him to cooperate with her after the shooting.[7] Attorney Lorenzen engaged the services of Andrew W. Meisler, PhD, who conducted an evaluation of the petitioner and issued a report on February 17, 2015. Dr. Meisler interviewed the petitioner, and he reviewed the police

[5] When the petitioner was arrested, he initially was charged with kidnapping in the first degree in violation of § 53a-92 (a) (2) (B), felony murder in violation of § 53a-54c, robbery in the first degree in violation of § 53a-134 (a) (1), criminal use of a firearm in violation of General Statutes § 53a-216c and criminal possession of a firearm in violation of General Statutes § 53a-217c (a) (1).

[6] General Statutes § 53a-14 provides in relevant part: "In any prosecution for an offense, it shall be a defense that the defendant engaged in the proscribed conduct because he was coerced by the use or threatened imminent use of physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist. . . ." As recognized by the Supreme Court, "[i]t is well established that . . . § 53a-14 provides that duress is a defense to a crime." (Internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 771, 120 A.3d 481 (2015). However, "[d]uress is not an affirmative defense. . . . Thus, if that defense is raised at a trial, the state shall have the burden of disproving [it] beyond a reasonable doubt. General Statutes § 53a-12 (a). [T]he assertion and proof of the . . . defense nevertheless remains the defendant's responsibility in the first instance." (Citation omitted; internal quotation marks omitted.) Id.

[7] See, e.g., *State* v. *Helmedach*, 306 Conn. 61, 79, 48 A.3d 664 (2012) (discussing defendant's theory in that case that her sole defense as to robbery and felony murder charges was that state had failed to prove that she had planned robbery with codefendant, while her duress defense related only to acts that she admitted committing *after* her codefendant threatened to kill her, namely, stealing victim's car and absconding with codefendant).

reports and statements relating to the shooting, as well as the police videotaped interviews of the petitioner and the codefendant. Dr. Meisler also reviewed the petitioner's Department of Correction medical records. Dr. Meisler concluded that the petitioner's actions "can be explained and understood as an acute and adaptive response to danger rather than as behavior driven by criminologic intent." He further concluded that the petitioner's "actions during and after the offense occurred during a state of altered consciousness and behavioral control resulting from a self-protective response to acute fear."

The defense provided Dr. Meisler's report to the state in the week prior to jury selection. The state filed an objection and argued that it was not disclosed in a timely manner. The trial court (*Mullarkey*, *J.*) indicated that it would give the state time to have the petitioner evaluated by the state's expert witness, Dr. Donald R. Grayson, which was then scheduled for April 16, 2015, the date the petitioner elected to enter his pleas of guilty to the substitute information.[8] During the petitioner's guilty plea canvass, Attorney Lorenzen asked the court to confirm that the petitioner understood that the defense had intended to present a defense of duress but that, by entering his pleas of guilty, he would be waiving his right to present the defense. The court (*Alexander*, *J.*) asked the petitioner if Attorney Lorenzen's representation was correct, and he responded that it was correct.

During jury selection, Attorney Lorenzen together with Attorney Stawicki, met with the petitioner at Northern Correctional Institution on several occasions during the evening hours. At those meetings, Attorney

[8] During the change of plea hearing, the state informed the court that the petitioner was scheduled to be interviewed by the state's doctor later that day.

Lorenzen discussed with the petitioner his options. He gave strong advice to the petitioner to plead guilty to the lesser offenses and receive a sentence of fifteen years rather than proceed to trial and be exposed to a conviction for the offense of felony murder, and risk the mandatory minimum of twenty-five years to serve with a maximum of sixty years on that charge alone. Attorney Lorenzen was concerned about the increased exposure, as well as whether a jury would credit the petitioner's claims that he did not know anything about robbing the victim with a gun, and that his postshooting actions (i.e., dumping the body in a wooded area, cleaning the blood from the car, throwing the gun away, asking Jennings to concoct an alibi) were as a result of being in shock from his codefendant's actions. Additionally, trial counsel discussed with the petitioner that there was an issue relating to telephone calls between the petitioner and other individuals. The telephone records received by the petitioner's trial counsel did not support the petitioner's version of what had transpired.[9]

Pilgrim was an acquaintance of the petitioner who was interviewed by the police on February 27, 2014, after his telephone number showed up on the petitioner's phone records on the day of the shooting. Pilgrim told the police that, in late August, 2013, he was hanging out with the petitioner and Jennings at his house on

[9] The petitioner testified that Attorney Lorenzen persuaded him to plead guilty because he was aware that Jennings had met with the prosecutor during jury selection, and Lorenzen told the petitioner the phone records showed that there was a five minute conversation between him and Jennings just after the shooting. According to the petitioner, Lorenzen told him that such a lengthy conversation would go against his defense of duress. The petitioner further testified that, after he pleaded guilty, Lorenzen then told him he had been mistaken, and the phone records did not show a five minute conversation. The court credits that Lorenzen counseled the petitioner that a jury could determine that the phone call between him and Jennings shortly after the incident undermined his defense of duress. However, the court does not credit the petitioner's claim that Lorenzen provided the petitioner with misinformation regarding the length of the telephone call.

Bond Street in Hartford. The petitioner wanted to buy marijuana, so Pilgrim called Jefferson and arranged for them to meet. Pilgrim told the police that, after the petitioner and Jennings came back from meeting Jefferson to purchase marijuana, the petitioner was furious because Jefferson had charged them for an extra bag. Pilgrim told the police that the petitioner stated he should rob Jefferson for his stash of marijuana.

Attorney Lorenzen contacted Pilgrim and asked him questions. Pilgrim, who was on parole, indicated to Lorenzen that he was going through his own issues, and it was not the right time for him to get involved. Pilgrim also was contacted by a representative of the state, and Pilgrim told the state he did not want to testify. During jury selection, Attorney Lorenzen informed the petitioner that Pilgrim had contacted the defense, and he was not going to take the witness stand at the petitioner's trial.

Prior to the conclusion of jury selection, the petitioner elected to plead guilty to a substitute information to the charges of robbery in the second degree and tampering with physical evidence on April 16, 2015. The court (*Alexander*, *J.*) conducted a thorough and complete canvass of the petitioner. The court explained the elements of each statute and summarized the evidence the state claimed provided the factual basis for each charge. The petitioner indicated that he understood the elements of both offenses as well as the evidence that formed the basis for each charge. The petitioner also confirmed that he had talked to his attorneys about his decision to enter a plea agreement rather than continue with the trial. Subsequently, on June 16, 2015, the court (*Alexander*, *J.*) sentenced the petitioner to a period of ten years of incarceration on the robbery in the second degree charge and to a period of five years of incarceration on the tampering with physical evidence

charge for a total effective sentence of fifteen years to serve.

III

DISCUSSION

As recognized by the United States Supreme Court, "the [s]ixth [a]mendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland* v. *Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The court also recognized that, "if the right to counsel guaranteed by the [c]onstitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann* v. *Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). Therefore, "defendants facing felony charges are entitled to the effective assistance of competent counsel"; id.; and that includes in the context of counsel advising a defendant whether to plead guilty. See *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The decision to plead guilty is "ordinarily the most important single decision in any criminal case." (Internal quotation marks omitted.) *Boria* v. *Keane*, 99 F.3d 492, 496–97 (2d Cir. 1996), cert. denied, 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997).

The legal principles in cases involving claims of ineffective assistance of counsel in connection with guilty pleas are governed by *Strickland* v. *Washington*, supra, 466 U.S. 668, and *Hill* v. *Lockhart*, supra, 474 U.S. 52. Under *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." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 704, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018); see also *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 11, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). Furthermore, "[t]he [long-standing] test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." (Internal quotation marks omitted.) *Hill* v. *Lockhart*, supra, 56. As noted in *Strickland*, "[u]nless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland* v. *Washington*, supra, 687.

Our courts have recognized that, "[t]o satisfy the performance prong under *Strickland-Hill*, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that the advice was not within the range of competence demanded of attorneys in criminal cases. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Reasonably competent attorneys may advise their clients to plead guilty even if defenses may exist. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, supra, 180 Conn. App. 704–705.

Although the decision to plead guilty is the defendant's to make, counsel "must make an informed evaluation of the options and determine which alternative will offer the defendant the most favorable outcome. A defendant relies heavily upon counsel's independent evaluation of the charges and defenses, applicable law, the evidence and the risks and probable outcome of a trial." *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 154, 662 A.2d 718 (1995); *Siemon* v. *Stoughton*, 184 Conn. 547, 556 n.3, 440 A.2d 210 (1981). "It is [well settled] that defense counsel have a constitutional duty to convey any plea offers from the government and to advise their clients on the crucial decision whether to accept a plea offer." (Internal quotation marks omitted.) *Cardoza* v. *Rock*, 731 F.3d 169, 178 (2d Cir. 2013); *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 797, 93 A.3d 165 (2014). It is the duty of a criminal defense lawyer to fully advise his client whether pleading guilty "appears to be desirable"; (emphasis omitted; internal quotation marks omitted) *Boria* v. *Keane*, supra, 99 F.3d 496; *Vazquez* v. *Commissioner of Correction*, 123 Conn. App. 424, 437, 1 A.3d 1242 (2010), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011); and "determine which alternative will offer the defendant the most favorable outcome." *Copas* v. *Commissioner of Correction*, supra, 154. Thus, the effective assistance of counsel includes counsel's informed opinion as to what pleas should enter. *Boria* v. *Keane*, supra, 497.

As noted in *Strickland*, "[t]he object of an ineffectiveness claim is not to grade counsel's performance." *Strickland* v. *Washington*, supra, 466 U.S. 697. The sixth amendment "does not guarantee perfect representation, only a reasonably competent attorney. . . . Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (Citations omitted; internal quotation marks omitted.)

Harrington v. *Richter*, 562 U.S. 86, 110, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); see also *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 30–31.

A trial of a habeas petition is not an opportunity for a new counsel to attempt to relitigate a case in a different manner. The court in *Strickland* cautioned that, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland* v. *Washington*, supra, 466 U.S. 689; *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 31.

In the context of guilty pleas, "[t]o satisfy the prejudice prong [under *Strickland-Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, supra, 180 Conn. App. 705. As recently recognized by the Appellate Court, "an allegation of the ineffective assistance of counsel is a factor to be taken into consideration in determining whether a guilty plea was voluntary and intelligent, but for the plea and the judgment of conviction based thereon to be overturned on this ground, it must be demonstrated that there was such an interrelationship between the ineffective assistance of counsel and the plea that it can be said the plea was not voluntary and intelligent because of the ineffective assistance." (Internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 797–98, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018).

With respect to the prejudice prong, a petitioner "must make more than a bare allegation that he would have pleaded differently and gone to trial . . . ." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018). "In evaluating whether the petitioner had met this burden and evaluating the credibility of the petitioner's assertions that he would have gone to trial, it [is] appropriate for the court to consider whether a decision to reject the plea bargain would have been rational under the circumstances." (Internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 280, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017). As noted in *Strickland*, "[u]nless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland* v. *Washington*, supra, 466 U.S. 687.

First, the petitioner's claim that trial counsel's performance was deficient because he failed to timely raise a defense of duress[10] and did not timely disclose Dr. Meisler as an expert witness is without merit. Although the state objected to the disclosure and moved to exclude Dr. Meisler's testimony due to late disclosure, the record reveals that the trial judge was not going to preclude Dr. Meisler's testimony due to the timing of disclosure. The petitioner was present in the courtroom when the trial judge stated he would permit time for the state to engage its own expert to examine the petitioner. In fact, the petitioner was scheduled to meet with the state's expert on the date he changed his plea to guilty. Therefore, to the extent the petitioner is asserting a claim that he pleaded guilty because he felt

[10] The petitioner does not provide any authority for the proposition that a defendant must provide notice to the state that he is asserting a defense of duress.

his duress defense was not going to be presented to the jury due to late disclosure, his claim is not credible. Trial counsel disclosed Dr. Meisler's report to the state prior to jury selection and was prepared to call him as a witness to support the petitioner's claim that he acted under duress after he witnessed his codefendant shoot the victim and then point the gun at him.[11] Accordingly, trial counsel's performance in securing an expert witness to support his defense that he was acting under duress after the shooting occurred does not support a claim of deficient performance.

Secondly, the petitioner's claims that trial counsel's performance was deficient because he failed to obtain Jennings' second statement and he did not investigate her also is without merit. Jennings did not give a second written statement. Instead, she was interviewed by the police, and her recantation is memorialized in a police report. Both trial counsel were aware of her recantation of the petitioner's alibi, and the court does not find credible that the petitioner was not aware that she had recanted. Regardless, the petitioner admitted to the police that he had asked her to lie for him and tell the police that he was with her on the day of the shooting. Therefore, based on the petitioner's admission to the police, it was sound trial strategy for trial counsel not to investigate Jennings and, instead, pursue an alternative theory of defense based on the petitioner's version of events.

[11] In the operative petition, the petitioner alleges that "counsel misrepresented that he intended to have Dr. Meisler testify at the jury trial in regard to the evaluation of the petitioner to support the defense of duress . . . ." The petitioner presented no credible evidence in support of this assertion, and credits Attorney Lorenzen's testimony that, if the case had gone to trial, he intended to call Dr. Meisler in support of his defense theory. Lorenzen's testimony is supported by the prosecutor's statement to the court during the first day of jury selection: "[The defense is raising the defense of duress to some of the charges and claim, I guess, of actual innocence with regard to the others."

While "[c]onstitutionally adequate assistance of counsel includes competent pretrial investigation"; *Siemon* v. *Stoughton*, supra, 184 Conn. 554; "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012). In *Gaines*, the court recognized the following: "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

"The reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the [petitioner] and on information supplied by the [petitioner]. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigations may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." (Internal quotation marks omitted.) Id., 680–81.

In this case, based on the information supplied by the petitioner to Attorney Lorenzen as well as the petitioner's statement to the police, Lorenzen's decision to not investigate Jennings is sound legal strategy based on

reasonable professional judgment. The defense strategy was to pursue a claim of actual innocence as to the robbery and felony murder, and then to argue that the petitioner was under duress after witnessing his codefendant shoot the victim. Jennings' original statement providing the petitioner with an alibi, and her later recantation, would not have been helpful to the petitioner's theory of the case. Furthermore, this court "will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, such as when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . or . . . the petitioner fails to present, at the habeas hearing, evidence or the testimony of witnesses that he argues counsel reasonably should have discovered during the pretrial investigation." (Footnotes omitted.) Id., 681–82. In the present case, Jennings' testimony would have been potentially harmful to the defense, and the petitioner did not present any relevant evidence counsel should have uncovered with further investigation. Therefore, the petitioner has not presented any credible evidence that trial counsel's decision to not investigate Jennings constituted deficient performance.

Similarly, while the petitioner alleged that trial counsel failed to investigate additional witnesses, namely, Pilgrim, Donraj Chandrat and Sheila Robinson, the petitioner did not offer any evidence that trial counsel did not conduct an investigation of these witnesses. Trial counsel was not asked whether he ever investigated these witnesses. See, e.g., *Romero* v. *Commissioner of Correction*, 112 Conn. App. 305, 312, 962 A.2d 894 (petitioner failed to present evidence that would allow habeas court to determine whether counsel's pretrial investigation was inadequate), cert. denied, 290 Conn. 921, 966 A.2d 236 (2009). The only witness who testified

at the habeas trial was Pilgrim. Pilgrim spoke with Attorney Lorenzen, but he told him he could not get involved since he had his own issues. Thus, trial counsel did contact Pilgrim, and the petitioner has not established that trial counsel did not investigate Pilgrim or that any investigation conducted was inadequate. Furthermore, the petitioner admitted that he knew at the time he entered his guilty pleas that Pilgrim had called his attorney's office and stated that he was not going to testify at the petitioner's trial. This admission defeats the petitioner's allegation that Attorney Lorenzen failed to inform the petitioner whether Pilgrim intended to testify.

The court also rejects the petitioner's claim that trial counsel misrepresented to the petitioner that the state possessed evidence that he made a five minute telephone call shortly after the incident to Jennings, which would have undermined his defense of duress. According to the petitioner, this misrepresentation contributed to his decision to plead guilty. He further testified that, after he pleaded guilty, trial counsel informed him he had been incorrect, and there was no five minute telephone call. The court did not find the petitioner's testimony on this subject to be credible, and the petitioner did not offer any additional evidence regarding this claim. Furthermore, the petitioner testified that he told Attorney Lorenzen he called Jennings to tell her he could not make it back to care for his dogs that he kept at her house. Therefore, regardless of whether the telephone call lasted ten seconds or five minutes, Attorney Lorenzen's advice to the petitioner that a jury could view the fact that he was able to have the presence to think about his dogs and make a telephone call at all as contrary to being under duress was reasonable.

Finally, the credible evidence does not support the petitioner's allegations that Attorney Lorenzen failed to communicate the strengths and weaknesses of the

state's case or that he failed to discuss the potential testimony of all anticipated witnesses. Attorney Lorenzen met with the petitioner to develop a strategy. There were numerous pretrial conferences between the petitioner and trial counsel as well as several conferences during jury selection. Attorney Lorenzen provided the discovery to the petitioner and discussed with the petitioner his options. He recommended to the petitioner that he should plead guilty to the lesser offenses and receive a sentence of fifteen years rather than proceed to trial and risk being convicted for the offense of felony murder and then being exposed to the mandatory minimum of twenty-five years to serve with a maximum of sixty years on that charge alone.

The petitioner has not established that his trial counsel's advice to plead guilty was not within the range of competence demanded of attorneys in criminal cases. The petitioner did not establish that counsel's representation fell below an objective standard of reasonableness such that the petitioner was unable to make an informed decision to plead guilty.

IV

CONCLUSION

For the foregoing reasons, the court denies the claims of ineffective assistance of counsel, and judgment shall enter denying the petition for a writ of habeas corpus.

STATE OF CONNECTICUT *v.* YUSEF L.*
(AC 43612)

Elgo, Cradle and DiPentima, Js.

Syllabus

Convicted, on guilty pleas of the crimes of violation of a protective order and strangulation in the second degree and on an admission to violation of probation, the defendant appealed to this court, claiming that the trial court improperly denied his motion to withdraw his guilty pleas because they were not made knowingly, voluntarily, and intelligently. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motion to withdraw his guilty pleas because it failed to determine whether he fully understood the maximum possible sentence that could result from consecutive sentences: the court informed the defendant that, if he were to plead guilty, he could receive up to five years in prison and five years of probation for each charge, and, although the defendant gave one word responses, they still represented a clear communication from the defendant to the court that he understood the maximum possible sentence before him; moreover, the defendant had prior experience with criminal proceedings, and, by his own admission, received adequate representation by counsel; accordingly, the court substantially complied with the applicable rule of practice (§ 39-19 (4)).

2. The trial court properly rejected the defendant's unpreserved claims seeking review pursuant to *State* v. *Golding* (213 Conn. 233), which challenged the court's denial of his motion to withdraw his guilty pleas:

   a. The defendant could not prevail on his claim that the trial court incorrectly advised him that a mandatory minimum sentence applied: although the defendant was correct that no mandatory minimum sentence applied with respect to the charges of strangulation in the second degree and violation of a protective order, his claim failed under the third prong of *Golding* because no constitutional violation occurred; the court never informed the defendant of the application of any mandatory

* In accordance with our policy of protecting the privacy interests of victims of family violence, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 64-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

minimum sentence, rather, the court explained the structure of the sentence to be imposed, and the record indicated that the defendant understood that explanation; thus, because the court did not misinform the defendant of a mandatory minimum sentence, the defendant's due process rights were not implicated.

b. The defendant's claim that the trial court failed to determine whether he fully understood that he had the right to plead not guilty and the right to the assistance of counsel was unavailing: the court explicitly informed the defendant that if he did not plead guilty he would proceed to trial, at which time he potentially could be found guilty, and the defendant indicated to the court that he understood that he had a right to plead not guilty; moreover, the defendant's familiarity with the criminal justice system supported the conclusion that he knew that he had the right to plead not guilty, and the court reasonably could have relied on the fact that the defendant was represented by counsel in all pretrial proceedings in the present case in concluding that the defendant understood the role of counsel and that he had the right to the assistance of counsel.

Argued May 25—officially released September 14, 2021

Procedural History

Information, in the first case, charging the defendant with violation of probation, and information, in the second case, charging the defendant with the crimes of breach of the peace in the second degree and strangulation in the second degree, and information, in the third case, charging the defendant with the crime of violation of a protective order, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the defendant was presented to the court, *Doyle*, *J.*, on an admission of guilt to violation of probation and pleas of guilty to strangulation in the second degree and violation of a protective order; thereafter, the state entered a nolle prosequi as to the charge of breach of the peace in the second degree; subsequently, the court denied the defendant's motion to withdraw and vacate his guilty pleas, and rendered judgment revoking probation and judgments of guilty in accordance with the pleas, from which the defendant appealed to this court. *Affirmed.*

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

Christopher W. Iverson, certified legal intern, with whom, on the brief, was *Michele C. Lukban*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, J. The defendant, Yusef L., appeals from the judgment revoking his probation and the judgments of conviction, rendered after his admission to a violation of his probation in violation of General Statutes § 53a-32 and after pleas of guilty, pursuant to the *Alford* doctrine,[1] of violation of a protective order in violation of General Statutes § 53a-223 and strangulation in the second degree in violation of General Statutes § 53a-64bb. On appeal, the defendant claims that the trial court improperly denied his motion to withdraw his guilty pleas because they were not made knowingly, voluntarily, and intelligently. Specifically, the defendant claims that the court (1) failed to determine whether he fully understood the maximum possible sentence that could result from consecutive sentences, (2) incorrectly advised him that a mandatory minimum sentence applied, and (3) failed to determine whether he fully understood that he had the right to plead not guilty and the right to the assistance of counsel.[2] We affirm the judgments of the trial court.

The following facts and procedural history are relevant to this appeal. On January 11, 2019, the defendant, while represented by counsel, admitted that he violated

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea." (Internal quotation marks omitted.) *State* v. *Webb*, 62 Conn. App. 805, 807 n.1, 772 A.2d 690 (2001).

[2] For convenience, we have reordered the defendant's claims as they are set forth in his brief.

his probation and entered guilty pleas pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to the charges of violation of a protective order and strangulation in the second degree with an agreed on sentence of "four years and two days to serve, followed by 2184 days of special parole." After conducting a plea canvass, the court, *Doyle*, *J.*, found that the defendant's admission and pleas were made knowingly and voluntarily, and accepted each of them. The court then ordered a presentence investigation report and continued the case for sentencing.

On January 12, 2019, the defendant sent a letter to the court seeking to withdraw his guilty pleas because he was "confused [as] to what [he] plead[ed] guilty to." On January 14, 2019, the defendant sent a second letter to the court, again stating that he wanted to withdraw his guilty pleas, and stating that he was not satisfied with the representation that he had received and that he was prepared to go trial. The court construed these letters as a motion by the defendant to withdraw his guilty pleas. On March 18, 2019, the defendant and his counsel appeared before the court. At that time, the defendant stated that he "was confused" and "didn't know what was going on" during the January 11, 2019 plea hearing. The court ordered a copy of the transcript from the January 11, 2019 hearing and informed the defendant that they would discuss its contents at a hearing on April 1, 2019.

At the April 1, 2019 hearing, the court stated to the defendant: "I reviewed the transcript [from the January 11, 2019 plea hearing] and I think it's pretty clear to me that, at the time, you understood everything that I asked you based on your responses. In the letter you seem to be more interested in just—you're not happy with the sentence, which I get, but that's not a basis for changing a plea. So what I'm inclined to do is I'll give you a copy of the transcript and I'll give you a new

date to look it over." The defendant persisted in his claim that he did not understand what had happened at the January 11, 2019 plea hearing, and the court responded that the defendant would receive a copy of the transcript so that he could "tell [the court] where [he] . . . [didn't] understand . . . ."

On April 26, 2019, the defendant sent a third letter to the court, this time requesting to represent himself in future proceedings. At a hearing on May 22, 2019, concerning his request for self-representation and after a lengthy canvass of the defendant, the court found: "[T]he defendant has knowingly and intelligently waived his right to counsel . . . he wants to represent himself or get a private attorney.[3] I'm going to continue the case one month to see if he gets a private attorney . . . [then] we are going forward on [the defendant's] motion to vacate if [he] wants to pursue it, or we are going to be going to sentencing." (Footnote added.) The court also ordered that the defendant's former attorney, Christopher J. Molyneaux, act as standby counsel for the defendant if he did not retain a private attorney.

On June 26, 2019, the self-represented defendant, with standby counsel present, argued that he should be permitted to withdraw his guilty pleas because the sentence "exceed[ed] the specified agreement [to] which [he] pleaded . . . ." Specifically, the defendant stated that he understood that he was accepting five and one-half years of special parole, and that he did not agree to "shy of six years" of special parole. The defendant further argued that he should be permitted to withdraw his guilty pleas because the court never used the word " 'consecutive' " when it canvassed him with regard to the charges to which he was pleading

[3] Although the court noted that the defendant's April 26, 2019 letter indicated that the defendant sought to represent himself, at the May 22, 2019 hearing he requested time to retain a private attorney.

guilty. The defendant gave no other reasons to withdraw his plea. The court denied the defendant's motion to withdraw his guilty plea, stating: "I don't think that you've provided a sufficient factual basis that requires a further evidentiary hearing. You've basically made some vague and conclusory allegations that you weren't sure about the sentence and exceeding it. It does not exceed the proposed agreement. You did not carry your burden to put forth sufficient facts that would warrant a further hearing . . . to address your motion to withdraw [your guilty plea]."

On July 9, 2019, after reviewing the presentence investigation report, the court sentenced the defendant as agreed. The defendant then appealed from the judgments of conviction, claiming that the court improperly denied his motion to withdraw his guilty pleas. Additional facts will be set forth as necessary.

"Our standard of review for the trial court's decision on a motion to withdraw a guilty plea under Practice Book § 39-27 is abuse of discretion. . . . After a guilty plea is accepted but before the imposition of sentence the court is obligated to permit withdrawal upon proof of one of the grounds in [§ 39-27]. An evidentiary hearing is not required if the record of the plea proceeding and other information in the court file conclusively establishes that the motion is without merit. . . .

"In considering whether to hold an evidentiary hearing on a motion to withdraw a guilty plea the court may disregard any allegations of fact, whether contained in the motion or made in an offer of proof, which are either conclusory, vague or oblique. For the purposes of determining whether to hold an evidentiary hearing, the court should ordinarily assume any specific allegation of fact to be true. If such allegations furnish a basis for withdrawal of the plea under [Practice Book § 39-27] and are not conclusively refuted by the record of the

plea proceedings and other information contained in the court file, then an evidentiary hearing is required. . . . We further [note] that the burden [is] on the defendant to show a plausible reason for the withdrawal." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Warner*, 165 Conn. App. 185, 191–92, 138 A.3d 463 (2016).

I

The defendant's first claim challenging the court's denial of his motion to withdraw his guilty pleas is that the court failed to determine whether he fully understood the maximum possible sentence that could result from consecutive sentences.[4] Specifically, the defendant argues that "[n]othing in the record suggests [that] [he] was aware of the actual sentencing possibilities," and that "[t]here was no substantial compliance with Practice Book § 39-19 (4)."[5] The state counters that the record shows substantial compliance with § 39-19 (4), and that the defendant was aware of the maximum possible sentence that would result from consecutive sentences. We agree with the state.

It is well established that "[a] defendant can voluntarily and understandingly waive [his] rights without literal compliance with the prophylactic safeguards of Practice Book §§ [39-19 and 39-20]. Therefore . . . precise compliance with the provisions [of §§ 39-19 and 39-20] is not constitutionally required." (Citations omitted.) *State* v. *Badgett*, 200 Conn. 412, 418, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). Accordingly, "[o]ur courts repeatedly have

[4] As the state acknowledges in its appellate brief, the defendant raised this claim before the trial court, thereby preserving it.

[5] Practice Book § 39-19 provides in relevant part: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands . . . (4) [t]he maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences . . . ."

held that only substantial compliance is required when warning the defendant of the direct consequences of a . . . plea pursuant to . . . § 39-19 in order to ensure that the plea is voluntary pursuant to . . . § 39-20." (Internal quotation marks omitted.) *State* v. *Hanson*, 117 Conn. App. 436, 444, 979 A.2d 576 (2009), cert. denied, 295 Conn. 907, 989 A.2d 604 (2010), cert. denied, 562 U.S. 986, 131 S. Ct. 425, 178 L. Ed. 2d 331 (2010).

"[W]hen determining whether there has been substantial compliance with Practice Book § 39-14 (4), we must conduct a two part inquiry. Our first inquiry is to determine whether the court accepted the defendant's pleas without first determining whether he was aware of and understood the maximum possible sentence to which he was exposed. . . . Next, if we conclude that the court failed to determine whether the defendant was aware of and understood the maximum possible sentence, we examine the record to determine whether, despite the court's failure, he nevertheless had actual knowledge of the maximum possible consequences of his pleas. . . . If either prong is satisfied, the pleas were accepted with substantial compliance with Practice Book § 39-19 (4)." (Citations omitted.) *State* v. *Carmelo T.*, 110 Conn. App. 543, 552–53, 955 A.2d 687, cert. denied, 289 Conn. 950, 960 A.2d 1037 (2008).

During the court's plea canvass of the defendant, the following exchange took place:

"The Court: [D]id [defense counsel] explain to you for *each* of [the] charges you could get up to five years in prison [and] five years of probation . . . ?

"The Defendant: Yes.

"The Court: Do you understand everything he explained to you about the court's offer?

"The Defendant: Yes.

"The Court: Are you satisfied with how your attorney represented you, sir?

"The Defendant: Yes.

"The Court: Counsel, did you go over all of this with your client?

"[Defense Counsel]: I did, Your Honor.

"The Court: And did he have any trouble understanding you?

"[Defense Counsel]: He did not, Your Honor." (Emphasis added.)

Our Supreme Court has held that, in the context of a plea canvass, "[a]lthough some form of meaningful dialogue is preferable to monosyllabic responses by the defendant . . . single-word responses [do not] require an automatic vacation of a guilty plea." *State* v. *Torres*, 182 Conn. 176, 179–80, 438 A.2d 46 (1980). Moreover, it is well established that a court may rely on a defendant's responses during a plea canvass in determining whether the guilty plea is knowing and voluntary. See, e.g., *State* v. *Young*, 186 Conn. App. 770, 780, 201 A.3d 439, cert. denied, 330 Conn. 972, 200 A.3d 1151 (2019).

In the present case, as the exchange referenced reflects, the court informed the defendant that, if he were to plead guilty, he could face up to five years in prison and five years of probation for *each* charge. Furthermore, although the defendant gave one word responses, they still represented a clear communication from the defendant to the court that he understood the maximum possible sentence before him. This is especially true considering that the defendant had prior experience with criminal proceedings—prior to the charges in the present case, he had pleaded guilty to a variety of charges, including a charge of possession of

narcotics—and, by his own admission, received adequate representation by counsel with respect to the maximum possible sentence that he faced in the present case. See, e.g., *State* v. *Claudio*, supra, 123 Conn. App. 293 (holding that prior experience with criminal proceedings and adequate representation by counsel are factors to be considered in determination of whether plea canvass was constitutionally sufficient); see also, e.g., *State* v. *Lage*, 141 Conn. App. 510, 524–25, 61 A.3d 581 (2013) (same). These facts, considered as a whole, demonstrate that the court correctly determined that the defendant was aware of and understood the maximum possible sentence to which he was exposed and thus, there was substantial compliance with the requirements of Practice Book § 39-19 (4).[6]

II

We now turn to the defendant's claims that were not properly preserved. The defendant claims that the court (1) incorrectly advised him that a mandatory minimum sentence applied and (2) failed to determine whether he fully understood that he had the right to plead not guilty and the right to the assistance of counsel. The defendant acknowledges that these claims are unpreserved, and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

"Under *Golding*, a [party] can prevail on a claim of constitutional error not preserved at trial only if the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of

[6] We observe that, although the court's explanation of the defendant's maximum sentence substantially complies with the requirements of Practice Book § 39-19 (4), the best practice is for the court to state the maximum sentence for each individual charge, and then state a total maximum exposure that is the sum of the maximum sentence for each individual charge.

constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [party] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate the harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [party's] claim will fail. The appellate tribunal is free, therefore, to respond to a [party's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *In re Madison C.*, 201 Conn. App. 184, 190, 241 A.3d 756, cert. denied, 335 Conn. 985, 242 A.3d 480 (2020).

A

The defendant's first unpreserved claim is that the court "incorrectly advised [him] that a mandatory minimum sentence was required on the two [charges] [he] was pleading [guilty] to . . . [because] [s]trangulation in the second degree and violation of a protective order have no mandatory minimums . . . [a]nd neither . . . mandates probation or special parole." According to the defendant, this claim should be reviewed under *Golding* because it is of "constitutional dimension . . . ." In response, the state argues that this claim fails under the third prong of *Golding*, because the court "never mistakenly stated that either of the defendant's two criminal charges carried a mandatory minimum sentence." We agree with the state.

It is well established that "[t]o ensure that a defendant is accorded due process . . . [a] plea must be voluntarily and intelligently entered." *State* v. *Domian*, 235 Conn. 679, 686, 668 A.2d 1333 (1996). To this end, Practice Book § 39-19 provides in relevant part that "[t]he judicial authority shall not accept [a] plea without first addressing the defendant personally and determining

that he or she fully understands . . . (2) [t]he mandatory minimum sentence, if any . . . .''

The defendant is correct in his assertion that no mandatory minimum sentence applies with regard to the crimes of strangulation in the second degree and violation of a protective order. The defendant's claim fails, however, under the third prong of *Golding* because, as the record indicates, no constitutional violation occurred. In claiming that the court incorrectly advised him that a mandatory minimum sentence applied, the defendant relies on the following language employed by the court: ''Right now, you're going to plead [guilty] to two class D felonies. One is strangulation in the second degree and the other is violation of a protective order. You have to, on each one, to get special parole, get on the bottom part two years and [one] day. So you're going to get two years and [one] day on each, okay, and then you're going to get the remainder in special parole.'' According to the defendant, this language shows that the court, ''in effect . . . incorrectly advised [him] that two years and [one] day was a mandatory minimum on each felony and that just shy of three years [of] special parole was also required on the bottom part of each felony.'' (Emphasis omitted.) This, however, is not the case.

The record reflects that the court never informed the defendant, either explicitly or impliedly, of the application of any mandatory minimum sentence. From an examination of the context of the language referenced by the defendant, it is clear that the court was explaining the structure of the sentence to be imposed and not the existence of a mandatory minimum sentence.[7] Moreover, the record shows that the defendant had a clear understanding of that explanation. Because the record

[7] We note that, in order for a defendant to be eligible for special parole, ''a definite sentence of more than two years'' must be imposed. General Statutes § 54-125e (a).

clearly indicates that the court did not misinform the defendant of a mandatory minimum sentence, we conclude that the defendant's due process rights are not implicated and no constitutional violation exists. Accordingly, the defendant's claim fails under the third prong of *Golding*.

B

The defendant's second unpreserved claim is that the court failed to determine whether he fully understood that he had the right to plead not guilty or to persist in that plea if it already had been made, as well as the right to the assistance of counsel. According to the defendant, "there is nothing in the record that supports a finding that [he] was aware . . . that he had the right to plead not guilty . . . [or] that he had the right to the assistance of counsel at trial." The defendant further argues that the court failed to comply with Practice Book § 39-19 (5).[8] In response, the state argues that this claim fails because "the record shows that the defendant was aware of his right to plead not guilty and of his right to the assistance of counsel at trial." We agree with the state.

The due process rights of a defendant are implicated if his plea has not been voluntarily and knowingly entered. See *State* v. *Domian*, supra, 235 Conn. 686. The defendant argues that this claim qualifies for *Golding* review because the court's alleged failure to inform him of his right to plead not guilty and of his right to the assistance of counsel implicates his due process rights. The record indicates, however, that such a failure did not occur. During the court's canvass of the defendant, the following exchange took place:

[8] Practice Book § 39-19 provides in relevant part: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands . . . (5) [t]he fact that he or she has the right to plead not guilty or to persist in that plea if it has already been made . . . and the right to the assistance of counsel . . . ."

"The Court: On the criminal charges, you [pleaded] [guilty] under the *Alford* doctrine. I need to make sure you understand what that means. When you do that, you're telling me that you don't agree with some or all the facts put on the record about those incidents; is that correct?

"The Defendant: Yes.

"The Court: Even though you don't agree with some or all the facts, you recognize you could be found guilty of those or some other charges. After you've thought about it and discussed it with your attorney, you, on your own, have decided it's in your best interest to accept the proposed offer *rather than risk going to trial and getting a longer sentence if you're found guilty after trial*; is that correct, sir?

"The Defendant: Yes.

"The Court: Even though you dispute the factual basis of the pleas, once I accept them, I'll be finding you guilty. Do you understand that, sir?

"The Defendant: Yes.

"The Court: Are you entering these pleas of your own free will?

"The Defendant: Yes." (Emphasis added.)

This exchange demonstrates that the court made it clear to the defendant that he had the right to plead not guilty. The court explicitly stated that if the defendant did not plead guilty he would proceed to trial, at which time he potentially could be found guilty. Moreover, the defendant, through his responses, indicated that he understood that he had the right to plead not guilty. It is well established that "[a] court is permitted to rely on a defendant's responses during a plea canvass." (Internal quotation marks omitted.) *State* v. *Young*, supra, 186 Conn. App. 780.

We again note the undisputed fact that the defendant was familiar with the criminal justice system. As this court has held, prior experience with criminal proceedings is a factor to be considered in determining whether a defendant's guilty plea is knowing and voluntary. See, e.g., *State* v. *Claudio*, supra, 123 Conn. App. 293. The defendant's familiarity with the criminal justice system further supports the conclusion that he knew that he had the right to plead not guilty. He also conceded that he had never gone to trial on a criminal charge, indicating that he understood that he had right to plead not guilty and to proceed to trial.

Additionally, the court reasonably could have relied on the defendant's familiarity with the criminal justice system in determining that he understood that he had the right to the assistance of counsel. The defendant stated, in reference to his prior criminal charges while being canvassed by the court regarding his request to represent himself, that he had "[o]nce in [his] life" been represented by an attorney from the public defender's office, and had been represented by private counsel "[a] majority of the time," indicating that he clearly understood both the role of counsel and his right to the assistance of counsel. Furthermore, the court reasonably could have relied on the fact that the defendant had been represented by counsel in all pretrial proceedings, through his entry of guilty pleas, in the present case. See *State* v. *Badgett*, supra, 200 Conn. 420–21 n.7 (holding that "[i]t would defy reality to suppose that [the defendant] had any doubts about his continued right to assistance of counsel," when defendant was represented by counsel throughout pretrial proceedings and his plea was "a tactical one and the product of discussion . . . [with] his counsel" (internal quotation marks omitted)). Accordingly, we conclude that the defendant's due process rights are not implicated and

no constitutional violation exists. Therefore, the defendant's claim fails under the third prong of *Golding*.

The judgments are affirmed.

In this opinion the other judges concurred.

KARL PAUL VOSSBRINCK *v.* BRIAN HOBART
(AC 42648)

Elgo, Alexander and DiPentima, Js.

Syllabus

The plaintiff, whose real property had been foreclosed on, brought an action against the defendant, a state marshal, alleging that the defendant stole, or allowed to be stolen, numerous items of the plaintiff's personal property when the defendant executed an order of ejectment at the property subsequent to the foreclosure. The plaintiff claimed that the defendant deprived him of certain of his constitutional rights and committed numerous violations of state law, including civil conspiracy and larceny. The defendant thereafter filed a motion for summary judgment, claiming that the trial court lacked subject matter jurisdiction and that he was entitled to judgment as a matter of law because no genuine issue of material fact existed. The trial court granted the defendant's motion, concluding, inter alia, that the defendant was entitled to sovereign immunity, which deprived the court of subject matter jurisdiction, and that the defendant was entitled to statutory immunity (§ 6-38a (b)) because there was no evidence of wanton, reckless or malicious conduct on his part. The court thereafter rendered judgment for the defendant, and the plaintiff appealed to this court. *Held*:

1. The trial court improperly concluded that the defendant was entitled to sovereign immunity, as state marshals are not state officials or public officials, and, thus, the doctrine of sovereign immunity is not available as a defense to an action against them for tortious conduct: the defendant's status as a state marshal is circumscribed by statute, as the legislature, following the abolition of the system of sheriffs by constitutional amendment and the passage of No. 99 of the 2000 Public Acts (P.A. 00-99), specifically designated state marshals as independent contractors who are compensated on a fee for service basis by agreement with an attorney, court or public agency, and who may not be a state marshal and a state employee at the same time, irrespective of the nature of the party that secures their services; accordingly, in effectuating an order of ejectment on behalf of the attorney representing the foreclosing party, which, at its core, involved a dispute between private parties, the defendant was not performing a sovereign function, and the mere fact

that his conduct involved the effectuation of a court order did not change the essential character of the service performed; moreover, the legislature's intention that statutory immunity replace sovereign immunity, which sheriffs who became state marshals would no longer enjoy, was reflected in the incorporation of § 6-38a (b) in P.A. 00-99, as § 6-38a (b) provides state marshals with limited immunity for certain tortious acts in the performance of their execution and service of process functions, and the legislature provided for indemnification pursuant to statute (§ 6-30a (b)) in the limited circumstances under which a state marshal performs a function that retains a sovereign quality and has been sued in his or her individual capacity.

2. The trial court properly determined that the defendant was entitled to immunity pursuant to § 6-38a (b); nothing in the record raised a genuine issue of material fact as to whether his actions were wanton, reckless or malicious, the plaintiff's reference to the defendant's helpers using their own pickup trucks to remove his belongings from the property in no way supported his claim that the defendant acted improperly, and no evidence substantiated the plaintiff's claim that the conduct of the defendant and his helpers amounted to theft.

3. The plaintiff's assertion that the trial court improperly failed to address a federal statutory (42 U.S.C. § 1983) claim he raised was unavailing and this court declined to address it, as no such claim was alleged in his complaint and, thus, it was not properly before the trial court.

Argued October 14, 2020—officially released September 14, 2021

Procedural History

Action to recover damages for, inter alia, the defendant's alleged violation of certain of the plaintiff's constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Karl Paul Vossbrinck, self-represented, the appellant (plaintiff).

Nathan C. Favreau, with whom, on the brief, was *Joseph B. Burns*, for the appellee (defendant).

Opinion

ELGO, J. The self-represented plaintiff, Karl Paul Vossbrinck, appeals from the summary judgment rendered

by the trial court in favor of the defendant, Brian Hobart. On appeal, the plaintiff claims that the court improperly (1) concluded that the defendant, as a state marshal, was entitled to sovereign immunity, (2) concluded that the defendant was entitled to statutory immunity pursuant to General Statutes § 6-38a (b),[1] and (3) failed to address his 42 U.S.C. § 1983 claim. We agree with the plaintiff that the defendant was not entitled to sovereign immunity. We nevertheless conclude that the court properly determined that no genuine issue of material fact exists as to whether the defendant is entitled to statutory immunity under § 6-38a (b). Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history were set forth by the trial court in its memorandum of decision or otherwise are undisputed. The plaintiff owned a twenty-four acre parcel of real property located at 487 Berkshire Road in Southbury (property). The property was the subject of a foreclosure proceeding,[2] and a judgment of strict foreclosure was rendered on June 21, 2011.[3] The law day ultimately passed, and title vested in Accredited Home Lenders, Inc. In his subsequent deposition testimony in this action, the plaintiff admitted that he was a party to the foreclosure action and had received copies of court orders from that action.

At all relevant times, the defendant was a state marshal. On September 10, 2012, the defendant served an order of ejectment on "the person(s) in possession" of the property, as well as "the chief executive officer of

[1] General Statutes § 6-38a (b) provides: "Any state marshal, shall, in the performance of execution or service of process functions, have the right of entry on private property and no such person shall be personally liable for damage or injury, not wanton, reckless or malicious, caused by the discharge of such functions."

[2] See *Accredited Home Lenders, Inc.* v. *Vossbrinck*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5007144-S.

[3] See *Vossbrinck* v. *Eckert Seamans Cherin & Mellott, LLC*, 301 F. Supp. 3d 381, 384 (D. Conn. 2018).

the town where the premises are situated." On October 2, 2012, the defendant arrived at the property with movers and removed certain items of personal property and possessions from the main house. Thereafter, Safeguard Properties, LLC, the foreclosing party's property management company, arrived to clear the yard and to haul away additional items of personal property. According to the plaintiff, certain items of his personal property that had been removed were of significant value and were unaccounted for. A considerable amount of the plaintiff's property remained on the premises after the ejectment process had concluded, which the plaintiff also alleged to be of great value. The remaining personal property was not removed from the premises until 2014, when it was liquidated by the foreclosing party's attorney. There allegedly has been no accounting for the disposition of that personal property.

The plaintiff commenced the present action in 2015. The plaintiff filed the operative complaint on May 6, 2016, in which he alleged, generally, that the defendant stole, or allowed to be stolen, numerous items of his personal property during the course of the ejectment. Thus, as the plaintiff further alleged, the defendant deprived him of his rights under 18 U.S.C. § 242, committed a civil conspiracy in violation of General Statutes § 53a-48, lacked standing to remove his property from his residence, lacked the authority to remove him from his home, committed larceny, was guilty of "unjust enrichment and quantum meruit," violated General Statutes §§ 15-140c, 49-22, 50-10 and 54-33g, and violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. Additionally, the plaintiff alleged that he was entitled to replevin pursuant to General Statutes § 52-515, and damages pursuant to General Statutes §§ 52-529, 52-530 and 53a-121.

On June 5, 2018, the defendant filed what he termed a "motion to dismiss and/or for summary judgment."

In that motion, the defendant asked the court to either dismiss or render summary judgment in his favor on all eighteen counts of the plaintiff's complaint, claiming both a lack of subject matter jurisdiction and that no genuine issue of material fact existed, which entitled him to judgment as a matter of law. In support thereof, the defendant relied on the plaintiff's deposition testimony, an affidavit from the defendant, and certain court filings from the underlying foreclosure action.

As the court noted in its memorandum of decision on the defendant's motion, "the plaintiff had not filed any competent admissible evidence in opposition to this motion that would either support his claims or rebut the claims of the defendant" at the time the motion initially was heard on September 4, 2018. The court, sua sponte, gave the plaintiff until September 24, 2018, to furnish any additional evidence that he wanted the court to consider when ruling on the defendant's motion. In response, the plaintiff submitted three affidavits—two from his sons and a third from Alan Gordon, a friend of the plaintiff. Read together, the affidavits allege that, "after the defendant had completed the ejectment process, a considerable amount of the plaintiff's personal property had been removed from [the property] and that substantial amounts of [the plaintiff's] personal property still remained in the yard at that address, much of which was strewn about the property in disarray."

In his affidavit submitted in support of his motion, the defendant averred that he removed only personal property from the plaintiff's main house, and that Safeguard Properties, LLC, was responsible for clearing the yard and hauling away additional items located there. The defendant further alleged that, after his work in connection with the 2012 ejectment was complete, he returned to the property on only one occasion to serve eviction papers on a tenant who was living at that

address. Additionally, the defendant noted that the plaintiff, in his deposition testimony, had acknowledged that the defendant was acting pursuant to a Superior Court order and that the defendant did not participate in the 2014 disposal of his personal property.

In its memorandum of decision granting the defendant's motion for summary judgment, the court held that the plaintiff's affidavits lacked sufficient information to create a genuine issue of fact with respect to any of the claims in his complaint. The court also explained that, in the alternative, "[e]ven if sufficient evidence had been adduced to defeat a motion for summary judgment on any of these claims, the court would nevertheless be compelled to dismiss this action for lack of subject matter jurisdiction on the basis of sovereign immunity." Citing § 6-38a (b), the court also concluded that the defendant was entitled to statutory immunity, stating that, "even if the defendant's alleged omission of failing to properly effectuate the transfer of the entirety of the plaintiff's substantial property to storage was negligent, there has been no evidence to show that any such failure was wanton, reckless or malicious." In a footnote, the court concluded that sovereign immunity would "also" bar the plaintiff's claims under the test established in *Spring* v. *Constantino*, 168 Conn. 563, 568, 362 A.2d 871 (1975), stating: "Subjecting the allegations in the complaint and the facts adduced in connection with this motion to that [*Spring*] analysis, this court concludes that the doctrine of sovereign immunity deprives the court of subject matter jurisdiction to adjudicate the plaintiff's claims."

The court further noted that, even if sovereign immunity did not operate as a bar to the plaintiff's claims, it still would have granted the defendant's motion in its entirety. The court addressed each of the claims in the plaintiff's complaint, explaining that many of the statutes on which the plaintiff relied did not provide a

private cause of action and that the plaintiff did not furnish any admissible evidence to support the other claims. The court made no mention of 42 U.S.C. § 1983 in its decision and the plaintiff sought no articulation in that regard. This appeal followed.

I

The plaintiff claims that the court improperly concluded, as a matter of law, that sovereign immunity barred his action against the defendant. The defendant argues that he is a state official and, therefore, is entitled to invoke sovereign immunity. We agree with the plaintiff.

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Miller* v. *Egan*, 265 Conn. 301, 313, 828 A.2d 549 (2003).

"[W]e have long recognized the validity of the common-law principle that the state cannot be sued without its consent . . . . We have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . While the principle of sovereign immunity is deeply rooted in our common law, it has, nevertheless, been modified and adapted to the American concept of constitutional government where the source of governmental power and authority is not vested by divine right in a ruler but rests in the people themselves who have adopted constitutions creating

governments with defined and limited powers and courts to interpret these basic laws." (Citations omitted; internal quotation marks omitted.) Id. "Sovereign immunity rests on the principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property." (Internal quotation marks omitted.) Id., 314.

Our analysis of whether sovereign immunity was properly invoked in the present action begins with the precedent of our Supreme Court in *Spring* v. *Constantino*, supra, 168 Conn. 563. In that seminal case, the court explained that Connecticut courts should consider "the following criteria for determining whether the suit is, in effect, one against the state and cannot be maintained without its consent: (1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability."[4] (Internal quotation marks omitted.) Id.,

[4] We are mindful of our recent decision in *Devine* v. *Fusaro*, 205 Conn. App. 554, A.3d (2021), petition for cert. filed (Conn. July 29, 2021) (No. 210124), in which this court clarified the proper purpose of the *Spring* test. As we explained, "[o]ur Supreme Court has affirmed that the [*Spring* test] is an appropriate mechanism . . . to determine the capacity in which the named defendants are sued in actions asserting violations of state law . . . . [W]e do not read the precedent of our Supreme Court to require a court to apply the *Spring* test if the complaint unequivocally states the capacity in which the defendant is sued. Indeed, closer examination of *Spring* and our Supreme Court's application of the *Spring* test . . . reveals that the test is not well suited for and was never expressly intended to apply to instances in which a plaintiff has made a clearly expressed election in the complaint to sue a state official in his or her individual capacity." (Citation omitted; internal quotation marks omitted.) Id., 568. For that reason, we concluded that "a court's application of the *Spring* test is unnecessary and ill-advised in a case . . . in which the plaintiff has expressed a clear and unambiguous choice in the operative complaint to sue a state

568. In addition, our Supreme Court set forth three factors regarding the "essential characteristics" of a "public office," which are whether the individual possesses "(1) an authority conferred by law, (2) a fixed tenure of office, and (3) the power to exercise some portion of the sovereign functions of government." (Internal quotation marks omitted.) Id. The court further emphasized that "[a] key element of this test is that the 'officer' is carrying out a sovereign function." Id., 569.

Whether state marshals are entitled to the protection of sovereign immunity is a question of first impression for the appellate courts of this state. Our analysis begins with § 6-38a (a), which provides in relevant part: "For the purposes of the general statutes, 'state marshal' means a qualified deputy sheriff incumbent on June 30, 2000, under section 6-38 or appointed pursuant to section 6-38b who shall have authority to provide legal execution and service of process in the counties in this state pursuant to section 6-38 *as an independent contractor compensated on a fee for service basis, determined . . . by agreement with an attorney,* court or public agency requiring execution or service

official in his or her individual capacity. In such cases, the doctrine of sovereign immunity simply is not implicated." Id., 563.

Unlike in *Devine*, the complaint in the present case does not contain "a clearly expressed election . . . to sue a state official in his or her individual capacity." Id., 568. Rather, the plaintiff alleged in relevant part that the defendant had improperly "used authority vested in him by the state of Connecticut" in his capacity as a state marshal. In response, the defendant alleged sovereign immunity as a special defense, claiming that he is a state official entitled to raise that doctrine as a shield from claims against him in his official capacity. See *Shay* v. *Rossi*, 253 Conn. 134, 162, 749 A.2d 1147 (2000), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003). We, therefore, must apply the *Spring* test to determine, in the first instance, whether the defendant is entitled to invoke the protections embodied in the doctrine of sovereign immunity. See *Sullins* v. *Rodriguez*, 281 Conn. 128, 136, 913 A.2d 415 (2007); *Devine* v. *Fusaro*, supra, 205 Conn. App. 568.

of process." (Emphasis added.) By its plain language, that statutory imperative indicates that state marshals are not only independent contractors but also that their services may be secured by attorneys representing private entities, in addition to courts or public agencies.[5]

Notably, the court in *Spring* v. *Constantino*, supra, 168 Conn. 563, did not actually apply the three factor test it articulated in determining whether the public defenders in question were public officials. Instead, the court emphasized that "[a] key element of [the] test is that the 'officer' is carrying out a sovereign function" and reasoned that, "[e]ven though the state must ensure that indigents are represented by competent counsel, it can hardly be argued that the actual conduct of the defense of an individual is a sovereign or governmental act. . . . The public defender when he represents his client is not performing a sovereign function and is

[5] Moreover, the statutory framework outlining the fee schedule for various services provided by state marshals delineates separate provisions with respect to those distinct entities. For example, General Statutes § 52-261 (a) provides in relevant part: "Except as provided in subsection (b) of this section and section 52-261a, each officer or person who serves process, summons or attachments on behalf of . . . (1) [a]n official of the state or any of its agencies, boards or commissions, or any municipal official acting in his or her official capacity, shall receive a fee of not more than thirty dollars for each process served . . . ."

Similarly, pursuant to General Statutes § 52-261a (a), "[a]ny process served by any officer or person for the Judicial Department or Division of Criminal Justice shall be served in accordance with the following schedule of fees . . . ."

In contrast, § 52-261 (a) provides in relevant part that each officer or person who serves process, summons or attachments on behalf of (2) "*any person*, *except a person described in subdivision (1) of this subsection*, shall receive a fee of not more than forty dollars for each process served and an additional fee of forty dollars for the second and each subsequent service of such process . . . ." (Emphasis added.)

As the previously discussed statutory provisions demonstrate, state marshals, as independent contractors, provide services for fees at varying rates set by statute relative to these distinct classifications, including private persons and entities.

therefore not a public or state official to whom the doctrine of sovereign immunity applies." Id., 569.[6]

Here, the record unequivocally indicates that the defendant was effectuating an order of ejectment on behalf of the attorney representing the foreclosing party.[7] Because that action, at its core, involved a dispute between private parties, the defendant was not performing a sovereign function. The mere fact that his conduct involved the effectuation of a court order does not change the essential character of the service performed, which involved a judicial remedy sought by private parties who secured his services. Moreover, we are not persuaded that the defendant's services would assume the character of a sovereign function even if public entities, like the Superior Court or a public agency, retained them. Irrespective of the nature of the party that secured a state marshal's services, our legislature plainly has indicated that state marshals are independent contractors and similarly reiterated under General Statutes § 6-38b (h) that "no person may be a state marshal and a state employee at the same time."

Despite those unambiguous legislative pronouncements, the defendant nonetheless attempts to assume the cloak of the sovereign and its functions by arguing that marshals are selected and regulated by the State

[6] In *Gross* v. *Rell*, 304 Conn. 234, 248 n.7, 40 A.3d 240 (2012), the court noted that, in 1976, "the legislature, through the enactment of Public Acts 1976, No. 76-371, §§ 1 and 2, added public defenders to the definition of 'state officers and employees' entitled to qualified statutory sovereign immunity pursuant to General Statutes § 4-165." As such, the court recognized that the holding in *Spring* v. *Constantino*, supra, 168 Conn. 576, that public defenders are not entitled to absolute quasi-judicial immunity, which was another theory advanced by the defendant, was superseded by statute.

[7] The "Application and Execution for Ejectment Mortgage Foreclosure" was made by Attorney Geraldine A. Cheverko on behalf of the foreclosing party and the entity entitled to possession, Deutsche Bank National Trust Company, as Indenture Trustee, on behalf of the holders of the Accredited Mortgage Loan Trust 2005-4.

Marshal Commission pursuant to General Statutes § 6-38f; that they may, under certain conditions, exercise the power to arrest without a warrant pursuant to General Statutes § 54-1f; that they may use force incident to an arrest pursuant to General Statutes § 53a-22 (b); and contends that "state marshals *are* the state when engaged in the performance of the executive branch's function of ejecting a person from property to which they have no right of possession." (Emphasis added.) Relying on those assertions, a plethora of Superior Court decisions,[8] and *Miller* v. *Egan*, supra, 265 Conn. 301, the defendant insists that he is a state official, notwithstanding the legislature's explicit statutory designation of state marshals as independent contractors who are not state employees. We are not persuaded.

As a preliminary matter, we note that the defendant's reliance on *Miller* v. *Egan*, supra, 265 Conn. 301, with respect to his status as a public official is misplaced. Although the parties in that case conceded that the defendants, all former sheriffs, were public officials pursuant to *Spring*,[9] sheriffs at the time were not only public officials but, more importantly, were constitutional officers. See Conn. Const., art. IV, § 25 ("[s]heriffs

[8] See *Brenner, Saltzman & Wallman, LLP* v. *Tony's Long Wharf Transportation, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-09-5032765 (November 26, 2012) (55 Conn. L. Rptr. 68); *McAllister* v. *Valentino*, Superior Court, judicial district of Fairfield, Docket No. CV-11-5029414-S (April 10, 2012) (53 Conn. L. Rptr. 796); *Mason* v. *Barbieri*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5011263-S (April 14, 2010); *International Motorcars, LLC* v. *Sullivan*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005168 (June 20, 2006) (41 Conn. L. Rptr. 559).

[9] Notably, at issue in *Miller* was whether the sheriffs were being sued in their official or individual capacity, the latter of which would not bar suit on the basis of sovereign immunity. Because the court held that, pursuant to *Spring*, the plaintiff asserted his claims against the individual defendants in their official capacities, and no exception to or waiver of sovereign immunity applied, those claims were barred by the doctrine of sovereign of immunity. *Miller* v. *Egan*, supra, 265 Conn. 301; see also *Devine* v. *Fusaro*, supra, 205 Conn. App. 554.

shall be elected in the several counties" and removed only by action of legislature); *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 793, 6 A.3d 726 (2010) ("[a] constitutional office is understood to be one expressly named in and created by [a] constitution, whereas a statutory office is one created by legislation" (internal quotation marks omitted)); *Sibley* v. *State*, 89 Conn. 682, 685, 96 A. 161 (1915) ("The rights, authority and duty thus conferred upon the sheriff by law clearly invests him with a portion of the sovereign power of the government to be exercised by him for the public good. The office of sheriff is thus a public office . . . ."). The sheriff system, however, was abolished by constitutional amendment and the passage of No. 99 of the 2000 Public Acts (P.A. 00-99) ("An Act Reforming the Sheriff System").[10] That legislation effected the transition from the sheriff system to a system of state marshals, who are selected and regulated by the State Marshal Commission, and judicial marshals, who are employed by the Judicial Branch. As such, nearly all of the responsibilities of sheriffs with respect to service of process were transferred to the state marshals, while their responsibilities with respect to courthouse security and the custody and transportation of prisoners were transferred to the judicial marshals.

Thus, in contrast to sheriffs, who indisputably were elected public officials under the Connecticut constitution, the defendant's status as a state marshal is circumscribed by statute. Following the abolition of the system of sheriffs, the legislature specifically designated state marshals as "*independent contractor*[*s*] *compensated on a fee for service basis*, *determined . . . by agreement with an attorney*, court or public agency requiring execution or service of process"; (emphasis added) General Statutes § 6-38a (a); who may not "be a state

[10] Article thirty, § 1, of the constitution of Connecticut, adopted November 29, 2000, repealed § 25 of article fourth of the constitution of Connecticut.

marshal and a state employee at the same time." General Statutes § 6-38b (h). By contrast, judicial marshals, now employed by the Judicial Branch, became state employees. See *Kim* v. *Emt*, 153 Conn. App. 563, 569 n.4, 102 A.3d 137 ("under our statutory scheme, judicial marshals are considered separate and distinct from state marshals, and are considered state employees of the Judicial Branch under General Statutes §§ 6-32d (b) and 6-32f (a)"), cert. denied, 315 Conn. 908, 105 A.3d 236 (2014).

Our Supreme Court's observations in *Sibley* v. *State*, supra, 89 Conn. 682, also inform our analysis. Concluding that sheriffs were not state employees entitled to benefits under the Workmen's Compensation Act of 1913, the court drew a clear distinction between public officers who exercise sovereign powers and state employees. "[The plaintiff] was not an employee, and . . . the [s]tate was not using his services for pay. He was performing a duty which he owed to the [s]tate, and the salary which was attached to the office was not given in payment for his services but, as is said concerning public officers . . . to enable him to perform his statutory duty as one of the public functionaries of the [s]tate exercising a portion of its sovereign powers. The [s]tate, like public municipal corporations and private firms and individuals, may be, and is a large employer of persons by contract. The [s]tate and the person or persons whom it employs to care for the lawns surrounding the capitol are as much employer and employee as are the householder and the person who is employed by him to mow his lawns; but no one would say that the [g]overnor and other public officers who exercise the sovereign powers of the [s]tate and receive, as such officers, the salary attached by law to their offices, are mere employees of the [s]tate. While exercising those powers they represent the [s]tate. *The office is a trust and not an employment; the salary*

attached is for the maintenance of the office and not a payment for the incumbent's services." (Emphasis added.) Id., 687–88. The court further observed that "[t]he office of sheriff is thus a public office . . . . The incumbent of such an office holds it as a trust from the [s]tate not resting upon contract. . . . He is a preserver of the public peace; he is not the hired servant of a master; no contract relation exists between him and the community or [s]tate."[11] (Citations omitted.) Id., 685.

In light of that precedent, we conclude that the acknowledgment in *Miller* v. *Egan*, supra, 265 Conn. 301, that *sheriffs* were public officials simply has no bearing on the status of state marshals. On the contrary, the reforms instituted in 2000 that established the state marshal system, coupled with the legislature's explicit designation of state marshals as independent contractors who are compensated on a fee for service basis, illuminates the legislature's intentions as to whether service of process constitutes a sovereign act. When the constitutional amendment abolishing the sheriff system was passed, the status of sheriffs as constitutional public officers effectively ended. Thus, the services rendered by state marshals, which do not include the services assumed by judicial marshals, are no longer inherently sovereign acts. Although this is most apparent when state marshals are effecting service on behalf of private litigants, it is no less true when their services are retained by a public agency. Thus, when the Office of the Attorney General, for example, institutes a suit and retains the services of a marshal for service of

[11] See also *Rogers* v. *County Commissioners*, 18 Conn. Supp. 401, 403 (1953) ("A sheriff of a county is a public officer. . . . He holds his office, not as an 'employee' under contractual relation, but as a public official under trust from the state, which has invested him with a portion of its sovereign power to be exercised in the interest of the public. . . . A deputy sheriff holds an appointment as distinguished from an employment, and is a public officer. . . . Deputies have the same powers as has their county sheriff." (Citations omitted.)).

process, the character of the service does not change simply because a constitutional officer has secured them.

Nor are we persuaded that the sovereign immunity enjoyed by the State Marshal Commission; see *Page* v. *State Marshal Commission*, 108 Conn. App. 668, 681, 950 A.2d 529, cert. denied, 289 Conn. 921, 958 A.2d 152 (2008); which is a public agency, should be imputed to the state marshals simply because the commission is charged with the hiring and oversight of the state marshals. The defendant has provided no authority that suggests that oversight and regulation by a state agency of persons or entities transforms the services rendered into sovereign functions.

Although it is true that state marshals have the title of peace officer and have the ability to effectuate an arrest as well as other law enforcement type authority in the course of their duties, peace officers, as defined by General Statutes § 53a-3,[12] are not limited to persons

[12] General Statutes § 53a-3 (9) defines " 'Peace officer' " as "a member of the Division of State Police within the Department of Emergency Services and Public Protection or an organized local police department, a chief inspector or inspector in the Division of Criminal Justice, a state marshal while exercising authority granted under any provision of the general statutes, a judicial marshal in the performance of the duties of a judicial marshal, a conservation officer or special conservation officer, as defined in section 26-5, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18, 29-18a or 29-19, an adult probation officer, an official of the Department of Correction authorized by the Commissioner of Correction to make arrests in a correctional institution or facility, any investigator in the investigations unit of the office of the State Treasurer, an inspector of motor vehicles in the Department of Motor Vehicles, who is certified under the provisions of sections 7-294a to 7-294e, inclusive, a United States marshal or deputy marshal, any special agent of the federal government authorized to enforce the provisions of Title 21 of the United States Code, or a member of a law enforcement unit of the Mashantucket Pequot Tribe or the Mohegan Tribe of Indians of Connecticut created and governed by a memorandum of agreement under section 47-65c who is certified as a police officer by the Police Officer Standards and Training Council pursuant to sections 7-294a to 7-294e, inclusive . . . ."

acting on behalf of the state. Because they include local and municipal officers as well as federal and tribal law enforcement officers who are not entitled to invoke state sovereign immunity, we are not persuaded that the status of peace officer provides a sufficient basis to conclude that one is a public official for purposes of sovereign immunity.

Additionally, as we discuss further in part II of this opinion, state marshals are entitled to a limited statutory immunity from liability for certain tortious acts in performance of their execution and service of process functions under § 6-38a (b), which provides: "Any state marshal, shall, in the performance of execution or service of process functions, have the right of entry on private property and no such person shall be personally liable for damage or injury, not wanton, reckless or malicious, caused by the discharge of such functions." That provision was incorporated into P.A. 00-99, reflecting the legislature's intention to replace sovereign immunity, which state marshals would no longer enjoy, with statutory immunity. That immunity is analogous to but, importantly, distinct from the immunity afforded to state officers and employees under General Statutes § 4-165, which provides that "[n]o state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment," and General Statutes § 5-141d, which provides that "any state officer or employee" sued for damages accruing while in the performance of their duties will be indemnified by the state for any such award arising from conduct that is not wanton, reckless, or malicious. These provisions offering state employees statutory immunity and defense and indemnification are significant to our discussion for two reasons. Because they are triggered when a state employee is sued in his or her individual capacity, the legislature's

decision to pass a separate but analogous provision for statutory immunity for state marshals underscores the underlying statutory scheme that (1) state marshals are not public officials or state employees, and (2) they cannot invoke sovereign immunity and, therefore, can be sued only in their individual capacity.[13]

[13] We note that, following the passage of P.A. 00-99, § 6-38a (b) buttressed other preexisting provisions of the statutory scheme that ensured that members of the public had a remedy when state marshals were individually sued for tortious conduct.

General Statutes § 6-30a (a) provides in relevant part: "On and after December 1, 2000, each state marshal shall carry personal liability insurance for damages caused by reason of such marshal's tortious acts in not less than the following amounts: (1) For damages caused to any one person or to the property of any one person, one hundred thousand dollars; and (2) for damages caused to more than one person or to the property of more than one person, three hundred thousand dollars. . . ."

That provision first was enacted in 1976 with respect to the former sheriffs and was amended by P.A. 00-99 with no changes, save the replacement of all references to sheriff with state marshal.

By its plain language, § 6-30a recognizes that a state marshal may cause damage in the performance of his or her duties, and it ensures that insurance coverage is available to protect any party injured by virtue of a state marshal's tortious conduct. In considering whether that provision should operate as a waiver of the state's sovereign immunity, the court in *Miller* v. *Egan*, supra, 265 Conn. 301, explained: "We fail to see how a requirement that sheriffs and deputy sheriffs purchase *personal liability* insurance necessarily implies that the legislature intended to waive the state's sovereign immunity, either from suit or liability, under § 6-30a. In fact, the opposite inference makes more sense, namely, that the legislature intended the individual sheriffs and deputy sheriffs, rather than the state, to bear liability for the conduct covered by the statute. This conclusion is bolstered by the statute's definition of 'tortious acts' as 'negligent acts, errors or omissions *for which such sheriff or deputy sheriff may become legally obligated* . . . .' General Statutes (Rev. to 1999) § 6-30a." (Emphasis altered.) Id., 329–30.

The court in *Miller* also reviewed the legislative history of § 6-30a. During the floor discussion of Public Acts 1976, No. 76-15, which eventually became § 6-30a, Representative Richard D. Tulisano, a member of the Judiciary Committee, which had sponsored the legislation, explained the purpose of the act: "We want to make sure that the public is protected from any acts which the sheriff may incur in the event that he does not have personal assets of his own to cover either misservice of process, assault or battery or any other [of] those items listed in the statute." 19 H.R. Proc., Pt. 2, 1976 Sess., p. 494. When Representative Gerald F. Stevens asked whether it was "the intention of this legislation that no state funds be expended for the

In the limited circumstances under which a state marshal performs a function that retains a sovereign quality, such as a civil capias arrest, and that state marshal has been sued in his or her individual capacity, our legislature specifically has provided for his or her indemnification. Our legislature addressed that issue in its 2007 amendment to General Statutes § 6-30a, which now provides in relevant part in subsection (b) that "[t]he state shall protect and save harmless any state marshal from financial loss and expense . . . arising out of any claim, demand or suit instituted against the state marshal for personal injury or injury to property by . . . any person who is lawfully taken into custody by the state marshal, *pursuant to a capias issued by . . . the Superior Court* and directed to the state marshal, if such injury occurs when such person, while in such custody, is transported in a private motor vehicle operated by the state marshal. In the event a judgment is entered against the state marshal for a malicious, wanton or wilful act, the state marshal shall reimburse the state for any expenses incurred by the state in defending the state marshal and the state shall not be

purchase of such insurance or for reimbursement of sheriffs," Representative Tulisano replied: "[I]t is absolutely the intention of this bill to have it be a personal liability of the sheriff *and not the state*." (Emphasis added.) Id., p. 495; see also *Miller* v. *Egan*, supra, 265 Conn. 301, 329–30 (discussing legislative history). The General Assembly's reenactment of § 6-30a in 2000, which replaced only references to "sheriffs" with "marshals," further demonstrates that the General Assembly intended state marshals to be personally liable for damages caused by their tortious conduct and instituted an insurance requirement for the protection of the public.

Moreover, General Statutes § 6-39 provides in relevant part that, "[e]ach state marshal, before entering upon the duties of a state marshal, shall give to the State Marshal Commission a bond in the sum of ten thousand dollars conditioned that such state marshal will faithfully discharge the duties of state marshal and answer all damages which any person sustains by reason of such state marshal's unfaithfulness or neglect. . . ."

The requirement that state marshals post a bond before entering upon their duties is independent from the insurance requirement, and it reinforces our conclusion that state marshals are not public officials, and, therefore, they may be sued only in their individual capacities.

held liable to the state marshal for any financial loss or expense resulting from such act." (Emphasis added.) General Statutes § 6-30a (b). Therefore, when state marshals perform capias arrests, and injury to person or property occurs during such an arrest, the state will indemnify state marshals as a substitute for the sovereign immunity that they are not entitled to invoke.

In light of the foregoing, we disagree with the court's conclusion that state marshals are public officials for sovereign immunity purposes. Because state marshals are not state officials or state employees, the doctrine of sovereign immunity is not available as a defense to an action for tortious conduct against a state marshal.[14] For that reason, the court improperly concluded that the defendant was entitled to sovereign immunity.

II

The plaintiff also claims that the court improperly concluded that the defendant was entitled to statutory immunity pursuant to § 6-38a (b).[15] More specifically, he argues that the defendant's "actions fall into the category of wanton, reckless or malicious because he ejected the plaintiff with the help of several persons, some in their own pickup trucks, and those persons, under the watchful eye of the defendant, took many

[14] We are mindful that this conclusion is at odds with a line of Superior Court cases, including *Brenner, Saltzman & Wallman, LLP* v. *Tony's Long Wharf Transportation, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-09-5032765 (November 26, 2012) (55 Conn. L. Rptr. 68), *McAllister* v. *Valentino*, Superior Court, judicial district of Fairfield, Docket No. CV-11-5029414-S (April 10, 2012) (53 Conn. L. Rptr. 796), *Mason* v. *Barbieri*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5011263-S (April 14, 2010), and *International Motorcars, LLC* v. *Sullivan*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005168 (June 20, 2006) (41 Conn. L. Rptr. 559). See footnote 8 of this opinion. To the extent that those cases concluded that state marshals are state employees or officials for purposes of a sovereign immunity analysis, we disavow those holdings.

[15] See footnote 1 of this opinion.

possessions of the plaintiff and kept them for themselves." For that reason, he argues that summary judgment was inappropriate. We disagree.

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

In granting the defendant's motion for summary judgment on the basis of statutory immunity, the court stated in relevant part: "[G]iving the plaintiff . . . the benefit of any uncertainty, as required by law, the evidence would at best support only a colorable claim for negligence against the defendant. This is because even if the defendant's alleged omission of failing to properly effectuate the transfer of the entirety of the plaintiff's substantial property to storage was negligent, *there has been no evidence to show that any such failure was*

wanton, reckless or malicious." (Emphasis added.) On our careful review of the materials submitted by the parties in connection with the defendant's motion, we agree that there is nothing in the record that raises a genuine issue of material fact as to whether the defendant's actions were wanton, reckless, or malicious. The plaintiff's reference to the defendant's "helpers" using "their own pickup trucks" in no way supports his claim that the defendant acted improperly. Furthermore, the plaintiff's argument rests on his conclusion that the conduct of the defendant and his helpers amounts to theft.[16] In the absence of any evidence to substantiate that claim, we cannot conclude that the defendant's conduct was wanton, reckless, or malicious. Accordingly, the court properly determined that the defendant is entitled to statutory immunity pursuant to § 6-38a (b).

III

As a final matter, the plaintiff claims that the court improperly failed to address his 42 U.S.C. § 1983 claim. We disagree. No such claim was alleged in the plaintiff's complaint, and, thus, it was not properly before the trial court. See, e.g., *Miller* v. *Egan*, supra, 265 Conn. 309 (plaintiff's right to recover is limited by allegations of complaint); *West Hartford* v. *Murtha Cullina, LLP*, 85 Conn. App. 15, 23 n.3, 857 A.2d 354 (declining to address unpreserved claim that was "not contained in the complaint and was not raised in the trial court"), cert. denied, 272 Conn. 907, 863 A.2d 700 (2004).

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal." (Internal quotation marks omitted.) *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426, 143 A.3d 661, cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016). It is well established

[16] In his appellate brief, the plaintiff states that "[t]he real issue before this court is to decide if the theft of more than $100,000 worth of the plaintiff's belongings constitute[s] wanton, reckless or malicious behavior."

that "[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *Council* v. *Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Citations omitted; internal quotation marks omitted.) *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000); see also Practice Book § 60-5. Because the plaintiff failed to raise a § 1983 claim before the trial court, we decline to address that claim in this appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

LORI BARNES ET AL. *v.* GREENWICH HOSPITAL ET AL.
(AC 44055)

Prescott, Suarez and Bear, Js.

Syllabus

The plaintiffs, L and her husband, sought to recover damages from the defendant physician, Z, her employer, and a hospital for, inter alia, injuries L sustained during a colonoscopy procedure performed by Z. The plaintiffs failed to attach an opinion letter written and signed by a similar health care provider to their original complaint, as was required by the applicable statute (§ 52-190a), and the defendants filed motions to dismiss the complaint for that failure. In response, the plaintiffs filed an amended complaint as of right pursuant to the applicable rule of practice (§ 10-59), and attached such an opinion letter. The amended complaint was filed and the opinion letter was dated after the expiration of the applicable statute of limitations. Following oral argument, the trial court granted the defendants' motions to dismiss for lack of personal jurisdiction as a result of the plaintiffs' failure to attach an opinion letter to their original complaint. On the plaintiffs' appeal to this court, *held* that the trial court did not err in its decision to grant the defendants' motions to dismiss: the plaintiffs failed to comply with the requirement

set forth in § 52-190a (a), as they did not attach an opinion letter to their original complaint, obtain an opinion letter prior to filing the action, or file the amended complaint prior to the expiration of the statute of limitations, and such noncompliance mandated dismissal of the action under § 52-190a (c) when it was timely raised by the defendants; moreover, the plaintiffs were not entitled to amend their deficient complaint as of right under the rule articulated in *Gonzales* v. *Langdon* (161 Conn. App. 497), because the scope of that remedy was limited to curative efforts initiated prior to the expiration of the statute of limitations, allowing only for the amendment or substitution of an existing opinion letter, and the plaintiffs' amendment instead sought to introduce a new opinion letter; furthermore, this court declined to extend *Gonzales* to permit the plaintiffs to cure the defect because it determined that doing so would have undermined the purpose of § 52-190a (a), which was to prevent frivolous medical malpractice actions by ensuring that there was a reasonable basis for filing a case.

Argued May 20—officially released September 14, 2021

Procedural History

Action to recover damages for medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Genuario*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Paul Ciarcia, with whom, on the brief, was *Frank N. Peluso*, for the appellants (plaintiffs).

Megan E. Bryson, with whom, on the brief, was *Carol S. Doty*, for the appellee (named defendant).

Diana M. Carlino, for the appellees (defendant Felice Zwas et al.).

Opinion

PRESCOTT, J. This appeal arises out of a medical malpractice action brought by the plaintiffs, Lori Barnes (Barnes) and Ray Barnes,[1] against the defendants,

[1] We refer to Barnes and Ray Barnes collectively as the plaintiffs and individually where appropriate.

Felice Zwas, Greenwich Hospital, and the Center for Gastrointestinal Medicine of Fairfield and Westchester, P.C. (Center for Gastrointestinal Medicine),[2] for an injury Barnes sustained during a colonoscopy procedure. The plaintiffs appeal from the judgment of the trial court dismissing their complaint for failure to attach a written opinion letter authored by a similar health care provider as required by General Statutes § 52-190a (a). On appeal, the plaintiffs claim that the trial court improperly granted the defendants' motions to dismiss for failure to comply with § 52-190a because the amended complaint filed by the plaintiffs as of right pursuant to Practice Book § 10-59,[3] to remedy their prior failure to attach a written opinion letter, was filed after the statute of limitations had expired and sought to attach an opinion letter that did not exist at the time the action was commenced.[4] We disagree with the plaintiffs' claim and affirm the judgment of the court.

[2] We refer to Zwas, Greenwich Hospital, and the Center for Gastrointestinal Medicine, collectively as the defendants and individually where appropriate.

[3] Practice Book § 10-59 provides, "The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day."

[4] The plaintiffs also claim that the court improperly granted the defendants' motions to dismiss because it failed to consider facts presented during oral argument that the defendants fraudulently concealed the cause of action pursuant to General Statutes § 52-595 and, thus, the statute of limitations should have been tolled. We do not review this claim because the record is inadequate. The plaintiffs raised this issue for the first time at oral argument to the trial court. There were no facts related to the issue of fraudulent concealment alleged in the complaint, the amended complaint, or the memorandum in opposition to the defendants' motions to dismiss. Moreover, the trial court did not address this issue in its memorandum of decision, nor did the plaintiffs seek an articulation from the court. See *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 632, 99 A.3d 1079 (2014) ("[W]e cannot consider this claim because the record is inadequate for our review. This court does not consider claims raised for the first time during an oral argument in the trial court when the trial court did not address the issue in its decision and the appellant failed to obtain an articulation from the trial court." (Emphasis omitted.)).

On or about August 27, 2019,[5] the plaintiffs commenced the present action[6] against the defendants. The return date was September 10, 2019. The plaintiffs' complaint contained the following allegations. On June 14, 2017, Barnes underwent a colonoscopy procedure at the Center for Gastrointestinal Medicine. During the procedure, the physician, Zwas, punctured Barnes' colon. An ambulance took Barnes to Greenwich Hospital where she underwent emergency surgery, and she then remained in the intensive care unit for three days. Barnes continued to experience ongoing medical issues as a result of the puncture and underwent an additional surgical procedure in April, 2019, to address those issues.

In counts one and two of the complaint, the plaintiffs alleged that Barnes' injuries were caused by the defendants' failure to exercise reasonable care and that the medical treatment Barnes received was a deviation from the standard of care ordinarily required by such medical professionals. Ray Barnes further alleged, in count three, a loss of consortium claim. Although the plaintiffs attached to their complaint their attorney's good faith certificate of reasonable inquiry, they failed

[5] The return of service, which was filed on August 30, 2019, indicates that Zwas and the Center for Gastrointestinal Medicine were served with the writ, summons, and complaint on August 26, 2019, and Greenwich Hospital was served with the same materials on August 27, 2019. See *Rocco* v. *Garrison*, 268 Conn. 541, 553, 848 A.2d 352 (2004) ("[i]n Connecticut, an action is commenced when the writ, summons and complaint have been served upon the defendant").

[6] On July 9, 2019, in the judicial district of Stamford-Norwalk, Barnes commenced a prior medical malpractice action against Greenwich Hospital and the Center for Gastrointestinal Medicine, based on the same alleged conduct as in the present case. *Barnes* v. *Greenwich Hospital*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-19-6042697-S. See *Carpenter* v. *Daar*, 199 Conn. App. 367, 370 n.2, 236 A.3d 239 ("[t]his court may take judicial notice of court files in other cases"), cert. granted, 335 Conn. 962, 239 A.3d 1215 (2020). Greenwich Hospital and the Center for Gastrointestinal Medicine each filed a motion to dismiss, which the court granted on October 15, 2019.

to attach an opinion letter written and signed by a similar health care provider as required by § 52-190a (a).

On September 20, 2019, Zwas and the Center for Gastrointestinal Medicine filed a motion to dismiss the complaint, pursuant to § 52-190a (c), for the failure to attach a written opinion letter of a similar health care provider. That same day, Greenwich Hospital also filed a motion to dismiss on identical grounds. The two motions primarily rely on the same substantive arguments.[7]

On October 8, 2019, the plaintiffs responded by filing an amended complaint as of right, pursuant to Practice Book § 10-59, along with an opinion letter with an attached curriculum vitae.[8] The opinion letter is dated October 6, 2019. On October 21, 2019, Zwas and the Center for Gastrointestinal Medicine filed an objection to the amended complaint. On December 9, 2019, the plaintiffs filed a memorandum in opposition to the defendants' motions. The defendants filed replies. Oral

[7] As the trial court pointed out in its memorandum of decision, the defendants also argued that this action should be dismissed on the basis of the prior pending action doctrine. On October 15, 2019, however, the first action filed by Barnes against the defendants, Greenwich Hospital and the Center for Gastrointestinal Medicine, was no longer pending because it had been dismissed by the court, *Hon. Kenneth B. Povodator*, judge trial referee, who found that the plaintiff had pleaded a medical malpractice claim but had failed to comply with § 52-190a.

[8] As the trial court recognized in its memorandum of decision: "The proposed new opinion letter provides that: 'I have had the opportunity to review the records provided of Lori Barnes. She sustained a 7 cm colonic perforation during a procedure that was scheduled to be a routine colonoscopy exam. I have been provided documents that indicate that the attending physician was distracted during the procedure. Giving complete and total attention during the performance of a procedure is a standard of care. A physician who has a lack of attention during a procedure is a deviation. It is reasonable to state that this lack of attention during the procedure led to the large perforation that occurred during the procedure and to its sequelae.' Also attached on a separate page is a curriculum vitae which provides in relevant part that the author is: 'Board Certified—American Board of Gastroenterology—1993.' "

argument on the motions to dismiss was heard at short calendar on January 27, 2020.

In a written memorandum of decision filed March 10, 2020, the court granted the defendants' motions to dismiss for lack of personal jurisdiction on the ground that the plaintiffs had failed to attach to the original complaint a written opinion letter of a similar health care provider as required by § 52-190a. The court further reasoned that the plaintiffs' attempt to cure the defect by amending the complaint pursuant to Practice Book § 10-59 and attaching an opinion letter dated October 6, 2019, was unavailing because the letter was obtained after the action commenced, after the defendants had filed their motions to dismiss, and after the applicable statute of limitations[9] had expired on September 12, 2019. In calculating the expiration of the statute of limitations, the court relied on the plaintiffs' allegation in their complaint that they received a ninety day extension pursuant to § 52-190a (b).[10] The court explained that, in the present case, the limitation period expired two years and ninety days after the date of the alleged injury.[11] This appeal followed.

The plaintiffs claim that the court improperly granted the defendants' motions to dismiss because the plaintiffs filed an amended complaint, as of right pursuant

[9] General Statutes § 52-584 provides in relevant part that the statute of limitations for a medical malpractice action is "two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

[10] General Statutes § 52-190a (b) provides in relevant part: "Upon petition to the clerk of any superior court or any federal district court to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. . . ."

[11] Aside from the plaintiffs' assertion that the statute of limitations was equitably tolled because the defendants fraudulently concealed the cause of action pursuant to General Statutes § 52-595; see footnote 4 of this opinion; the plaintiffs do not claim that the trial court erred in calculating the expiration of the statute of limitations.

to Practice Book § 10-59, to which they attached the requisite opinion letter authored by a similar health care provider. Specifically, the plaintiffs maintain that, under *Gonzales* v. *Langdon*, 161 Conn. App. 497, 128 A.3d 562 (2015), when a plaintiff in a medical malpractice action seeks to amend his or her complaint as of right in order to attach the first and only opinion letter the plaintiff has obtained, such amendment can be sought after the statute of limitations has expired, and the letter itself need not have been in existence at the time the action was commenced nor prior to the expiration of the statute of limitations. We disagree.

The following legal principles guide our review. "Our standard of review in an appeal challenging the granting of a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Peters* v. *United Community & Family Services, Inc.*, 182 Conn. App. 688, 699–700, 191 A.3d 195 (2018).[12]

[12] This is the standard that applies when, as in the present case, "a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone. . . . If, however, the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdic-

Section 52-190a (a) provides in relevant part: "No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . [T]he claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . ." Moreover, § 52-190a (c) provides: "The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

Our Supreme Court has recognized that "[§] 52-190a requires that the written opinion letter must have been

tion is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citation omitted; internal quotation marks omitted.) *Devine* v. *Fusaro*, 205 Conn. App. 554, 562 n.8, A.3d (2021), quoting *Conboy* v. *State*, 292 Conn. 642, 651–54, 974 A.2d 669 (2009).

obtained prior to filing the action and that the good faith certificate and opinion letter must be filed when the action commences." (Emphasis added.) *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 396, 21 A.3d 451 (2011). "[T]he written opinion letter, prepared in accordance with the dictates of § 52-190a . . . is akin to a pleading that must be attached to the complaint in order to commence properly the action." Id., 398. "Our legislature . . . specifically authorized the dismissal of a medical malpractice action for the failure to attach an opinion letter to the complaint." *Kissel* v. *Center for Women's Health, P.C.*, 205 Conn. App. 394, 431, A.3d (2021).

"Because the purpose of § 52-190a is to require the opinion prior to commencement of an action, allowing a plaintiff to obtain such opinion after the action has been brought would vitiate the statute's purpose by subjecting a defendant to a claim without the proper substantiation that the statute requires." *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 585, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009); id., 585–86 (The trial court properly dismissed a medical malpractice action where the plaintiff failed to attach a written opinion of a similar health care provider to the complaint "because it is clear that no opinion existed at the time the action was commenced . . . . The plaintiff could not turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action. . . . [Thus] the plaintiff did not and could not comply with the statutory mandate requiring that the written opinion letter be filed with the complaint when the action was commenced . . . ."); see also *Torres* v. *Carrese*, 149 Conn. App. 596, 611 n.14, 90 A.3d 256 ("[a]lthough the plaintiff may have obtained opinion letters from [similar health care providers] after the action commenced, after the

defendants had filed their motions to dismiss, and after the statute of limitations had expired, the court may not consider those documents''), cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

As this court explained in *Peters*: "In *Gonzales* . . . this court recognized an . . . avenue of recourse available to plaintiffs to correct defects *in an existing opinion letter*. We held, as a matter of first impression, that a plaintiff who files a legally insufficient opinion letter may, in certain instances, cure the defective opinion letter through amendment of the pleadings, thereby avoiding the need to file a new action. Specifically, we stated that if a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to amend the original opinion letter, or to substitute a new opinion letter for the original opinion letter, the trial court (1) must permit such an amendment if the plaintiff seeks to amend as of right within thirty days of the return day and the action was brought within the statute of limitations, and (2) has discretion to permit such an amendment if the plaintiff seeks to amend within the applicable statute of limitations but more than thirty days after the return day. . . .

"In *Gonzales*, this court reasoned that [t]he legislative purpose of § 52-190a (a) is not undermined by allowing a plaintiff leave to amend his or her opinion letter or to substitute in a new opinion letter if the plaintiff did file, in good faith, an opinion letter with the original complaint, and later seeks to cure a defect in that letter within the statute of limitations. Amending within this time frame typically will not prejudice the defendant or unduly delay the action. . . . In light of the numerous references in *Gonzales* to the statute of limitations, we conclude that *the court intended to limit the scope of its newly recognized remedy to those curative efforts initiated prior to the running of the statute of limitations*." (Citations omitted; emphasis altered; internal

quotation marks omitted.) *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 701–702. Similarly, in *Ugalde* v. *Saint Mary's Hospital, Inc.*, 182 Conn. App. 1, 12, 188 A.3d 787, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018), this court explained that "[t]he holding in *Gonzales* permits amendments to legally insufficient opinion letters only if they are sought prior to the expiration of the statute of limitations."

Furthermore, in *Kissel*, this court again emphasized that, based on our case law, "it cannot be disputed that regardless of the method employed to cure a defect in an opinion letter filed pursuant to § 52-190a, such correction must be initiated prior to the expiration of the statute of limitations." *Kissel* v. *Center for Women's Health, P.C.*, supra, 205 Conn. App. 426. In that recent case, this court considered, after a jury trial and verdict rendered in favor of the plaintiff in a medical malpractice action, whether the trial court had improperly denied the defendants' pretrial motions to dismiss for the plaintiff's failure to comply with § 52-190a because she failed to attach to her initial complaint an opinion letter from a similar health care provider and her efforts to cure this defect occurred outside of the limitation period. Id., 397, 409. There, the trial court "found that the opinion letter had been authored prior to the commencement of the action and that the failure to attach it to the original complaint resulted from inadvertence or oversight." Id., 409. This court concluded, however, that the trial court "lacked personal jurisdiction over [the defendants] as a result of the plaintiff's failure to cure the § 52-190a defect within the statutory limitation period and that the medical malpractice action, therefore, should have been dismissed." Id., 411.

In the present case, it is undisputed that there was no opinion letter attached to the original complaint, and the plaintiffs did not obtain an opinion letter prior

to filing the action. No opinion letter existed until October 6, 2019, after the expiration of the statute of limitations on September 12, 2019, and the plaintiffs filed an amended complaint on October 8, 2019, also after the statute of limitations had expired on September 12, 2019. As such, the plaintiffs did not comply with the requirement clearly set forth in § 52-190a (a), and such noncompliance mandates dismissal of the action under § 52-190a (c) when timely raised by the defendants as in this case. As this court pointed out in *Votre*, which is factually analogous to the present case in that the plaintiff there did not attach any opinion letter to her original complaint and one did not exist at the time the action was commenced, "allowing a plaintiff to obtain . . . [an] opinion after the action has been brought would vitiate the statute's purpose by subjecting a defendant to a claim without the proper substantiation that the statute requires." *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585.[13]

Nevertheless, the plaintiffs contend that they were entitled to amend their deficient complaint as of right[14] under the first prong of *Gonzales* because "the action was brought within the statute of limitations . . . ." *Gonzales* v. *Langdon*, supra, 161 Conn. App. 510. This argument is unpersuasive for two reasons. First, it fails to account for the entirety of the language of the rule articulated in *Gonzales*. The rule, as stated, only applies "if a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to *amend the original opinion letter*, or to *substitute* a new opinion letter *for the original opinion letter* . . . ." (Emphasis

[13] We note that the plaintiff in *Votre* did not attempt to amend her complaint to add an opinion letter. *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 584. In this way, that case is distinguishable from the present one, although that difference does not affect our analysis.

[14] It is undisputed that the plaintiffs filed their amended complaint "during the first thirty days after the return day," which, as mentioned previously, was September 10, 2019. Practice Book § 10-59.

added.) Id. Here, there was no "original opinion letter" to "amend" or "substitute." Id. The amendment at issue sought to introduce an opinion letter for the first time—one that did not exist prior to the commencement of the action nor prior to the expiration of the limitation period.

Second, as this court specified in *Peters*, the court in *Gonzales* "intended to limit the scope of its newly recognized remedy to those curative efforts initiated prior to the running of the statute of limitations." *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 702. Moreover, this court's holding in *Kissel* leaves no room for doubt that where a plaintiff in a medical malpractice action fails to attach an opinion letter to the initial complaint and his or her efforts to cure that defect are not initiated prior to the expiration of the statute of limitations, the court lacks personal jurisdiction over the defendant and the action is subject to dismissal pursuant to § 52-190a (c). See *Kissel* v. *Center for Women's Health, P.C.*, supra, 205 Conn. App. 411. Here, the plaintiffs' curative effort—namely, the filing of an amended complaint—was initiated only after the statute of limitations had expired. Therefore, the recourse identified in *Gonzales* is not available.

We decline to further extend *Gonzales* to apply to the circumstances of the present case because the recourse the plaintiffs seek is contrary to what "[o]ur Supreme Court has concluded [is] the purpose of § 52-190a (a) [which] is to prevent frivolous medical malpractice actions by [ensuring] that there is *a reasonable basis for filing* a medical malpractice case under the circumstances . . . and eliminat[ing] some of the more questionable or meritless cases . . . ." (Emphasis added; internal quotation marks omitted.) *Gonzales* v. *Langdon*, supra, 161 Conn. App. 518. That purpose would be undermined if we permit plaintiffs, after the statute of limitations has expired and after the opposing party

has spent considerable time and resources in connection with an ultimately successful motion to dismiss, to recast a medical malpractice action in a form that, if it had been timely filed, may demonstrate sufficient merit to satisfy the requirements of § 52-190a (a). Also, as we previously noted, "allowing a plaintiff to obtain [a similar health care provider] opinion after the action has been brought would vitiate the statute's purpose by subjecting a defendant to a claim without the proper [timely] substantiation that the statute requires." *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585.

Accordingly, we agree with the trial court's decision to grant the defendants' motions to dismiss, as it is undisputed that the plaintiffs failed to comply with § 52-190a (a), and the rule articulated in *Gonzales* does not apply in the present case to permit the plaintiffs to remedy their defective complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

CAROLINA CASUALTY INSURANCE COMPANY *v.* CONNECTICUT SOLID SURFACE, LLC (AC 43215)

Prescott, Cradle and DiPentima, Js.

Syllabus

The defendant and cross claim plaintiff appealed from the summary judgment rendered in favor of K, the cross claim defendant. K had represented B Co., a servicing agent for the plaintiff, in a previous breach of contract action against the defendant. The defendant filed a counterclaim against B Co. in that action, and both claims subsequently were dismissed by agreement of the parties. Thereafter, the plaintiff sought to recover damages from the defendant for breach of contract in connection with certain unpaid premiums on an insurance policy. After the trial court granted the defendant's motion to cite in K as a third-party defendant, the defendant filed a cross complaint against K for vexatious

litigation in relation to the B Co. action. The court subsequently granted K's motion for summary judgment and rendered judgment thereon, and the defendant appealed to this court. *Held* that the trial court properly rendered summary judgment in favor of K on the defendant's vexatious litigation claim; the defendant failed to demonstrate the existence of a genuine issue of material fact regarding whether B Co.'s action had terminated in its favor, the defendant having failed to present any evidence that tended to demonstrate that fact, and there was undisputed evidence in the form of the defendant's admission, which it never sought to withdraw or amend, that it would not have agreed to a dismissal of its counterclaim against B Co. if it did not receive in exchange a dismissal of B Co.'s claim, which constituted a contractual agreement supported by consideration akin to a negotiated settlement of that action.

Argued February 16—officially released September 14, 2021

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Joseph M. Shortall*, judge trial referee, granted the defendant's motion to cite in Howard Kantrovitz as a third-party defendant; thereafter, the named defendant filed a cross complaint against Howard Kantrovitz; subsequently, the court, *Gleeson*, *J.*, granted the motion for summary judgment filed by Howard Kantrovitz and rendered judgment thereon, from which the named defendant appealed to this court. *Affirmed.*

Taryn D. Martin, with whom, on the brief, was *Robert A. Ziegler*, for the appellant (named defendant).

Jane S. Bietz, with whom, on the brief, was *Carmine Annunziata*, for the appellee (defendant Howard Kantrovitz).

Opinion

PRESCOTT, J. An essential element of a claim of vexatious litigation is that the prior civil action underlying the claim must have *terminated in favor of the proponent of the claim*. See *Blake* v. *Levy*, 191 Conn. 257, 263, 464 A.2d 52 (1983). The dispositive issue in

the present appeal is whether a prior action that ended in the summary dismissal of the action by agreement of the parties constitutes such a favorable disposition. We conclude that it does not.

The defendant and cross claim plaintiff, Connecticut Solid Surface, LLC (CT Solid Surface), appeals from the summary judgment rendered on its vexatious litigation cross claim by the court in favor of the cross claim defendant, Attorney Howard Kantrovitz.[1] It claims that the court improperly concluded that Kantrovitz was entitled to judgment as a matter of law because CT Solid Surface had failed to demonstrate the existence of a genuine issue of material fact regarding whether the prior action underlying the vexatious litigation cross claim had terminated in its favor, particularly in light of undisputed evidence that the parties to the prior action had reached a settlement that resulted in the court's dismissal of that action.[2] We affirm the judgment of the court.

The record before the court established the following undisputed facts and procedural history. Prior to the

[1] The named plaintiff in the action underlying this appeal, Carolina Casualty Insurance Company (Carolina Casualty), is not a party to the cross complaint that is the subject of the appeal and has not participated in the present appeal. Although there has not been a final disposition of Carolina Casualty's complaint against CT Solid Surface, the court's disposition of all counts of the cross complaint nevertheless constitutes an appealable final judgment. See Practice Book § 61-2.

[2] Although we construe CT Solid Surface as having raised a single claim on appeal, it raises a number of arguments related to that claim, which it identifies in its brief as distinct claims of error. Specifically, it argues that the court improperly (1) determined that an exchange of consideration was relevant to the issue of whether the prior action had terminated in its favor, (2) concluded that it failed to provide evidentiary support for its assertion that Kantrovitz had failed to effectuate a settlement of the prior action, and (3) failed to consider whether the action had been "voluntarily dismissed" after Kantrovitz' appearance in the prior action was replaced. Our resolution of these arguments is subsumed in our plenary consideration and rejection of its claim that the trial court improperly rendered summary judgment.

filing of the action underlying the present appeal, Kantrovitz, on behalf of his client, Berkley Net Underwriters, Inc. (Berkley), a servicing agent for Carolina Casualty,[3] commenced a civil action against CT Solid Surface to collect certain unpaid premiums that CT Solid Surface allegedly owed on a workers' compensation insurance policy issued by Carolina Casualty. See *Berkley Net Underwriters, Inc.* v. *Connecticut Solid Surface, LLC*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034163-S. CT Solid Surface filed a motion to dismiss that prior action, arguing that Berkley was not the proper party to bring the action because it was not a legal entity registered to do business in the state nor was it registered with the insurance commissioner. Although Berkley filed a motion for permission to substitute Carolina Casualty as the proper party plaintiff, the court denied that motion.[4] CT Solid Surface thereafter filed a counterclaim against Berkley asserting violations of the Unauthorized Insurers Act, General Statutes § 38a-271 et seq., the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-815 et seq. Berkley filed a motion to dismiss the counterclaim in which it argued that (1) the court lacked subject matter jurisdiction because the counterclaim was brought against a nonexistent entity, and (2) the causes of action all fell outside of the applicable statute of limitations. On July 24, 2017, the court, *Young, J.*, issued notice disposing of the parties'

[3] According to the pleadings, a servicing agent underwrites and issues policies on behalf of the insurer and services policies by conducting audits and billing for premiums.

[4] The court indicated in its order denying the motion that it was not convinced the action was commenced through mistake; see Practice Book § 9-20; and, furthermore, the defendant had filed a counterclaim against the original plaintiff "making substitution inappropriate." *Berkley Net Underwriters, Inc.* v. *Connecticut Solid Surface, LLC*, supra, Superior Court, Docket No. CV-16-6034163-S (November 21, 2016).

motions to dismiss without discussing the merits, indicating in its order that each was "[g]ranted by agreement of the parties."

Carolina Casualty commenced the underlying action against CT Solid Surface on June 30, 2017, seeking the same unpaid premiums sought in the prior action. The court granted CT Solid Surface's motion to cite in Kantrovitz as an additional defendant. CT Solid Surface thereafter filed a cross complaint against Kantrovitz asserting a claim of vexatious litigation with respect to the prior action.[5] According to CT Solid Surface, Kantrovitz' failure to investigate properly whether Berkley was the correct party to maintain the prior action led to the filing of an unnecessary civil action, against which CT Solid Surface was required to expend both time and money to defend.

On February 1, 2019, Kantrovitz filed a motion for summary judgment on the cross complaint. He argued, in relevant part, that "[t]he undisputed material facts, including [CT Solid Surface's] own admissions, demonstrate that the underlying action did not terminate in favor of [CT Solid Surface]. Rather, the underlying action was settled by agreement of both parties to dismiss their claims against each other." Because a favorable termination of the prior action is an essential element of a vexatious litigation claim, Kantrovitz argued that CT Solid Surface's cross claim failed as a matter of law.

[5] The initial cross complaint contained an additional count sounding in abuse of process. The court granted a motion to strike both counts of the cross complaint, agreeing with Kantrovitz that count one failed to state a claim of vexatious litigation because CT Solid Surface failed to allege that the prior action had terminated in its favor and that count two failed to state a claim for abuse of process because CT Solid Surface failed to allege that the filing of the prior action fell outside the purpose for which legal process was intended. CT Solid Surface filed an amended cross complaint with respect to the vexatious litigation count only, and judgment was rendered for Kantrovitz on the abuse of process count.

In support of his argument, Kantrovitz submitted CT Solid Surface's responses to the request for admissions as an exhibit. Part of those responses included CT Solid Surface's admission that "a settlement agreement was reached in the [prior action], in which the parties agreed to resolve their claims by mutual releases and both parties withdrawing their claims." Although it is undisputed that mutual releases never were executed and withdrawals of the complaint and counterclaims were never filed, Kantrovitz also submitted in support of his motion for summary judgment a transcript from a hearing in the prior action on the parties' motions to dismiss, at which Attorney Jared Alfin, who had replaced Kantrovitz as counsel for Berkley and who also represented Carolina Casualty, appeared and advised the court that "[t]he parties have spoken about this matter and we have agreed to have confirmation be e-mailed that both motions can be granted today."[6] Moreover, in its responses to the request for admissions filed in the present case, CT Solid Surface admitted that it "would

[6] After the court called the case, the following colloquy took place:

"Attorney Alfin: Thank you, Your Honor. Good morning. . . .

"The Court: Yes, sir. There's a motion to dismiss that's on?

"Attorney Alfin: Yeah, the defendant's motion to dismiss, the claim is on for today. There's also been filed a motion to dismiss the counterclaim. The parties have spoken about this matter and we have agreed to have confirmation be e-mailed that both motions can be granted today.

"The Court: Okay.

"Attorney Alfin: The case will be disposed of.

"The Court: So the entire case would be disposed of?

"Attorney Alfin: Yes, Your Honor.

"The Court: All right. And who did you contact?

"Attorney Alfin: Attorney [Robert] Ziegler, [the attorney for CT Solid Surface], who we went back and forth via e-mail confirming that.

"The Court: All right. So your representation is that both counsel have agreed that the motions to dismiss may be granted and that will dispose of the case?

"Attorney Alfin: Yes, Your Honor.

"The Court: All right. Thank you, sir.

"Attorney Alfin: Thank you, Your Honor.

"The Court: The motions are granted by agreement."

not have agreed to a dismissal of its counterclaim against [Berkley] if [CT Solid Surface] did not *receive*, *in exchange*, a dismissal of [Berkley's] claims against it." (Emphasis added.)

CT Solid Surface filed an objection to Kantrovitz' motion for summary judgment. It did not challenge the validity of the evidence submitted by Kantrovitz, but only the legal conclusions to be drawn from that evidence. It acknowledged that the law in Connecticut is that a civil action that ends in a negotiated settlement is not considered to have terminated in favor of either party and, thus, cannot support a subsequent vexatious litigation claim. See *Blake* v. *Levy*, supra, 191 Conn. 264. It argued, however, that courts have stated that a final determination on the merits is not necessary to satisfy the favorable termination requirement and that proof of a dismissal or abandonment of a prior action is sufficient "so long as the proceeding has terminated without consideration." *DeLaurentis* v. *New Haven*, 220 Conn. 225, 251, 597 A.2d 807 (1991). CT Solid Surface maintained that the only "negotiated settlement" was the one in which the parties agreed to exchange mutual releases and withdrawals, which never occurred.

Following a hearing, the trial court granted Kantrovitz' motion for summary judgment on the vexatious litigation cross claim. It concluded that CT Solid Surface had not presented any evidence that tended to demonstrate that the prior action had terminated in its favor because the undisputed evidence showed that the parties had exchanged consideration for an agreed upon disposition of the prior action. On the basis of that conclusion, the court held that CT Solid Surface could not prove an essential element of its vexatious litigation claim, and it rendered summary judgment in favor of Kantrovitz. This appeal followed.

CT Solid Surface claims that the trial court improperly rendered summary judgment in favor of Kantrovitz on its cross claim for vexatious litigation on the ground that CT Solid Surface failed to present evidence that tended to show that the prior action on which it based its cross claim had terminated in its favor. It essentially argues that the evidence, properly construed, definitively demonstrates that the prior action terminated in its favor, or, alternatively, that a genuine issue of material fact exists regarding whether the parties entered into a negotiated settlement. We disagree.

"The fundamental purpose of summary judgment is preventing unnecessary trials. . . . If a plaintiff is unable to present sufficient evidence in support of an essential element of his cause of action at trial, he cannot prevail as a matter of law. . . . To avert these types of ill-fated cases from advancing to trial, following adequate time for discovery, a plaintiff may properly be called upon at the summary judgment stage to demonstrate that he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his cause of action. . . .

"Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . .

"It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Only if the defendant as the moving party has submitted no evidentiary proof to rebut the allegations in the complaint, or the proof submitted fails to call those allegations into question, may the plaintiff rest upon factual allegations alone. . . .

"[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Brown* v. *Otake*, 164 Conn. App. 686, 699–701, 138 A.3d 951 (2016).

We turn next to the law governing claims of vexatious litigation. "In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice *and a termination of suit in the plaintiff's favor*. . . . The statutory cause of action for vexatious litigation exists under [General Statutes] § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. . . . In the context

of a claim for vexatious litigation, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Emphasis added; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 158 Conn. App. 176, 183, 118 A.3d 158 (2015).

With respect to the favorable termination element, our Supreme Court has explained that "[c]ourts have taken three approaches to the 'termination' requirement. The first, and most rigid, requires that the action have gone to judgment resulting in a verdict of acquittal, in the criminal context, or no liability, in the civil context. The second permits a vexatious suit action even if the underlying action was merely withdrawn so long as the plaintiff can demonstrate that the withdrawal took place under circumstances creating an inference that the plaintiff was innocent, in the criminal context, or not liable, in the civil context. The third approach, while nominally adhering to the 'favorable termination' requirement, in the sense that any outcome other than a finding of guilt or liability is favorable to the accused party, permits a malicious prosecution or vexatious suit action whenever the underlying proceeding was abandoned or withdrawn without consideration, that is, withdrawn without either a plea bargain *or a settlement favoring the party originating the action*." (Emphasis altered; footnotes omitted.) *DeLaurentis* v. *New Haven*, supra, 220 Conn. 250. Summing up the law as applied in Connecticut, our Supreme Court stated that "we have never required a plaintiff in a vexatious suit action to prove a favorable termination either by pointing to an adjudication on the merits in his favor or by showing affirmatively that the circumstances of the termination indicated his innocence or nonliability, *so long as the proceeding has terminated without consideration*." (Emphasis added.) Id., 251. This comports with the court's earlier holding in *Blake* v. *Levy*, supra, 191 Conn.

264, that, if "a lawsuit ends in a negotiated settlement or compromise, it does not terminate in the plaintiff's favor and therefore will not support a subsequent suit for vexatious litigation. . . . This conclusion recognizes that the law favors settlements, which conserve scarce judicial resources and minimize the parties' transaction costs, and avoids burdening such settlements with the threat of future litigation." (Citations omitted.)

On the basis of our plenary review of the record, we agree with the conclusion of the court that "[t]he undisputed evidence that the parties exchanged consideration in the disposal of the underlying action clearly demonstrates that [CT Solid Surface] is unable to prove the essential element of favorable termination for the purpose of maintaining a vexatious litigation action." As the court explained in its memorandum of decision, Kantrovitz provided undisputed evidence concerning an exchange of consideration between Berkley and CT Solid Surface. Specifically, Kantrovitz submitted CT Solid Surface's responses to his request for admissions. "Any matter admitted [in response to a request for admissions] is conclusively established unless the judicial authority on motion permits withdrawal or amendment of the admission." Practice Book § 13-24 (a). CT Solid Surface never sought to withdraw or to amend its admissions. Relevant to the issue before us is CT Solid Surface's admission that, in the prior action, it "would not have agreed to a dismissal of its counterclaim against [Berkley] if [CT Solid Surface] did not receive, in exchange, a dismissal of [Berkley's] claims against it." In other words, CT Solid Surface reached a mutual agreement with Berkley to stipulate to a dismissal of its counterclaim in exchange for Berkley's promise to accept a dismissal of its action against CT Solid Surface. Although CT Solid Surface contends that it never executed any formal settlement agreement, and

tries to portray what occurred as Berkley voluntarily agreeing to a dismissal of its complaint, that argument fails to recognize the legal import of the parties' agreement. As the trial court indicated in rejecting this argument, "[c]onsideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made" and an "exchange of promises is sufficient consideration . . . ." (Citation omitted; internal quotation marks omitted.) *Bilbao* v. *Goodwin*, 333 Conn. 599, 616–17, 217 A.3d 977 (2019). CT Solid Surface failed to provide any evidentiary support for its argument that there was a genuine issue of material fact as to whether a settlement occurred. "Mere statements of legal conclusions . . . and bald assertions, without more, are insufficient to raise a genuine issue of material fact capable of defeating summary judgment." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 193, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014).

In summary, Berkley's promise to agree to the dismissal of its complaint in exchange for CT Solid Surface's promise to agree to the dismissal of its counterclaim constituted a contractual agreement supported by consideration akin to a negotiated settlement of the action. Because that disposition favored "the party originating the action"; *DeLaurentis* v. *New Haven*, supra, 220 Conn. 250; it was not, as a matter of law, a termination of the action in favor of CT Solid Surface. Accordingly, Kantrovitz was entitled to summary judgment on the vexatious litigation cross claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MATTHEW S. LAVECCHIA
(AC 44003)

Elgo, Cradle and DiPentima, Js.

Syllabus

The defendant, who had been convicted after a jury trial of the crime of assault in the third degree in connection with an altercation at a restaurant, appealed to this court from the judgment of the trial court. A police officer, who spoke to the victim and witnesses, and reviewed security camera footage, responded affirmatively at trial when asked if his investigation led him to conclude that probable cause existed for the defendant's arrest. The defendant objected to the testimony on the ground that the police officer's answer contained a legal conclusion, and the trial court overruled the objection. The trial court also declined the defendant's request to admit into evidence the psychiatric records of the only direct witness to the altercation, who, in the months prior to the altercation, maintained a YouTube channel and uploaded videos of himself discussing his mental health struggles. *Held*:

1. The defendant's unpreserved claim that the trial court permitted the police officer to testify on an ultimate issue in violation of § 7-3 of the Connecticut Code of Evidence was unreviewable because it was not raised before the trial court; at no time did defense counsel raise any claim that the testimony constituted an opinion on an ultimate issue, the defendant's sole objection having been that it contained a legal conclusion, and, because the defendant's claim that the testimony violated his constitutional rights was evidentiary in nature, rather than constitutional, it did not qualify for review pursuant to *State* v. *Golding* (233 Conn. 213).
2. The trial court did not abuse its discretion in denying the defendant's request to admit into evidence the witness' psychiatric records, the court having first conducted an in camera inspection of the records and determined that they contained nothing related to the witness' ability or capacity to relate the truth, or to observe, recollect or narrate the relevant occurrences.

Argued May 12—officially released September 14, 2021

Procedural History

Substitute information charging the defendant with the crime of assault in the third degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, and

tried to the jury before *McShane*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

John R. Williams, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Matthew R. Kalthoff*, assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Matthew S. Lavecchia, appeals from the judgment of conviction, rendered after a jury trial, of assault in the third degree in violation of General Statutes § 53a-61 (a) (1). On appeal, the defendant claims the trial court abused its discretion by (1) admitting into evidence the testimony of a police officer as to whether probable cause existed for the defendant's arrest and (2) excluding from evidence the psychiatric records of a witness for the state. We 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 February 2, 2018, the defendant and Haroon Ramzan got into an altercation at the Citrus Restaurant in Milford. The defendant struck Ramzan in the face multiple times, breaking his nose. The defendant subsequently was arrested and, following a jury trial, convicted of assault in the third degree. The court sentenced the defendant to a term of nine months of incarceration, execution suspended, and three years of probation. This appeal followed.

I

The defendant first claims that the court abused its discretion in admitting testimony from a police officer as to whether probable cause existed for the defen-

dant's arrest. On appeal, the defendant contends that the officer improperly was permitted to testify on an "ultimate issue" in violation of § 7-3 of the Connecticut Code of Evidence. In response, the state argues that (1) the defendant failed to preserve this claim for appellate review, and (2) the claim is evidentiary in nature and, thus, not entitled to review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We agree with the state.

The following additional facts and procedural history are relevant to this claim. At all relevant times, Christopher J. Deida was an officer with the Milford Police Department. On February 3, 2018, Deida was dispatched to the restaurant shortly after midnight. Upon arrival, he observed Ramzan bleeding and arranged for a paramedic to attend to him. Deida then spoke with Ramzan and other witnesses at the scene and reviewed security camera footage of the interactions between the defendant and Ramzan prior to the altercation.

On direct examination, Deida responded affirmatively when the prosecutor asked him whether his investigation led him to conclude that probable cause existed to arrest the defendant. The defendant objected to that testimony on the ground that Deida's answer contained a legal conclusion. The court overruled that objection.

At the close of Deida's testimony, the court provided a curative instruction to the jury, stating in relevant part: "Ladies and gentlemen, we're going to break for the day. But . . . before I read you these instructions, I just want to tell you this. There was some testimony with regard to probable cause. And whether or not this officer believes there was probable cause. Whether or not this officer believes there's probable cause is not for you to take into consideration. In other words, you are the trier of fact, you will decide whether or not the

defendant is guilty of the crime of assault in the third degree, not what this officer thinks. And there was [a] reference in regard to a judge. Whether or not a judge signed on probable cause. It wasn't answered whether a judge did or didn't. However, what is important to you, ladies and gentlemen, is this: you are the trier of fact, you are the ones who decide the facts in this case, and whether a judge or police officer believes there was probable cause, which is significantly less than . . . beyond a reasonable doubt, that you have to decide that, ladies and gentlemen.

"So, I ask that you just put aside . . . any concerns with regard to probable cause and who may have thought there was probable cause. You are the trier of fact, and you will decide whether or not the defendant is, in fact, guilty of the charge of assault in the third degree."

On appeal, the defendant contends that the court abused its discretion in permitting Deida's testimony regarding the existence of probable cause. As our Supreme Court has explained, "[t]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . [A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Citations

omitted; internal quotation marks omitted.) *State* v. *Edwards*, 334 Conn. 688, 703, 224 A.3d 504 (2020).

At trial, the defendant's sole objection to the testimony at issue was that it contained a legal conclusion. At no time did defense counsel raise any claim that Deida's testimony constituted an opinion on an ultimate issue. Because the defendant's objection was not properly raised before the court, his claim is unpreserved and, hence, unreviewable.

The defendant alternatively seeks review of his claim pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, claiming that the court's ruling on his objection to Deida's testimony amounted to a constitutional violation. That request is without merit. Although the defendant portrays the court's ruling on his objection to Deida's testimony as constitutional in nature, it remains settled law that "unpreserved evidentiary claims masquerading as constitutional claims" are not entitled to *Golding* review. (Internal quotation marks omitted.) *State* v. *Warren*, 83 Conn. App. 446, 451, 850 A.2d 1086, cert. denied, 271 Conn. 907, 859 A.2d 567 (2004); see also *State* v. *Taveras*, 49 Conn. App. 639, 645, 716 A.2d 120 ("[t]he improper admission of opinion testimony that answers a question that a jury should have resolved for itself is not of constitutional significance and is a type of evidentiary error" (internal quotation marks omitted)), cert. denied, 247 Conn. 917, 722 A.2d 809 (1998). Because the defendant's claim is evidentiary in nature, we decline to consider the merits of that unpreserved claim.

II

The defendant also claims that the court abused its discretion in declining to admit into evidence the psychiatric records of a witness for the state. We disagree.

The following additional facts are relevant to the defendant's claim. Tony Ly, a friend of Ramzan and an

acquaintance of the defendant, was the only direct witness to the February 2, 2018 altercation. In the months prior to the altercation, Ly maintained a YouTube channel and uploaded videos of himself discussing his various mental health struggles. Disks containing several of those videos were marked for identification as exhibits for trial.

Prior to the commencement of trial, the state filed a motion in limine to "preclude inquiry or mention of . . . Ly's mental health." The defendant, in turn, requested an in camera review of Ly's psychiatric records. The court granted the defendant's motion, and Ly signed a waiver allowing his psychiatric records to be examined by the court.

After conducting an in camera review of those records, the court informed the parties that "nothing in [those records] relates to the witness' ability to or capacity to relate the truth, observe, recollect, or narrate relevant occurrences." The court then ordered Ly's psychiatric records to be sealed for possible appellate review. With respect to the state's motion in limine, the court informed the parties that the defendant would be afforded "broad discretion" to question Ly about his mental health. The court also informed the state that any objections to such a line of questioning would be handled on an individual basis.

On appeal, the defendant nevertheless claims that the court abused its discretion in excluding Ly's psychiatric records from evidence. Our review of his claim is governed by the following principles. "Upon inspecting the records in camera, the trial court must determine whether the records are especially probative of the witness' capacity to relate the truth or to observe, recollect and narrate relevant occurrences. . . . If the court determines that the records are probative, the state must obtain the witness' further waiver of his privilege

concerning the relevant portions of the records for release to the defendant, or have the witness' testimony stricken. If the court discovers no probative and impeaching material, the entire record of the proceeding must be sealed and preserved for possible appellate review. . . . Once the trial court has made its inspection, the court's determination of a defendant's access to the witness' records lies in the court's sound discretion, which we will not disturb unless abused. . . .

"Access to confidential records should be left to the discretion of the trial court which is better able to assess the probative value of such evidence as it relates to the particular case before it . . . and to weigh that value against the interest in confidentiality of the records. . . . [T]he linchpin of the determination of the defendant's access to the records is whether they sufficiently disclose material especially probative of the ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality and disclosing them to the defendant in order to protect his right of confrontation." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Slimskey*, 257 Conn. 842, 855–57, 779 A.2d 723 (2001). "On appeal, the appellate tribunal reviews the confidential records to determine whether the trial court abused its discretion in concluding that no information contained therein is especially probative of the victim's ability to know and correctly relate the truth so as to justify breaching their confidentiality in disclosing them to the defendant." (Internal quotation marks omitted.) *State* v. *Francis*, 267 Conn. 162, 172, 836 A.2d 1191 (2003).

We have conducted our own in camera review of the psychiatric records at issue and are convinced that the trial court did not abuse its discretion in denying the defendant's request to admit them into evidence. No information therein reflects any inhibition of Ly's ability

to perceive the February 2, 2018 altercation between the defendant and Ramzan or his ability to testify at trial as to what he observed. See *State* v. *Santiago*, 224 Conn. 325, 337, 618 A.2d 32 (1992). We therefore conclude that the court did not abuse its discretion in excluding those psychiatric records from evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GREGORY PIERRE (AC 40618)

Elgo, Suarez and Devlin, Js.

Syllabus

Convicted, inter alia, of the crimes of manslaughter in the first degree, felony murder and two counts of kidnapping in the first degree in violation of statute (§ 53a-92 (a) (2) (A) and (B)), the defendant appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The sentencing court had merged the defendant's manslaughter conviction into the felony murder conviction and sentenced him to sixty years of incarceration on the felony murder conviction. The court also sentenced the defendant to twenty-five years of incarceration on each of the two counts of kidnapping. In his motion to correct, the defendant claimed, inter alia, that the constitutional prohibition against double jeopardy was violated because, under a retroactive application of *State* v. *Polanco* (308 Conn. 242), the sentencing court incorrectly merged the felony murder and manslaughter convictions instead of vacating the manslaughter conviction. He further claimed that he was unlawfully convicted of and sentenced on the two kidnapping counts because each count arose out of the same act or transaction, and the trial court improperly failed to vacate one of the kidnapping convictions. *Held* that the trial court improperly denied the defendant's motion to correct an illegal sentence as to his challenge to the court's failure to vacate the manslaughter conviction, and, because the form of the court's judgment was improper, its judgment was reversed as to that claim and the case was remanded with direction to dismiss the motion to correct as to that claim: the trial court lacked jurisdiction over the defendant's claim that the manslaughter conviction should have been vacated, as he did not assert that his sentence was affected by his conviction of the felony murder and manslaughter charges, he was not sentenced on the merged manslaughter conviction,

and the only relief he sought in his motion to correct was the vacatur of the manslaughter conviction; moreover, the defendant's claim that his sentence on each of the kidnapping counts violated his right to be free of double jeopardy was unavailing, as subparagraphs (A) and (B) of § 53a-92 (a) (2) are separate offenses for double jeopardy purposes.

Argued May 27—officially released September 14, 2021

Procedural History

Substitute information charging the defendant with two counts of the crime of kidnapping in the first degree, and with one count each of the crimes of capital felony, murder, felony murder and robbery in the first degree, brought to the Superior Court in the judicial district of New London and tried to the jury before *Schimelman*, *J.*; verdict and judgment of guilty of two counts of kidnapping in the first degree, and one count each of felony murder, robbery in the first degree and the lesser included offense of manslaughter in the first degree, from which the defendant appealed; thereafter, this court, *Foti*, *West* and *Hennessey*, *Js.*, affirmed the trial court's judgment and, on the granting of certification, the defendant, appealed to the Supreme Court, which affirmed this court's judgment; subsequently, the court, *Strackbein*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment*; *affirmed in part*; *judgment directed in part*.

Gregory Pierre, self-represented, the appellant (defendant).

Michael L. Regan, state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Gregory Pierre,[1] appeals from the judgment of the trial court denying his motion

[1] The defendant was self-represented before the trial court and is self-represented in the present appeal.

to correct an illegal sentence. The defendant argues that the court abused its discretion in denying his motion. He claims that his sentence violated the constitutional prohibition against double jeopardy, which is enshrined in the fifth amendment to the United States constitution and made applicable to the states through the fourteenth amendment, because (1) the court improperly merged his felony murder and manslaughter convictions, and (2) he was unlawfully convicted of and sentenced on two counts of kidnapping in the first degree for a single act. With respect to the first claim, we conclude that the form of the judgment is improper, and we remand the case to the trial court with direction to dismiss the portion of the motion to correct in which the petitioner raised that claim. We affirm the judgment of the trial court in all other respects.

The record reveals that, in 2001, following a jury trial, the defendant was convicted of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1), felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), and two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A) and (B).[2] At the time of sentencing, the court, *Schimelman, J.*, merged the manslaughter conviction into the felony murder conviction and imposed a sentence of sixty years of imprisonment with respect to the felony murder conviction. The court imposed a sentence of twenty-five years of imprisonment with respect to each of the kidnapping convictions and imposed a sentence of twenty years of imprisonment

[2] In a separate trial, one of the defendant's codefendants, Jeffrey Smith, was convicted of the same charges as those of which the defendant was convicted. See *State* v. *Smith*, 107 Conn. App. 746, 946 A.2d 926, cert. denied, 288 Conn. 905, 953 A.2d 650 (2008). An additional codefendant, Abin Britton, was convicted in a separate trial of manslaughter in the first degree, two counts of kidnapping in the first degree, and one count of robbery in the first degree. See *State* v. *Britton*, 283 Conn. 598, 600, 929 A.2d 312 (2007).

with respect to the robbery conviction. The sentences for the kidnapping and robbery convictions were concurrent to each other but consecutive to the sentence imposed for felony murder. Thus, the court imposed a total effective sentence of eighty-five years of imprisonment. Thereafter, the defendant appealed, and this court affirmed the judgment of conviction. *State* v. *Pierre*, 83 Conn. App. 28, 847 A.2d 1064 (2004), aff'd, 277 Conn. 42, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).[3]

On September 28, 2015, the defendant, pursuant to Practice Book § 43-22, filed a motion to correct an illegal sentence and a supporting memorandum of law. The motion set forth two grounds. First, the defendant argued that the sentencing court's merger of the felony murder and manslaughter convictions was improper under a retroactive application of the rule set forth in *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013). In *Polanco*, our Supreme Court, in the exercise of its supervisory authority, determined that, "when a defendant is convicted of greater and lesser included offenses, the trial court shall vacate the conviction for the lesser offense rather than merging it with the conviction for the greater offense." Id., 260. Relying on *Polanco*, the defendant in the present case asserted that the proper remedy was for his conviction of manslaughter to be vacated. Second, the defendant argued that, in violation of double jeopardy principles, his multiple kidnapping convictions arose from the same act or transaction. The defendant asserted that the proper remedy was for one of the kidnapping convictions to be vacated. The state filed a memorandum of law in opposition to the motion to correct. On April 29, 2016,

[3] A detailed recitation of the facts underlying the judgment of conviction is set forth in *State* v. *Pierre*, 277 Conn. 42, 47–52, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

the court, *Strackbein*, *J.*, heard argument from the parties with respect to the motion. On May 2, 2016, the court, in a memorandum of decision, denied the motion.

Pursuant to Practice Book § 43-22, "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "We review the [trial] court's denial of [a] defendant's motion to correct [an illegal] sentence under the abuse of discretion standard of review. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did. . . .

"An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is inherently contradictory. . . . Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way which violates the defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keeps its plea agreement promises . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Logan*, 160 Conn. App. 282, 287–88, 125 A.3d 581 (2015), cert. denied, 321 Conn. 906, 135 A.3d 279 (2016). On appeal, the defendant relies on the same two grounds that he raised before the trial court.[4]

[4] We note however, that, in his appellate brief, the defendant has substantively changed what *relief* he believes to be proper with respect to his first claim. Specifically, he argues that the proper remedy with respect to that claim is for the conviction of felony murder to be vacated, instead of the manslaughter conviction, and he seeks to be resentenced accordingly. We

The defendant's first claim, which challenges the merger of his felony murder and manslaughter convictions, is controlled by our Supreme Court's recent decision in *State* v. *Smith*, 338 Conn. 54, A.3d (2021).[5] In *Smith*, one of the defendant's codefendants, in a motion to correct an illegal sentence, raised the exact same claim as the claim presently before us. See id., 58; see also footnote 2 of this opinion. After the trial court in *Smith* denied the motion to correct, the defendant appealed to this court, which affirmed the judgment on its merits. *State* v. *Smith*, 180 Conn. App. 371, 384, 184 A.3d 831 (2018), rev'd, 338 Conn. 54, A.3d (2021). Following a grant of certification to appeal related solely to the merger claim, our Supreme Court in *Smith* concluded that the trial court lacked jurisdiction to entertain the claim because (1) the defendant had not claimed that his *sentence* was affected by the alleged cumulative convictions, (2) the sentencing court had not imposed any sentence on the merged manslaughter conviction, and (3) the only relief sought by the defendant in the motion to correct was the vacatur of the manslaughter conviction. *State* v. *Smith*, supra, 338 Conn. 63–64. Relying on *Smith*, we conclude that the trial court in the present case lacked jurisdiction over the defendant's merger claim, and, with respect to this claim, the court should have dismissed, rather than denied, the motion to correct an illegal sentence.[6]

decline to consider this unpreserved alteration in the defendant's claim. See, e.g., *State* v. *Syms*, 200 Conn. App. 55, 59–60, 238 A.3d 135 (2020) (declining to review claim not raised in motion to correct illegal sentence); *State* v. *Starks*, 121 Conn. App. 581, 592, 997 A.2d 546 (2010) (review under *State* v. *Golding*, 213 Conn, 233, 239–40, 567 A.2d 823 (1989), is unavailable in appeal from denial of motion to correct illegal sentence brought under Practice Book § 43-22).

[5] This court stayed the present appeal pending our Supreme Court's final determination in *State* v. *Smith*, supra, 338 Conn. 54. Prior to oral argument before this court, which took place on May 27, 2021, this court notified the parties to be prepared to address the impact of *Smith* on this appeal.

[6] Our Supreme Court's grant of certification to appeal in *Smith* was limited to the issue of whether the trial court properly denied the claim raised in

The defendant's second claim, which challenges the multiple kidnapping convictions allegedly arising out of the same act or transaction, is controlled by this court's decision in *State* v. *Smith*, supra, 180 Conn. App. 379. The defendant in *Smith*, like the defendant in the present case, was convicted of one count of kidnapping in violation of § 53a-92 (a) (2) (A) and one count of kidnapping in violation of § 53a-92 (a) (2) (B). Id. The convictions in *Smith* were based on the same operative facts as those at issue in the present case, involving a single victim. See id. The defendant's double jeopardy claim in *Smith* is identical to the double jeopardy claim raised by the defendant in the present case. In *Smith*, this court rejected the claim on the ground that subparagraphs (A) and (B) of § 53a-92 (a) (2) are separate offenses for double jeopardy purposes. Relying on this court's opinion in *Smith*, we conclude that the trial court in the present case properly denied the defendant's motion to correct with respect to this claim.

The form of the judgment is improper with respect to the trial court's denial of the portion of the motion

the motion to correct that the sentencing court had improperly merged the homicide convictions; the certified issue was whether *Polanco* should be applied retroactively. See *State* v. *Smith*, 330 Conn. 908, 193 A.3d 559 (2018). Thus, our Supreme Court's grant of certification did not encompass the other double jeopardy claims that this court considered and rejected on their merits in *State* v. *Smith*, supra, 180 Conn. App. 376–79, nor did the court in its opinion refer to this court's resolution of those claims. We note, however, that, in *Smith*, our Supreme Court stated that this court's judgment was "reversed," and it remanded the case to this court with direction to remand the case to the trial court with direction to dismiss the defendant's motion to correct an illegal sentence. *State* v. *Smith*, supra, 338 Conn. 65.

Because our Supreme Court did not grant certification to appeal with respect to this court's resolution of the other double jeopardy claims resolved in *State* v. *Smith*, supra, 180 Conn. App. 376–79, our Supreme Court did not address the other claims in any manner in its opinion, and its conclusion with respect to the certified issue related to merger does not appear to have required a different outcome with respect to the other claims, we do not interpret the court's opinion to have reversed this court's judgment with respect to those other claims.

to correct an illegal sentence in which the defendant claimed that the sentencing court improperly merged the homicide convictions, and the case is remanded to the trial court with direction to dismiss that portion of the motion to correct; the judgment is affirmed in all other respects.