ANTHONY JOHNSON *v.* COMMISSIONER OF CORRECTION (AC 42994)

Prescott, Elgo and DiPentima, Js.

Syllabus

The petitioner, who had been convicted on a guilty plea, of the crime of manslaughter in the first degree with a firearm in connection with his involvement in an altercation in 2008, sought a writ of habeas corpus, claiming, inter alia, a violation of the ex post facto clause of the United States constitution. In 2011, the legislature enacted a statute (§ 18-98e) that permitted certain inmates, including the petitioner, to earn risk reduction earned credit toward the reduction of their sentences, at the discretion of the respondent, the Commissioner of Correction, and amended the statute (§ 54-125a) governing parole eligibility to permit risk reduction credit to be applied to advance the parole eligibility date of inmates convicted of certain violent offenses. In 2013, No. 13-3 of the 2013 Public Acts (P.A. 13-3) amended § 54-125a and removed the language that permitted the risk reduction credit earned under § 18-98e to advance the parole eligibility date of violent offenders. The petitioner claimed, inter alia, that the 2013 amendment, as applied retroactively to him, violated the ex post facto clause of the federal constitution. The habeas court rendered judgment declining to issue a writ of habeas

corpus pursuant to the applicable rule of practice (§ 23-24 (a) (1)) on the ground that it lacked subject matter jurisdiction. The petitioner then filed a second petition for a writ of habeas corpus, in which he alleged that the Department of Correction (department) had unconstitutionally forfeited his risk reduction earned credit that had already been earned and applied. The court again declined to issue the writ, concluding that the second petition was identical to the first petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal and in declining to issue a writ of habeas corpus on the petitioner's second petition because it was identical to the first petition, as no such ground is contained in Practice Book § 23-24: under § 23-24, the judicial authority shall issue a writ of habeas corpus unless it appears that it lacks jurisdiction, the petition is wholly frivolous on its face or the relief sought is not available; moreover, as the respondent conceded, the first and second petitions were not identical, as the first petition was construed by the habeas court as a constitutional challenge regarding the department's failure to allow the petitioner to continue to earn and apply new credits to his sentence, and the second petition specifically concerned risk reduction earned credits that allegedly had already been earned and applied pursuant to § 18-98e.
2. This court affirmed the decision of the habeas court to decline to issue a writ of habeas corpus on the alternative ground that the habeas court lacked subject matter jurisdiction over the second petition, as the petitioner's criminal offense predated the enactment of the risk reduction earned credit program; this court previously applied precedent from our Supreme Court in the context of a habeas court's decision to decline to issue a writ for lack of jurisdiction pursuant to Practice Book § 23-24 (a) (1) in *Whistnant* v. *Commissioner of Correction*, (199 Conn. App. 406), and the present case was indistinguishable from that case in all material respects, as both cases involved petitioners who committed criminal offenses in 2008, years before the enactment of the risk reduction earned credit program in 2011, and who claimed that the retroactive application of the 2013 amendment to § 54-125a (b) (2) to him violated the ex post facto clause, and, as in *Whistnant*, the enactment of P.A. 13-3 simply returned the petitioner to the same position in terms of parole eligibility that he was in at the time that he committed the offense.

Argued March 4—officially released October 12, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment declining to issue a writ of habeas corpus; thereafter, the court

denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

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

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, was *Joseph T. Corradino*, state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Anthony Johnson, appeals from the judgment of the habeas court declining to issue a writ of habeas corpus pursuant to Practice Book § 23-24. On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal and declining to issue a writ of habeas corpus. The respondent, the Commissioner of Correction, concedes that the court abused its discretion in denying his petition for certification and declining to issue the writ for the reason stated by the court, but nonetheless argues that we should affirm the judgment because the court lacked jurisdiction over the petition. We agree with the respondent and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. The petitioner was involved in an altercation that occurred on December 7, 2008. He thereafter was arrested and charged with murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On December 2, 2009, the petitioner pleaded guilty to one count of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a. On February 26, 2010, the court sentenced the petitioner to a term of thirty years of incarceration, execution suspended after eighteen years, with five years of probation.

On February 25, 2019, the petitioner filed a petition as a self-represented party for a writ of habeas corpus (first petition), raising an ex post facto challenge to the application of the risk reduction earned credit program that was established in 2011, by No. 11-51 of the 2011 Public Acts (P.A. 11-51), as codified in General Statutes (Supp. 2012) §§ 18-98e and 54-125a, which was eliminated in 2013, following the enactment of No. 13-3, § 59, of the 2013 Public Acts (P.A. 13-3).[1] In that petition, the petitioner broadly alleged that application of P.A. 13-3 to his sentence violated the ex post facto clause of the United States constitution.[2]

On March 4, 2019, the habeas court, *Bhatt*, *J.*, declined to issue the writ pursuant to Practice Book § 23-24 (a) (1). In its written order, the court concluded that it lacked subject matter jurisdiction over the first petition because the date of the offense underlying the petitioner's conviction was December 7, 2008, and thus predated the enactment of the risk reduction earned credit program established by P.A. 11-51. In so doing, the court relied on *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 373–74, 163 A.3d 597 (2017), *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 199 A.3d 1127 (2018), cert. granted, 335 Conn. 901, 225 A.3d 685 (2020), and *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, 194 A.3d 867 (2018), cert. granted, 335 Conn. 901, 225 A.3d 960 (2020), noting that "[o]ur Supreme Court and Appellate Court have repeatedly held that this court lacks jurisdiction over claims involving an offense date that is prior to the enactment of the [risk reduction earned credit] statute,"

[1] Number 13-3, § 59, of the 2013 Public Acts amended subsections (b) (2), (c) and (e) of General Statutes (Rev. to 2013) § 54-125a to delete provisions permitting the reduction of time off a prisoner's parole eligibility date for risk reduction credit earned under § 18-98e.

[2] The constitution of the United States, article one, § 10, provides in relevant part: "No State shall . . . pass any . . . ex post facto Law . . . ."

including ex post facto challenges. The court then concluded its order with the following statement: "The holdings of those [appellate] cases make clear that this court has no jurisdiction to consider the claims raised in the [first petition]. If, however, the petitioner is claiming that credits that have already been earned and applied in the past have been unconstitutionally forfeited by the Department of Correction [department], as opposed to [the department's] failure to allow the petitioner to continue to earn and apply new credits to his sentence, then the petitioner is invited to refile the petition."[3]

Approximately two weeks later, the petitioner filed a second petition for a writ of habeas corpus (second petition), in which he amended his first petition as suggested by the habeas court. Specifically, the petitioner alleged in relevant part that the department had "unconstitutionally forfeited risk reduction earned credit . . . from the petitioner [that] have already been earned and applied . . . ." The petitioner further alleged that "the retroactive application of [P.A.] 13-3 violat[es] the ex post facto clause" by "[w]ithdrawing any credits that [were] earned toward the reduction of [his parole eligibility date]." By way of relief, the petitioner asked the court to "reinstate any lawfully earned [risk reduction earned credit] that was forfeited unconstitutionally with the retroactive application of P.A. 13-3." On March 25, 2019, the habeas court, *Newson, J.*, declined to issue the writ "because [the second petition] is identical to [the first petition], which was declined . . . on March

[3] Although perhaps well intentioned, it is not proper for a court that lacks subject matter jurisdiction over a given controversy to provide such guidance to litigants. See, e.g., *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 304 Conn. 820, 827 n.8, 43 A.3d 607 (2012) ("the [trial] court should have dismissed the action for lack of subject matter jurisdiction and proceeded no further" (internal quotation marks omitted)); *Nieves* v. *Cirmo*, 67 Conn. App. 576, 587 n.4, 787 A.2d 650 ("[t]he court is not an advocate and should not be placed in a position of making tactical decisions for the [parties] before it"), cert. denied, 259 Conn. 931, 793 A.2d 1085 (2002).

4, 2019."[4] The petitioner then filed a petition for certification to appeal, which the court denied. From that judgment, the petitioner appealed to this court.

The petitioner subsequently filed a motion requesting that the habeas court file a memorandum of decision pursuant to Practice Book § 64-1. The court denied that motion on August 12, 2019, stating in relevant part: "The basis for the court's [decision to] decline [to issue the writ] pursuant to Practice Book § 23-24 [was] on the ground that the [second] petition was identical to [the first petition] that had been declined approximately two weeks prior pursuant to Practice Book § 23-24 . . . where [the habeas court] did provide the petitioner with an order including legal reasoning, does not require further explanation." (Citation omitted.)

In response, the petitioner filed a motion for articulation, in which he asked the habeas court to articulate the basis of its decision to deny his motion seeking a memorandum of decision, its decision to decline to issue the writ, and its denial of his petition for certification to appeal. The court summarily denied that motion the next day. On September 3, 2019, the petitioner filed an "amended motion for articulation," again seeking articulation of the habeas court's decision declining to issue a writ of habeas corpus. The court denied the amended motion on September 16, 2019, stating that "[t]he basis for the court's decision was made clear in its order and is not in need of further articulation." On September 26, 2019, the petitioner filed a motion for review of the habeas court's denial of his amended

[4] Although the court stated in its order that the second petition was "being returned," the court in substance declined to issue a writ of habeas corpus. See Practice Book § 23-24. As our Supreme Court recently explained, "by ordering the return of the petition, the court did not issue the writ. Ordering the petition returned is consistent with the court's not accepting the writ." *Cookish* v. *Commissioner of Correction*, 337 Conn. 348, 357 n.7, 253 A.3d 467 (2020).

motion. On December 4, 2019, this court denied review of that motion.

On appeal, the petitioner argues that the habeas court abused its discretion when it denied the petition for certification to appeal because it improperly declined to issue the writ on the ground that the second petition was "identical" to the first one. The respondent concedes that the court abused its discretion in both denying his petition for certification to appeal and declining to issue the writ on that ground.[5] The respondent nevertheless argues, as an alternative ground of affirmance, that we should affirm the judgment of the habeas court because it lacked jurisdiction over the second petition. See Practice Book § 23-24 (a) (1). We agree with the respondent.[6]

I

We first consider the propriety of the stated basis of the habeas court's decision to decline to issue the writ. In its March 25, 2019 order, the court declined to issue

[5] In his appellate brief, the respondent states in relevant part: "If this court concludes . . . that the habeas court did have jurisdiction [over the second petition], the respondent concedes that the habeas court, *Newson*, *J.*, erred in declining to issue the writ under Practice Book § 23-24 on the ground that the [second petition] and the [first petition] were identical, because the petitions were not, in fact, identical. . . . If this court accepts the respondent's concession of error, the habeas court abused its discretion in denying the petitioner's petition for certification to appeal, and the decision of the habeas court declining to issue the writ therefore should be reversed."

[6] The precedent of our Supreme Court instructs that an appellate court "need not decide whether the habeas court abused its discretion in denying certification to appeal when there is an alternat[ive] ground for affirming the decision of the habeas court . . . ." (Internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 591, 198 A.3d 562 (2019). In light of our conclusion that the habeas court lacked jurisdiction to issue the writ pursuant to Practice Book § 23-24 (a) (1), we need not decide the question of whether the court abused its discretion in denying the petition for certification to appeal. We likewise do not consider the petitioner's additional claims that the habeas court violated his right to due process by refusing to hold a hearing on the petition and that it abused its discretion in declining to furnish an articulation of its decision.

the writ "because [the second petition] is identical to [the first petition] . . . ." On appeal, the petitioner contends that the court abused its discretion in so doing, as no such ground is contained in Practice Book § 23-24. We agree.

As a preliminary matter, we note that our review of a habeas court's order declining to issue a writ of habeas corpus is governed by the abuse of discretion standard. See *Stephen S.* v. *Commissioner of Correction*, 199 Conn. App. 230, 235, 235 A.3d 639 (2020). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *Walker* v. *Commissioner of Correction*, 223 Conn. 411, 414, 611 A.2d 413 (1992).

Titled "Preliminary Consideration of Judicial Authority," Practice Book § 23-24 governs the authority of a court to issue a writ of habeas corpus and provides in relevant part: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available. . . ."[7] By contrast, Practice Book § 23-29 governs the

[7] As our Supreme Court has observed, "[i]f any of [the] three enumerated circumstances exist, then the writ never issues in the first place, and the judicial authority is required to notify the petitioner [that] it declines to issue the writ. . . . Section 23-24 thus reverses the usual sequence followed in the ordinary civil case; the habeas petition first is filed with the court, and the writ issues and service of process occurs only if the court determines, after a preliminary review of the petition, that the petition pleads a nonfrivolous claim within the court's jurisdiction upon which relief can be granted." (Citation omitted; internal quotation marks omitted.) *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 557, 223 A.3d 368 (2020).

authority of a court to dismiss a petition for various reasons *after* a writ has been issued.[8]

In *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 555, 223 A.3d 368 (2020), our Supreme Court sought to "clarify the proper application of these two rules of practice." The court explained that "the screening function of Practice Book § 23-24 plays an important role in habeas corpus proceedings, but it is intended only to weed out obviously and unequivocally defective petitions, and we emphasize that [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims. . . . Screening petitions prior to the issuance of a writ is intended to conserve judicial resources by eliminating obviously defective petitions; it is not meant to close the doors of the habeas court to justiciable claims. Special considerations ordinarily obtain when a petitioner has proceeded pro se. . . . [I]n such a case, courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed. . . . The justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners. . . . Thus, when borderline cases are detected in the preliminary review under § 23-24, the habeas court should issue the writ and appoint counsel so that any potential deficiencies can be

[8] Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas relief can be granted; (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition; (4) the claims asserted in the petition are moot or premature; (5) any other legally sufficient ground for dismissal of the petition exists."

addressed in the regular course after the proceeding has commenced." (Citations omitted; internal quotation marks omitted.) Id., 560–61. The court further emphasized that, "[i]n contrast [with Practice Book § 23-24], Practice Book § 23-29 contemplates the dismissal of a habeas petition *after the writ has issued* on any of the enumerated grounds." (Emphasis added.) Id., 561; see also id., 563 (describing Practice Book § 23-29 as procedure utilized "[a]fter the writ has issued").

In the present case, the habeas court declined to issue the writ pursuant to Practice Book § 23-24 "because [the second petition] is identical to [the first petition] . . . ." No such ground is set forth in § 23-24. For that reason, the court improperly declined to issue the writ on that basis.

In *Stephen S.* v. *Commissioner of Correction*, supra, 199 Conn. App. 231, this court reversed a habeas court's decision to decline to issue a writ on the ground that the petition was identical to a previously dismissed petition. The petitioner in that case had filed a third habeas petition alleging ineffective assistance of counsel on the part of his trial and appellate counsel. Id., 234. The habeas court declined to issue the writ pursuant to Practice Book § 23-24 (a) (2), stating that the petition was "wholly frivolous on its face, to wit: [t]he petition raises claims identical to those already raised, litigated, and resolved against the petitioner in [the first and second habeas actions]." (Internal quotation marks omitted.) Id., 235. On appeal, the petitioner claimed that the court improperly declined to issue the writ because the claims raised in his third habeas petition were "different from the claims raised in his two prior habeas petitions" and were not " 'wholly frivolous on [their] face.' " Id., 231. Relying on *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 560, this court concluded that the petitioner's claims were not " 'obviously and unequivocally defective' . . . but, rather, [were]

cognizable claims that should have survived the 'screening function' of . . . § 23-24 and entitled the petitioner to present evidence in support of his claims." (Citation omitted.) *Stephen S.* v. *Commissioner of Correction*, supra, 239. In light of the foregoing, this court concluded that the habeas court had abused its discretion in declining to issue the writ. Id., 240.

That precedent compels a similar conclusion here. In the present case, the habeas court declined to issue the writ on the ground that the second petition was identical to the first petition. As the respondent concedes, the first and second petitions are not "identical." The first petition was construed by the habeas court as a constitutional challenge regarding the department's failure to allow the petitioner to continue to earn and apply new credits to his sentence. By contrast, the second petition specifically concerned risk reduction earned credits that allegedly had "already been earned and applied" pursuant to General Statutes (Supp. 2012) § 18-98e and allegedly had been forfeited by the department in violation of the ex post facto clause. Thus, the second petition plainly alleges a different and distinct claim from that set forth in the first petition. We therefore conclude that the court improperly declined to issue the writ on the ground that the second petition was identical to the first petition.

II

That determination does not end our inquiry. Although the respondent concedes that the stated basis of the habeas court's decision is untenable, he argues, as an alternative ground of affirmance, that the court lacked subject matter jurisdiction over the second petition because the petitioner's criminal offense predated the enactment of the risk reduction earned credit program.[9] For that reason, the respondent maintains that

[9] "An appellate court may affirm the judgment of the [habeas] court although it may have been grounded on a wrong reason," particularly when the question of subject matter jurisdiction is involved. *Jobe* v. *Commissioner*

the court reached the correct result in declining to issue the writ. See Practice Book § 23-24 (a) (1) ("[t]he judicial authority shall issue the writ unless it appears that . . . the court lacks jurisdiction"). We agree.

In *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 374, our Supreme Court addressed a claim, similar to the one presented here, that "the retroactive application of [P.A. 13-3] to [the petitioner], when he committed his offense and was sentenced prior to the amendments' effective date, violates the ex post facto clause of the United States constitution." The Supreme Court rejected that claim, stating: "[W]hen the petitioner committed his offense in 2010, a violent offender for whom parole was available would become eligible for parole after he had served 85 percent of his definite sentence. See General Statutes (Rev. to 2009) § 54-125a (e). Although a short-lived 2011 amendment altered this calculation to include earned risk reduction credit; P.A. 11-51, § 25; [P.A. 13-3] restored the parole eligibility calculation to 85 percent of the violent offender's definite sentence. Far from creating a genuine risk that the petitioner would be incarcerated for a longer period of time, [P.A. 13-3] simply returned the petitioner to the position that he was in at the time of his offense." *Perez* v. *Commissioner of Correction*, supra, 378. The court also disagreed with the petitioner's contention that, in conducting an ex post facto inquiry, a court may consider the statute that was in effect at the time of the plea and sentencing. Id., 378–79. To the contrary, the court held that a court presented with an ex post facto challenge must compare "the statute *in effect at the time of the petitioner's offense* to the challenged statute

of Correction, 181 Conn. App. 236, 237 n.3, 186 A.3d 1219 (2018), aff'd, 334 Conn. 636, 224 A.3d 147 (2020); see also *Reinke* v. *Greenwich Hospital Assn.*, 175 Conn. 24, 29–30, 392 A.2d 966 (1978) (appellate court may "affirm a trial court's decision although based upon an erroneous ground if the same result is required by law").

. . . .” (Emphasis added.) Id., 380. Because the petitioner’s criminal offense occurred prior to the enactment of the risk reduction earned credit program in 2011, the court concluded that “the habeas court lacked jurisdiction” over the petitioner’s ex post facto claim. Id., 362; accord *James E.* v. *Commissioner of Correction*, 326 Conn. 388, 390, 163 A.3d 593 (2017) (applying *Perez* and concluding that habeas court properly dismissed petition alleging ex post facto violation for lack of subject matter jurisdiction); *Boria* v. *Commissioner of Correction*, supra, 186 Conn. App. 344–45 (same).

More recently, this court applied that precedent in the context of a habeas court’s decision to decline to issue a writ for lack of jurisdiction pursuant to Practice Book § 23-24 (a) (1). In *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 409, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020), the petitioner, like the petitioner in the present case, committed the underlying criminal offense in 2008. In 2019, he filed a petition for a writ of habeas corpus that contained allegations nearly identical to those presented in the present case—namely, that “prior to the enactment of P.A. 13-3, he *had earned risk reduction credit* that the respondent *had applied* to advance his parole eligibility date . . . but, following the enactment of P.A. 13-3, the respondent stopped applying the credit that he had earned to advance his parole eligibility date. . . . [T]he petitioner [thus] asserted that P.A. 13-3, as applied to him retroactively, violated the ex post facto clause of the United States constitution.” (Emphasis added.) Id., 411. Pursuant to Practice Book § 23-24 (a) (1), the habeas court declined to issue the writ for lack of jurisdiction. Id., 408.

On appeal, this court explained that the petitioner had “made no claim that legislation regarding eligibility for parole consideration became more onerous after the date of his criminal behavior. Rather, he claim[ed]

that new legislation enacted in 2011 . . . after his criminal conduct . . . conferred a benefit on him that was then taken away in 2013. Such a claim, however, does not implicate the ex post facto prohibition because the changes that occurred between 2011 and 2013 have no bearing on the punishment to which the petitioner's criminal conduct exposed him when he committed [the offense for which he is incarcerated]. . . . Indeed, with regard to his parole eligibility, P.A. 13-3 returned the petitioner to the same position that he was in at the time that he committed the [offense] in 2008." (Citation omitted; internal quotation marks omitted.) Id., 421–22. We further acknowledged the precedent of our Supreme Court in *Perez* and *James E.*, which held that a habeas court lacks subject matter jurisdiction over ex post facto claims predicated on the retroactive application of P.A. 13-3 to petitioners whose underlying offenses were committed prior to the enactment of P.A. 11-51. Id., 422. This court thus concluded that the habeas court properly declined to issue a writ pursuant to Practice Book § 23-24 (a) (1). Id., 423.

The present case is indistinguishable from *Whistnant* in all material respects. Both cases involve petitioners who committed criminal offenses in 2008, years before the enactment of the risk reduction earned credit program in 2011. Both cases involve ex post facto challenges regarding credit that allegedly had been earned and applied prior to the enactment of P.A. 13-3. As in *Whistnant*, the enactment of P.A. 13-3 simply returned the petitioner in the present case to the same position in terms of parole eligibility that he was in at the time that he committed the offense on December 7, 2008. For that reason, the habeas court lacked subject matter jurisdiction over his second petition alleging an ex post facto claim predicated on the retroactive application of P.A. 13-3. See *James E.* v. *Commissioner of Correction*, supra, 326 Conn. 390–91; *Perez* v. *Commissioner of*

Correction, supra, 326 Conn. 362; *Whistnant* v. *Commissioner of Correction*, supra, 199 Conn. App. 422. Because the court lacked jurisdiction over the second petition, we agree with the respondent that the habeas court's decision to decline to issue a writ of habeas corpus was proper pursuant to Practice Book § 23-24 (a) (1).

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHANIE BOLOGNA *v.* RICHARD BOLOGNA
(AC 43848)

Elgo, Suarez and DiPentima, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying her postjudgment motion for clarification. Pursuant to the parties' separation agreement, which was incorporated into the judgment of dissolution, the parties were to list their jointly owned home for sale prior to June 30, 2012, and equally divide the sale proceeds. Alternatively, either party could buy out the other's interest for 50 percent of the home's net value, which was to be calculated by subtracting any outstanding mortgages from the fair market value. The plaintiff was permitted to remain in the home until the date of sale, provided, inter alia, that she make the mortgage payments. Postjudgment, the parties agreed not to sell the home, and the plaintiff continued to reside in it and make the required mortgage payments, which increased in July, 2012, from interest only to principal and interest. In 2019, the plaintiff filed a motion for clarification, requesting that the trial court issue an order requiring the buyout price to be calculated using the mortgage balance as of the date of the separation agreement or as of June, 2012, in order to prevent the defendant from obtaining a windfall on the sale or buyout of the home, as the distribution of the sale proceeds or buyout price would not otherwise take into account the payments she had made on the mortgage between June, 2012 and 2019. Following a hearing, the trial court ordered the sale of the home, set the list price, required that the sale proceeds be equally divided in accordance with the separation agreement, and declined to change the calculation of the buyout price, and the plaintiff appealed to this court. *Held* that, in denying the plaintiff's postjudgment motion for clarification, the trial court did not improperly modify the

parties' separation agreement but, rather, effectuated the terms of that agreement: the trial court correctly construed the plaintiff's motion for clarification as an impermissible motion for modification and properly determined that it did not have the authority to modify the terms of the agreement, as the agreement clearly stated the intent of the parties to equally divide the net proceeds of the sale of the home and to calculate the buyout price based on the mortgage amounts outstanding at the time of the buyout, the parties did not alter the manner in which the sale proceeds were to be distributed or the buyout price was to be calculated when they agreed to deviate from the judgment by not selling the home prior to the date required by the agreement, and, through her motion, the plaintiff sought to amend the agreement, rather than to clarify its terms, by altering the manner in which the buyout price was to be calculated, and such an amendment would cause a substantial change to the existing judgment; moreover, the separation agreement did not provide for a set off or credit for any mortgage payments made by the plaintiff, and the plaintiff acquiesced to the possibility that the defendant would receive more money from the sale or buyout of the home than initially contemplated when she decided, without further altering the terms of the agreement, not to sell the home or buy out the defendant prior to the date required by the agreement.

Argued April 8—officially released October 12, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Dennis F. Harrigan*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *McLaughlin, J.*, denied the plaintiff's motion for clarification, and the plaintiff appealed to this court. *Affirmed.*

Michael J. Devine, for the appellant (plaintiff).

Jennifer Neal Bardavid, for the appellee (defendant).

Opinion

SUAREZ, J. In this postdissolution matter, the plaintiff, Stephanie Bologna, appeals from the judgment rendered by the trial court in response to her postjudgment motion for clarification as well as the court's denial of

her motion for reargument and reconsideration of its ruling on her motion.[1] The court concluded, in accordance with the terms of the parties' separation agreement that was incorporated into the judgment of dissolution, that the plaintiff was obligated to divide equally the proceeds of the sale of the marital home with the defendant, Richard Bologna. On appeal, the plaintiff claims that the court improperly modified the dissolution judgment when it denied her motion for clarification. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. The parties were married on June 1, 1997, and had two children born to the marriage. On May 6, 2010, the court, *Hon. Dennis F. Harrigan*, judge trial referee, rendered a judgment of dissolution, which incorporated by reference a separation agreement dated May 2, 2010.[2] At the time the court rendered its judgment, the parties jointly owned, among other things, a marital home in Stamford. Article 5 of the separation agreement governs the division of the parties' marital home. Section 5.1 (a) of the separation agreement provides in relevant part: "Title to the Marital Home is currently held in the parties' joint names, as joint tenants with rights of survivorship. The Marital Home is currently subject to [a] first mortgage in joint names with Cendant, with a current outstanding balance of approximately $651,000.00; and a Home Equity Line of Credit (HELOC) in joint names with Cendant, with a current outstanding balance of approximately $49,000.00."

[1] In her brief to this court, the plaintiff has not distinctly challenged the court's denial of her motion for reargument and reconsideration. In light of the arguments raised in her brief, we consider any challenge with respect to that ruling to be encompassed by her claim of error with respect to the ruling on her motion to clarify.

[2] The parties utilized the services of a private mediator in negotiating the separation agreement and both parties retained separate counsel to review the agreement.

Section 5.4 of the separation agreement governs the sale of the marital home and provides in relevant part: "Unless otherwise agreed to by the parties, the Marital Home shall be listed for sale according to the following:

"(a) By June 30, 2012 [t]he Marital Home will be listed for sale at a listing price that is agreed to by both parties . . . .

"(c) Upon the sale of [the] Marital Home, after payment of the taxes, mortgages, conveyance taxes, broker's commission(s), [attorney's] fees, and any other expenses reasonably incident to sale, as a property settlement the remaining proceeds shall be equally divided (50/50) between the parties. However, if the resulting sale results in a deficit, then said deficit shall also be equally divided (50/50) between the parties."

Section 5.3 of the separation agreement provides in relevant part: "Until the closing of sale of the Marital Home, the parties agree to the following:

"(a) [The plaintiff] shall continue to live in the Marital Home. . . .

"(c) The parties shall continue to own the house as joint tenants with rights of survivorship.

"(d) Except as otherwise provided, *from the date of divorce until the closing of sale*, [*the plaintiff*] *shall pay the expenses related to the Marital Home (including but not limited to mortgage payments*, *taxes*, *insurance and utilities)*. If [the plaintiff] does not make any required payment (e.g. a monthly mortgage payment), then [the defendant] may, at his election, make such payment and deduct that amount from his next alimony payment(s)." (Emphasis added.)

Section 5.4 (d) of the separation agreement includes a buyout provision, which provides in relevant part: "At any time up to when [the] Marital Home must be listed for sale, the parties can discuss a buyout by one of the

other's interest. If one party buys out the other, it shall be for 50% of the net value, calculated as follows: the fair market value as determined by the average of three appraisals or market analyses (one appraisal or market analysis provided by [the plaintiff], one appraisal or market analysis provided by [the defendant], and one apprais[al] or market analysis that is jointly selected), less the amount of any outstanding mortgages or other liens, and less the costs of refinancing said outstanding mortgages and liens. Under any buyout, the terms of a buyout shall include refinancing and satisfying any then-current joint mortgage(s), and a transfer of [the] seller's interest in the Property to the buyer. If within 30 days of commencing said discussions, the parties cannot agree to all the terms of a buyout, then the Marital Home shall be listed for sale . . . ." Additionally, pursuant to § 5.4 (e) of the separation agreement, the court "shall retain jurisdiction over issues regarding the Marital Home until the closing of sale has been completed."

Instead of listing the marital home for sale by June 30, 2012, in accordance with § 5.4 (a) of the separation agreement, the parties agreed that, in order to keep their children in the same home and school district, they would not sell the home. At the time the parties entered into the separation agreement, the mortgage on the marital home was an adjustable rate mortgage wherein the monthly mortgage payments applied only toward interest. In July, 2012, the terms of the mortgage on the marital home were to reset, wherein the monthly payments increased to include interest and principal. The plaintiff continued to live in the home with her children and paid all expenses, including the mortgage, taxes, and insurance. From 2012 to 2019, the plaintiff's mortgage payments reduced the principal balance by more than $170,000.[3]

[3] In her motion to clarify, the plaintiff stated that, specifically, her payments "resulted in an extra $175,000 of equity." The dollar amount by which the principal was reduced is not relevant to the plaintiff's claim on appeal.

From 2012 through 2019, the parties discussed several options to buy out the defendant's interest in the marital home but were unable to agree on the terms, and the house was never listed for sale. On June 7, 2019, the plaintiff filed a motion for clarification in which she requested that the court "intervene and issue a ruling that the buyout price should be calculated using the mortgage balances as they were at the time that the parties signed their separation agreement on May 2, 2010," or, alternatively, "when the property was supposed to be listed [for sale] in June of 2012." The plaintiff argued that "[t]he current situation was not contemplated by the parties at the time they signed the separation agreement on May 6, 2010, and as such the parties are not bound by the [buyout] provisions of [§] 5.4 (d)." She asserted that her mortgage payments from May, 2010 to June, 2019, added $175,000 of equity to the marital home and that to calculate the buyout amount using the balance of the mortgage in June, 2019, "would result in a windfall of $87,500 to the defendant." She added that she "ha[d] made numerous improvements to the property, to which the defendant has refused to contribute, and these improvements have either increased the fair market value of the property or prevented a loss of value." The plaintiff asserted that, "[s]hould the court rule that the buyout amount should be calculated using the mortgage balance of 2019 . . . the defendant would be unjustly enriched, and the plaintiff would be deprived of a fair and equitable division of the marital assets." On July 3, 2019, the defendant filed an objection to the motion for clarification in which he argued that the terms of the separation agreement were clear and unambiguous and that, by filing a motion for clarification, the plaintiff was improperly seeking "to alter the terms of the separation agreement to suit her purposes."

On November 5, 2019, the court, *McLaughlin*, *J.*, conducted an evidentiary hearing and heard testimony

from the parties and witnesses.[4] On November 19, 2019, the court issued a memorandum of decision in which it ordered the sale of the marital home, set the list price, and, in accordance with the separation agreement, ordered that the proceeds of the sale be equally divided. The court, citing *Roos* v. *Roos*, 84 Conn. App. 415, 853 A.2d 642, cert. denied, 271 Conn. 936, 861 A.2d 510 (2004), and *Roberts* v. *Roberts*, 32 Conn. App. 465, 629 A.2d 1160 (1993), concluded that it "[did] not have the authority to modify the parties' separation agreement relating to the division of the marital home postjudgment." The court stated: "The separation agreement is clear that the parties evenly share in the proceeds from the sale of the marital home as a 'property settlement.' " Similarly, the court concluded that it "ha[d] no authority to alter the terms of the buyout provision in the separation agreement as the plaintiff requests. . . . The buyout provision allows either party to buy out the other's interest in the marital home by paying 50 percent of the net value of the marital home. There is a specific process the parties must go through in reaching the net value. Included in that process is the reduction of the fair market value [l]ess the amount of any *outstanding* mortgages or other liens . . . . See Separation Agreement § 5.4 (d). The plaintiff asks the court to alter the language of this provision by allowing her to deduct the value of the mortgages on the marital home as of May, 2010. The clear language of the buyout provision requires the parties to reduce the fair market value of the marital home by any outstanding mortgages, not mortgages that no longer exist." (Citation omitted; emphasis in original; internal quotation marks omitted.)

[4] The plaintiff also filed a motion for contempt, postjudgment, and a motion for order, postjudgment, seeking orders to effectuate the sale of the marital home. On November 5, 2019, the court heard all motions simultaneously and, on November 19, 2019, entered orders related thereto. The plaintiff appeals only from the court's order regarding the motion to clarify.

On December 9, 2019, the plaintiff filed a "postjudgment motion for reargument and reconsideration." In her motion, the plaintiff argued that the court's decision was based on clearly erroneous findings of fact and errors of law. Specifically, the plaintiff asserted that she was asking the court "for orders to *effectuate* the property division and did not seek to modify the property division." (Emphasis in original.) In support thereof, the plaintiff relied on *Schneider* v. *Schneider*, 161 Conn. App. 1, 7, 127 A.3d 298 (2015), a case in which the parties' separation agreement required the defendant to make the mortgage payments for their marital home. When the defendant stopped making those payments, the plaintiff made them on her behalf and filed a motion for an order that the defendant reimburse him for the payments, which the trial court denied. Id., 2, 5. On appeal, this court concluded that the trial court's denial constituted an improper modification of the property distribution order. Id., 3. In the present case, the plaintiff contended in her motion for reargument and reconsideration that *Schneider* stands for the proposition that a request for reimbursements for mortgage payments constitutes an effectuation, not a modification, of a dissolution judgment. On December 17, 2019, the defendant filed an objection to this motion.

On January 6, 2020, the court, *McLaughlin*, *J.*, heard oral argument on the motion for reargument and reconsideration and, on January 7, 2020, issued an order denying the motion. In that order, the court considered this court's decision in *Schneider* and determined that the case supported its conclusion. The court articulated: "[J]ust as the *Schneider* separation agreement required the defendant to make the mortgage payments for the marital home, the parties' separation agreement [in the present case] requires the plaintiff to make all mortgage payments. The agreement does not provide for any

credit to the plaintiff for those payments. The separation agreement provides for the parties to share evenly in the proceeds from the sale of the marital home. Thus, to give the plaintiff a credit for the mortgage payments she was required to make under the separation agreement would alter the percentage distribution of the proceeds from the sale of the marital home. In essence, the defendant would be reimbursing the plaintiff for payments she was obligated to make. The *Schneider* court found this result an improper transfer of property, postjudgment."

The court reiterated that it "[did] not have the authority to modify a property distribution subsequent to the entry of the final divorce," and stated that, "[f]or the court to now provide the plaintiff with a credit for the payments she was required to make under the separation agreement would be an impermissible modification of the separation agreement." The court noted that "[t]he parties could have agreed to open the judgment and modify the separation agreement before the plaintiff started making the additional principal payments. They did not."

This appeal followed. Additional facts and procedural history will be set forth as necessary.

The plaintiff claims that the court improperly modified the dissolution judgment when it denied her motion for clarification. Specifically, the plaintiff asserts that (1) "[i]n failing to recognize the initial noncompliance of the parties, the . . . court improperly modified the original decree," (2) the "court's denial gave a windfall to the defendant" because of the proceeds he would receive from the sale of the marital home, and (3) the "specific amount of the mortgage liabilities was assigned as part of the property settlement at the time of the dissolution and should be used in calculating the net value upon sale." In response, the defendant

contends that the court did not impermissibly modify its property distribution but, instead, properly effectuated the judgment. We agree with the defendant.

We begin by setting forth our standard of review and relevant legal principles. "[C]ourts have no inherent power to transfer property from one spouse to another; instead, that power must rest upon an enabling statute. . . . The court's authority to transfer property appurtenant to a dissolution proceeding rests on [General Statutes] § 46b-81. . . . Accordingly, the court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage. . . . A court, therefore, does not have the authority to modify the division of property once the dissolution becomes final. . . . Although the court does not have the authority to *modify* a property assignment, a court . . . does have the authority to issue postjudgment orders *effectuating* its judgment." (Emphasis in original; internal quotation marks omitted.) *Schneider* v. *Schneider*, supra, 161 Conn. App. 5–6.

"Under Practice Book [§ 17-4], a civil judgment may be opened or set aside . . . [when] a motion seeking to do so is filed within four months from the date of its rendition. . . . Absent waiver, consent or other submission to jurisdiction, however, a court is without jurisdiction to modify or correct a judgment, in other than clerical respects, after the expiration of [that four month period] . . . .

"Even beyond the four month time frame set forth in Practice Book § 17-4,[5] however, courts have continuing

[5] Practice Book § 17-4 provides in relevant part: "(a) Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. The parties may waive the provisions of this subsection or otherwise submit to the jurisdiction of the court. . . ."

jurisdiction to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers . . . . When an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events, therefore, a trial court may, at any time, exercise its continuing jurisdiction to effectuate its prior [judgment] . . . by interpreting [the] ambiguous judgment and entering orders to effectuate the judgment as interpreted . . . . In cases in which execution of the original judgment occurs over a period of years, a motion for clarification is an appropriate procedural vehicle to ensure that the original judgment is properly effectuated. . . .

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

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

"[T]he purpose of a clarification is to take a prior statement, decision or order and make it easier to under-

stand. Motions for clarification, therefore, may be appropriate where there is an ambiguous term in a judgment or decision . . . but, not where the movant's request would cause a substantive change in the existing decision. Moreover, motions for clarification may be made at any time and are grounded in the trial court's equitable authority to protect the integrity of its judgments."[6] (Citation omitted; footnote added; footnote omitted; internal quotation marks omitted.) *Almeida* v. *Almeida*, 190 Conn. App. 760, 765–67, 213 A.3d 28 (2019).[7]

"In order to determine the substance of the trial court's actions here, we begin by examining the definitions of both alteration and clarification. An alteration is defined as [a] change of a thing from one form or state to another; making a thing different from what it was without destroying its identity. Black's Law Dictionary (4th Ed. 1968) [p. 71]. An alteration is an act done upon the instrument by which its meaning or language is changed. If what is written upon or erased from the instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. Id. Similarly, a modification is defined as [a] change; an alteration or amendment which introduces new element into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. Black's Law Dictionary (6th Ed. 1990) [p. 905].

"Conversely, to clarify something means to free it from confusion. Webster's New World Dictionary of the

[6] "[I]t is . . . within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, 165 Conn. App. 473, 484, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016).

[7] See also *Cunningham* v. *Cunningham*, 204 Conn. App. 366, 374, 254 A.3d 330 (2021) (noting that, in contrast with order that merely effectuates existing judgment, "[a] modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the [subject matter] intact").

American Language (2d Ed. 1972) [p. 272]. Thus, the purpose of a clarification is to take a prior statement, decision or order and make it easier to understand." (Internal quotation marks omitted.) *Silver* v. *Silver*, 200 Conn. App. 505, 516, 238 A.3d 823, cert. denied, 335 Conn. 973, 240 A.3d 1055 (2020).

In the present case, the court properly concluded in its memorandum of decision that it did not have the authority to modify the terms of the separation agreement. The court found that, "[i]n or around July, 2012, the plaintiff and the defendant jointly refinanced the mortgage of the marital home to ensure the plaintiff could afford the mortgage payments. . . . Since that time, the plaintiff has continued to live in the home with her children. . . . From 2012 until 2019, the plaintiff made principal payments on the mortgage for the marital home thereby reducing the principal balance by over $170,000."[8] The court stated: "The plaintiff asks the court to enter orders to give her the sole benefit of the increased equity . . . ." The court, citing § 5.4 (c) of the separation agreement, concluded that "[t]he separation agreement is clear that the parties evenly share in the proceeds from the sale of the marital home as a 'property settlement.' " We agree.

Applying the foregoing principles to the present case, we conclude that the court correctly construed the

[8] In the plaintiff's postjudgment motion for reargument and reconsideration, she argued that the court made a factual error in its November 19, 2019 memorandum of decision in finding that the parties "refinanced" the marital home. Rather, she contended, "the terms of their *existing mortgage* required greater payments toward principal starting in 2012." (Emphasis in original.) In its January 7, 2020 order denying the motion, the court stated: "The parties agree that there was no refinance of the mortgage. Rather, the terms of the mortgage existing at that time required payments toward principal after June 30, 2012. Up until June of 2012, the mortgage required payments of interest only." Nevertheless, the parties acknowledge that the terms of their mortgage changed in June, 2012. Thus, whether the parties "refinanced" the mortgage is not relevant to our resolution of the instant appeal and we consider any error on the part of the court in its original ruling to be harmless.

plaintiff's motion for clarification to be an impermissible motion for modification. It is clear from the separation agreement that the parties intended to list the marital home for sale by June 30, 2012, and to equally divide the net proceeds or deficit as a property settlement. The parties, by agreement, deviated from that judgment by not selling the home within the specified period of time, and the plaintiff continued making mortgage payments after the terms of the mortgage reset requiring payments toward its principal. The parties, however, did not alter the terms of the buyout provision of the separation agreement. Section 5.4 (d) of the agreement clearly states: "If one party buys out the other, it shall be for 50% of the net value, calculated as follows: the *fair market value* as determined by the average of three appraisals or market analyses . . . less the amount of any *outstanding mortgages* or other liens, and less the costs of refinancing said outstanding mortgages and liens. Under any buyout, the terms of a buyout shall include refinancing and satisfying *any then-current joint mortgage(s)*, and a transfer of seller's interest in the Property to the buyer. If within 30 days of commencing said discussions, the parties cannot agree to all the terms of a buyout, then the Marital Home shall be listed for sale pursuant to the terms set forth above." (Emphasis added.) The plaintiff's motion for clarification does not seek to free from confusion the terms of the separation agreement. Rather, it seeks to amend the separation agreement by introducing a new element into the details of the judgment by seeking a ruling that the buyout price be calculated using the mortgages' balances as they were at the time the parties signed the separation agreement or, alternatively, by calculating the price of the buyout as of when the marital home was supposed to be listed for sale in June, 2012. Such amendment would cause a substantial change in the existing judgment and, therefore, is an impermissible modification of the judgment.

In support of her argument that the court modified the original judgment by denying her motion for clarification, the plaintiff again relies on this court's decision in *Schneider* v. *Schneider*, supra, 161 Conn. App. 1. As previously discussed in this opinion, in *Schneider*, the parties entered into a separation agreement that was incorporated into the dissolution judgment. Id., 3. "Under the plain terms of the agreement, the plaintiff would reside in the marital home and the defendant, in lieu of child support, would be responsible for one half of the home's holding costs until . . . the home's sale, or . . . the plaintiff's first court-ordered payment of $10,050 toward their child's college expenses. Once either event occurred, the defendant would become fully responsible for paying the holding costs until the home was sold." (Footnote omitted.) Id. The parties "adhered to the provisions of the agreement and equally split the holding costs." Id., 4. When their child entered college, the plaintiff made the court-ordered payment of college expenses, relieving him of the obligation to pay one half of the home's holding costs. Id. "Nevertheless, the plaintiff and the defendant each continued to pay one half of the mortgage payments for another two and one-half years until the home's eventual sale . . . ." Id. The plaintiff, therefore, paid an additional $51,331.96 toward the household expenses beyond what the judgment required. Id. The defendant conceded that she did not pay the entirety of the holding costs. Id. The plaintiff filed a motion for order seeking reimbursement from the defendant for the additional contributions he made toward the household expenses, which the trial court denied. Id., 4–5.

On appeal to this court, the plaintiff argued that the trial court's denial of his motion for order impermissibly modified the dissolution judgment. Id., 5. This court agreed and held that, by failing to make the court-ordered payments, the defendant violated the court's

order. Id., 7. Moreover, the court held that the "[trial] court's denial, when considered together with the distribution of the proceeds from the sale of the home, resulted in a windfall to the defendant, who was able to avoid paying one half of the holding costs for several years while still receiving the benefit of those payments when she received the sale proceeds." Id., 8. This court concluded that the "practical result of the [trial] court's determination was an additional transfer of property from the plaintiff to the defendant, and, as a result, it constituted an improper modification of the original judgment." Id.

The present case is distinguishable from *Schneider*. Unlike in *Schneider*, the plaintiff in the present case was solely responsible for paying the holding costs of the marital home. Thus, the plaintiff was doing what was required under the terms of the judgment. Further, because the judgment did not require the defendant to make mortgage payments, there is no indication that he violated its terms. Rather, the parties mutually agreed to extend the sale by date so that their children could remain in the marital home and stay in the same school district. In July, 2012, the terms of the existing mortgage changed from requiring payments of interest only to requiring payments of both principal and interest. The separation agreement did not provide for a set off or a credit for those payments. The separation agreement simply states that, "[u]pon the sale of [the] Marital Home, after payment of the taxes, mortgages, conveyance taxes, broker's commission(s), [attorney's] fees, and any other expenses reasonably incident to [the] sale, as a property settlement the remaining proceeds shall be equally divided (50/50) between the parties."

As the plaintiff states in her brief to this court, the parties "mutual[ly] disregard[ed] . . . the court-ordered sale date" and "jointly agreed to go *outside the terms of their agreement* when they *chose to ignore*" that order. (Emphasis added.) The plaintiff cannot now

seek to modify the judgment merely because the parties decided that they no longer wanted to list the home for sale by June 30, 2012. The court had the authority to effectuate the existing order, which it did by ordering the sale of the marital home and the equal division of the proceeds in accordance with the terms of the separation agreement. If the defendant receives more money from the sale of the marital home than he would have had the parties sold the home or exercised the buyout provision of the separation agreement in or around 2012, it is because the plaintiff acquiesced to this possibility by deciding not to sell the home or buy out the defendant at that time.

In her brief to this court, the plaintiff asserts that "neither party expected that the provisions of [§] 5.4 would be applicable some seven years after anticipated performance . . . ." Although it is true that the parties' circumstances changed after they executed the separation agreement, this change resulted from the parties' voluntary actions, which did not include altering the terms of the separation agreement. Accordingly, we conclude that the court did not improperly modify the separation agreement when it denied the plaintiff's post-judgment motion for clarification. Rather, the court effectuated the terms of the existing separation agreement to which the parties previously had agreed.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHANIE DANNER *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL.
(AC 44194)

Alvord, Alexander and Vertefeuille, Js.

Syllabus

The plaintiff filed an affidavit of illegal discriminatory practice with the defendant Commission on Human Rights and Opportunities, alleging that the defendant A Co. wrongfully terminated her employment. Following an assignment of the matter to the commission's Office of Public

Hearings, a human rights referee granted A Co.'s motion for summary judgment, finding that there was no genuine issue of material fact. The plaintiff and the commission separately appealed the referee's decision granting the motion for summary judgment to the Superior Court. The plaintiff claimed that genuine issues of material fact existed. The trial court consolidated the appeals, sustained the consolidated appeal and remanded the matter for a trial before the Office of Public Hearings, concluding that the referee improperly rendered summary judgment because A Co. did not meet its burden of establishing that there were no genuine issues of material fact. On A Co.'s appeal to this court, *held* that the trial court properly sustained the consolidated appeal and remanded the matter for a hearing: the court properly considered the plaintiff's affidavit as competent evidence in opposition to A Co.'s motion for summary judgment as the plaintiff's affidavit of discriminatory practice was sworn and was properly considered pursuant to the applicable rule of practice (§ 17-49); moreover, the court properly conducted a plenary review of the record in considering whether genuine issues of material fact existed, as the deferential standard used to review administrative fact-finding did not extend to the determination of whether genuine issues of material fact existed in the summary judgment context; furthermore, the court did not err in considering whether genuine issues of material fact existed, as the record contained contradictory information, including a sworn statement by an employee of A Co. that the plaintiff's job duties required her to be physically present at the workplace and the plaintiff's sworn statement that she had received a workplace accommodation to work from home, and the referee, rather than identifying factual disputes raised by the competing affidavits, improperly decided the factual question by crediting the statements made in the affidavit of the A Co. employee and improperly determined that there were no genuine issues of material fact.

Argued March 2—officially released October 12, 2021

Procedural History

Appeals from the decision by a human rights referee for the named defendant rendering summary judgment in favor of the defendant Atos IT Solutions and Services, Inc., and denying the plaintiff's motion for reconsideration, brought to the Superior Court in the judicial district of New Britain, where the court, *Cordani*, *J.*, consolidated the appeals; thereafter, the court, *Cordani*, *J.* rendered judgment sustaining the appeal and remanding the matter to the named defendant for trial,

from which the defendant Atos IT Solutions and Services, Inc., appealed to this court. *Affirmed.*

Martin J. Regimbal, pro hac vice, with whom was *Elizabeth F. Flynn*, for the appellant (defendant Atos IT Solutions and Services, Inc.).

Zachary T. Gain, for the appellee (plaintiff).

Michael E. Roberts, for the appellee (named defendant).

William Tong, attorney general, *Clare E. Kindall*, solicitor general, and *Colleen B. Valentine* and *Matthew F. Larock*, assistant attorneys general, filed a brief for the state of Connecticut as amicus curiae.

Opinion

ALVORD, J. This appeal arises out of an action by the plaintiff, Stephanie Danner, in which a human rights referee (referee) from the Office of Public Hearings (office) of the defendant Commission on Human Rights and Opportunities (commission) rendered summary judgment in favor of the defendant Atos IT Solutions and Services, Inc. (Atos). Thereafter, the plaintiff and the commission appealed to the Superior Court,[1] which

[1] In its memorandum of decision, the Superior Court stated: "Because the court finds that [Atos] has clearly not met its burden of establishing that no genuine issues of material fact exist and this finding is determinative of the appeal, the court has not decided the general issue of whether or not a [referee] in a public hearing context [before the commission] has the ability to grant a motion for summary judgment in any circumstance."

The commission's brief filed with this court is limited to arguing that "[t]his court should affirm the decision of the Superior Court on the alternat[ive] ground that the [referee] is not authorized to dispose of complaints at [a] public hearing through summary judgment." The commission states: "In doing so, the court need not reach the arguments raised by Atos on appeal, or otherwise address the merits of the summary judgment motion itself."

The state of Connecticut has, pursuant to Practice Book § 67-7, filed an amicus curiae brief in the present matter arguing that the referee has the authority to grant motions for summary judgment as a means of disposing of meritless complaints at a public hearing. The state did not participate in oral argument.

consolidated the appeals. The court, following oral argument, sustained the appeal and remanded the matter to the office for trial. Atos appeals from the judgment of the Superior Court sustaining the appeal and remanding the matter to the office for trial. On appeal, Atos claims that the Superior Court erred in considering the plaintiff's affidavit of illegal discriminatory practice as evidence in opposition to Atos' motion for summary judgment and in relying on the averments contained in the affidavit to determine that genuine issues of material fact existed. Atos also claims that the Superior Court erred in failing to afford deference to the referee's decision.[2] We affirm the judgment of the Superior Court.

The following facts and procedural history are relevant to this appeal. On December 5, 2016, the plaintiff filed an affidavit of illegal discriminatory practice with the commission. In her affidavit, the plaintiff averred: "[Atos] has an office located at 7 McKee Place, Cheshire, Connecticut 06410. . . . [Atos] employs [fifteen] or more individuals. . . . [Atos] employed [the plaintiff]. . . . [Atos] hired [the plaintiff] in May, 2001. . . . [The plaintiff's] original job position was technical services manager. . . . On or about August 8, 2016, [Atos] transferred [the plaintiff] to help desk agent. . . . [Atos] employs David Hamilton. . . . Hamilton is a supervisory employee. . . . Hamilton supervised [the plaintiff]. . . . [The plaintiff] has a disability. . . . Specifically, [the plaintiff] suffers from bipolar disorder and anxiety disorder. . . . [Atos] was aware of the mental disability. . . . [The plaintiff] had workplace accommodations for her disability. . . . The workplace accommodation was working from home. . . . The

We conclude that the Superior Court correctly sustained the appeal on the basis that the referee improperly rendered summary judgment because there existed genuine issues of material fact. Accordingly, we decline to reach the alternative ground for affirmance raised by the commission and need not address the argument contained in the state's amicus brief.

[2] Because Atos' claims are interrelated, we consider them together.

workplace accommodation was finite leaves of absences (continuous and intermittent). . . . In June, 2016, [the plaintiff] took a continuous leave of absence. The leave of absence went from June 14, 2016 through August 19, 2016. . . . The leave of absence was disability related. . . . The 2016 leave of absence was . . . protected [by the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. (2012)]. . . . Following her return from the FMLA protected 2016 leave of absence, [Atos] asked [the plaintiff] to submit documentation in support of her ongoing work from home accommodation. . . . [The plaintiff] complied with [Atos'] request and supplied documentation from her physician. . . . On October 17, 2016, [Atos] terminated [the plaintiff's] employment. . . . [Atos] told [the plaintiff] that the termination was due to a reorganization and that her 'job was no longer available'. . . . In October, 2016, [Atos] employed about [forty] help desk employees. . . . [The plaintiff] is unaware of any other help desk employee terminated at the time [the plaintiff] was terminated. . . . There were two new help desk employees training for the position prior to [Atos] terminating [the plaintiff's] employment. . . . [Atos'] website had the help desk agent II job posted as being open in Cheshire, Connecticut at around the same time that it terminated [the plaintiff's] employment. . . . [The plaintiff] can perform the essential functions of the job with or without a reasonable accommodation. . . . Any and all excuses to be offered by [Atos] to explain the termination decision would be a pretext to mask discrimination and/or retaliation. . . . [The plaintiff] charges [Atos] with disability discrimination, failure to accommodate and retaliation."

On October 3, 2017, the matter was sent to the office for a public hearing through the early legal intervention program. On December 26, 2018, Atos filed a motion for summary judgment, in which it argued that the plaintiff

could not establish a prima facie case of disability discrimination. Specifically, Atos argued that the plaintiff was not qualified to perform the functions of her position and that her employment was not terminated because of her disability. It further argued that, even if she could establish a prima facie case of discrimination, it had articulated a legitimate, nondiscriminatory reason for terminating her employment and that she could not demonstrate that such reason was pretextual. With respect to the plaintiff's claim of failure to provide reasonable accommodations for her disability, Atos argued that the plaintiff's only request, to work from home, was not a reasonable accommodation because being present in the office was an essential function that Atos was not required to waive. With respect to the plaintiff's claim of retaliation, Atos argued that there was no evidence indicating a causal connection between her requests for leave and to work from home and the termination of her employment.

In support of its motion, Atos submitted affidavits of Laurie Onderick, who was employed by Atos as a human resource specialist responsible for leave administration,[3] and Hamilton, who was employed by Atos as

[3] Onderick averred that she assisted the plaintiff with multiple requests for FMLA leave and accommodations starting in 2015, and ending in late 2015. Onderick averred: "Specifically, in October, 2015, [the plaintiff] requested and was granted intermittent FMLA leave. . . . From October, 2015 through June, 2016, Atos granted intermittent leave to [the plaintiff] each time it was requested. . . . In June, 2016, [the plaintiff] requested approximately three months of continuous FMLA leave from June 13 through September 8, 2016. A true and correct copy of the record showing the request for continuous leave is attached as [e]xhibit 1. . . . However, based on her prior intermittent FMLA leave, [the plaintiff] was only eligible for FMLA leave through August 9, 2016. Yet, as an accommodation, Atos approved the entirety of the requested continuous leave through September 8, 2016, despite the fact that she was not eligible for it after August 9, 2016. . . . After her continuous FMLA leave from June 13 through September 8, 2016, [the plaintiff] requested another year of intermittent FMLA leave, this time requesting leave from September 20, 2016 through September 20, 2017. The request was denied due to lack of paperwork from her physician. A true and correct copy of the record showing the requested leave is attached as

service desk manager and was the plaintiff's manager throughout her employment, along with evidentiary exhibits attached to both affidavits. In his affidavit, Hamilton averred, inter alia, the following: "I managed [the plaintiff] for her entire employment with Atos beginning in 2001, when she became an employee of Atos as a service desk manager level I. In this position, she supervised service desk employees. . . . Due to the loss of numerous Atos clients and due to the fact that many of Atos' IT help desk positions, including those who reported to [the plaintiff], were being offshored to the Philippines in a cost saving effort, [the plaintiff's] managerial position was eliminated in August, 2016, as her supervisory role was no longer necessary. . . . The offshoring efforts began approximately seven years ago. . . . In order to avoid terminating her altogether, I reassigned [the plaintiff] as a service desk technician tasked with providing computer support services to Cooper University Health Center ('Cooper Hospital'), an Atos client. . . . In this role [the plaintiff] was expected to answer the helpline telephones, receive, analyze, and resolve client issues, and escalate issues when necessary. The problem solving aspects of her position required her to learn new things every day and to retain that knowledge. . . . I assumed the duty of supervision over any remaining U.S. based service desk technicians working out of the Cheshire, Connecticut office. . . . While [the plaintiff] was on FMLA leave in the summer of 2016, she and I communicated via instant messages. It was then that she

[e]xhibit 2. . . . She additionally asked to be permitted to work from home despite her physician advising that her only restriction was limited driving distances. A true and correct copy of the record showing that requested accommodation is attached as [e]xhibit 3. . . . After numerous communications between [the plaintiff] and Atos' human resources department, [the plaintiff] submitted revised physician paperwork on October 9, 2016, indicating a permanent [work from home] restriction. A true and correct copy of the record showing that requested accommodation is attached as [e]xhibit 4."

informed me that her alleged bipolar and anxiety disorders had severely impacted her short term memory. Specifically, one of her messages to me read, 'Honestly I don't know what you guys are going to do with me. I have nobody to manage and I'd do a shitty job if I did.' She further told me that she 'was trying to cut down on the Klonopin but it's at a why bother now. [Her] short term memory is really bad and [it's] permanent.' Exhibit I to this affidavit is a true and accurate copy of my text conversation with [the plaintiff]. . . .

"As a service desk technician on the Cooper Hospital account, it was critical that [the plaintiff] physically present to Atos' Cheshire, Connecticut office where the account was managed. Onsite attendance was required as problems had to be quickly resolved among the technicians and the managers to minimize impact to the client's services. Managers, like myself, had to be able to immediately and directly communicate with the service desk technicians assigned to us in case of failures to critical hospital systems. Delays in resolving such IT issues can literally have life or death implications. . . . For example, Atos was responsible for the computers located [in] Cooper Hospital's operating rooms. If these computers went down during surgery or for an extended period of time, the results could be dire. The urgent and fast pace[d] nature of the services the service desk technicians had to provide in conjunction with the managers required service desk technicians to physically be in the office. Thus, it was an essential job function for service desk technicians assigned to the Cooper Hospital account to work out of the Cheshire office as opposed to remotely. All of the U.S. based service desk technicians assigned to the account did so. . . . Similarly, all of the Philippines based service desk technicians assigned to the Cooper Hospital account also worked together out of a local office as opposed to individuals working remotely from home.

For the same reasons, none of these foreign based service desk technicians assigned to the Cooper Hospital [account] worked from home. . . . However, after September 14, 2016, [the plaintiff] only physically appeared for less than a single shift at the Cheshire office. . . .

"On October 9, 2016, I was informed that [the plaintiff's] physician had ordered that she work from home on a permanent basis. . . . Because such restriction could not be accommodated due to the fact that [the plaintiff's] position required that she present for work, l made the decision to terminate her. . . . Her last day of employment with Atos was October 17, 2016. . . . My decision to terminate [the plaintiff] was not based on her alleged bipolar disorder and anxiety, nor her requests to work from home or requests for leave. Instead, it was based solely on the fact that she could not perform an essential function of her job—physically presenting for work and she conceded she could not perform her duties. . . . On or around the day I terminated [the plaintiff], there was an online posting for a help desk analyst II position. However, the posting was in error and was unposted approximately one week later as the service desk was no longer hiring full time employees at this time. Thus, the position ultimately went unfilled by a full time employee. . . . I was laid off on November 7, 2017, as part of the same costs saving initiative that resulted in the elimination of [the plaintiff's] original managerial position."

On January 4 and 29, 2019, respectively, the commission and the plaintiff filed separate objections to Atos' motion for summary judgment, in which they both argued that the referee is not authorized to render summary judgment in the administrative proceedings before the office. The plaintiff also objected on the ground that the early legal intervention decision to send the matter directly to public hearing necessarily meant that

there had been established the existence of genuine issues of material fact. Atos filed replies to both objections.

On February 22, 2019, the referee granted Atos' motion for summary judgment. The referee first determined that she had the authority to render summary judgment in the administrative proceedings before the office. The referee next rejected the plaintiff's argument that the fact that her complaint had been transferred to the office for a public hearing necessarily established the existence of genuine issues of material fact.

Ultimately, the referee concluded that Atos had met its initial burden of demonstrating the absence of any genuine issues of material fact. Specifically, she stated that Atos "ha[d] made an affirmative evidentiary showing that there is not a factual dispute that the [plaintiff's] position as a service desk technician required her to be able to 'learn new things daily and to maintain such knowledge in order to receive, analyze, and resolve client issues, and determine to escalate issues when necessary.' " Referencing the plaintiff's text message to Hamilton, the referee found that, by the plaintiff's own admission, the plaintiff's "ability to perform her job duties was impaired as a result of her short-term memory loss due to the medications she was taking for bipolar disorder and anxiety." The referee further concluded that Atos had made an evidentiary showing that there was no factual dispute that the plaintiff's job duties required her to be present at Atos' Cheshire office and that her presence at the office was essential to her position. The referee concluded that Atos had met its initial burden of demonstrating the absence of any genuine issues of material fact both that the plaintiff was unable to perform the essential functions of her position and that an indefinite work from home accommodation was not a reasonable accommodation to which the plaintiff was entitled. Lastly, the referee concluded that

Atos had met its initial burden of demonstrating that it had a legitimate, nondiscriminatory reason for terminating the plaintiff's employment.

The referee determined that "the [plaintiff] failed to present any concrete evidence demonstrating the existence of a disputed issue of material fact as to whether the [plaintiff] was able to perform the essential functions of the position, with or without a reasonable accommodation, to wit, that she was qualified for the job; whether the requested accommodation was a reasonable one and did not present an undue hardship on [Atos]; or whether the articulated business reasons for [Atos'] employment decisions were merely a pretext for discrimination." Accordingly, the referee concluded that Atos was entitled to judgment as a matter of law.

As to the plaintiff's retaliation claim, the referee determined that Atos was entitled to judgment as a matter of law after determining that the plaintiff had not "countered [Atos'] evidence by calling the tribunal's attention to other evidentiary items demonstrating that the [plaintiff's] participation in a statutorily protected activity was a motivating factor in her termination under the causal connection standard . . . or that [Atos'] proffered reasons for the [plaintiff's] termination were pretextual." (Citations omitted.) Accordingly, the referee granted Atos' motion for summary judgment as to all of the plaintiff's claims.

The plaintiff filed a motion for reconsideration, and Atos filed an opposition thereto. The motion was denied on March 20, 2019. Thereafter, the plaintiff appealed the decision of the referee to the Superior Court, and the parties briefed their positions. The court heard oral argument on July 9, 2020.

On July 13, 2020, the court, *Cordani*, *J.*, issued its memorandum of decision, in which it concluded that the referee improperly rendered summary judgment

because Atos had not met its burden of establishing that there were no genuine issues of material fact. The court first noted that the plaintiff's complaint is in the form of an affidavit and constitutes competent counter evidence in considering the motion for summary judgment. The court considered the affidavits of the plaintiff and of Hamilton and identified the following genuine issues of material fact: whether (1) "the [plaintiff's] employment [was] terminated because of a reorganization and her job [was] no longer . . . available as she reported that she was told, or because she could not perform an essential function of the job by being physically present in the office as . . . Hamilton stated"; (2) the job posting for the plaintiff's position was actually a mistake; (3) two new employees were training for the plaintiff's position at the time she was terminated; (4) the plaintiff already had been granted an accommodation for working from home as she had claimed, and, if yes, Atos was retracting a previously granted accommodation; (5) being physically present was an essential job function given that the same job was performed by people in the United States and in the Philippines, who presumably coordinate with each other; (6) working at home was a reasonable accommodation given the requirements of the position; (7) the plaintiff could perform the essential job functions as she had asserted; (8) it was a coincidence that the plaintiff's managerial position was allegedly eliminated in August, 2016, at the same time she was making her accommodation request, given that the offshoring of service desk positions had been ongoing for seven years; and (9) alleged comments made by the plaintiff in text messages meant that the plaintiff could not " 'learn new things daily and maintain such knowledge.' " The court also identified as a genuine issue of material fact what the essential job functions were for the plaintiff's position.

The court concluded that the referee's decision contained factual findings that were inappropriate in the

context of a motion for summary judgment. Specifically, the court stated: "For instance, the [referee] found that the [plaintiff] could not perform the essential functions of her job in the face of the [plaintiff's] sworn assertion that she could and in the face of the fact that the [plaintiff] had already been performing her job from home for some time. Each of the issues of material fact noted by the court above have been either explicitly or implicitly decided against the [plaintiff] by the [referee] in arriving at her final decision. The [referee] appears not to have given any evidentiary weight to the [plaintiff's] affidavit/complaint, which is inappropriate in this summary judgment context." Accordingly, the court sustained the appeal and remanded the matter to the office for a hearing. Thereafter, Atos filed the present appeal.

On appeal, Atos claims that the Superior Court erred in sustaining the consolidated appeal. First, it argues that the court erred in considering the plaintiff's affidavit as competent counter evidence to Atos' motion for summary judgment. The plaintiff responds that "[a]ffidavits are competent counter evidence that a nonmoving party may submit in opposition to a motion for summary judgment." We agree with the plaintiff.

We first set forth our standard of review. Our review of the question of whether the Superior Court considered properly the plaintiff's affidavit as competent evidence in opposition to the motion for summary judgment involves a question of law over which our review is plenary. See *Teodoro* v. *Bristol*, 184 Conn. App. 363, 374–75, 195 A.3d 1 (2018) (issue of whether excerpt from certified deposition transcript must be separately certified as such, apart from certification of original transcript from which it was excerpted, in order to make it admissible in support of or in opposition to motion for summary judgment is entitled to plenary review).

Atos argues that the Superior Court's determination that the plaintiff's affidavit, as a sworn statement, constitutes competent counter evidence in considering a motion for summary judgment is "devoid of any supporting authority and is counter to controlling case law." The only authority cited by Atos, however, discusses the role of the pleadings in framing the issues for summary judgment. See *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014) ("[t]he pleadings determine which facts are relevant and frame the issues for summary judgment proceedings or for trial"); *TD Bank, N.A.* v. *Salce*, 175 Conn. App. 757, 768–69, 169 A.3d 317 (2017) ("[I]t is not enough . . . merely to assert the existence of such a disputed issue . . . [instead] the genuine issue aspect requires the party to bring forward before trial evidentiary facts, or substantial evidence outside of the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . Mere statements of legal conclusions or that an issue of fact does exist are not sufficient to raise the issue." (Internal quotation marks omitted.)).

The affidavit of discriminatory practice filed by the plaintiff is unlike a civil complaint, in that it is sworn and in the form of an affidavit. Affidavits are properly considered pursuant to the rule of practice governing summary judgment motions, Practice Book § 17-49, which rule the referee expressly identified as governing her adjudication of Atos' motion. See Practice Book § 17-49 ("[t]he judgment sought 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" (emphasis added)); see also Practice Book § 17-46 ("[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,

and shall show affirmatively that the affiant is competent to testify to the matters stated therein"). Atos has provided this court with no authority prohibiting consideration, during summary judgment proceedings, of attestations contained in a signed and notarized affidavit of illegal discriminatory practice. Accordingly, we are not persuaded by Atos' claim.

In the alternative, Atos argues that, even if the attestations of the plaintiff properly were considered, they were insufficient to create genuine issues of material fact. Specifically, it contends that the plaintiff's affidavit "is conclusory, supported by nothing other than [the plaintiff's] rank speculation, and replete with irrelevant and unsupported allegations."

Before addressing whether the record reveals genuine issues of material fact, we turn to the interrelated argument of Atos that the Superior Court erred in failing to afford deference to the referee's decision. It argues that, "[i]n finding the complaint created genuine issues of material fact warranting denial of Atos' motion for summary judgment, the Superior Court failed to provide substantial deference to the [referee's] findings as to the impact of the complaint on the motion and merely substituted its own judgment for that of the [referee]." It contends that the Superior Court "strayed well beyond its 'strictly limited' and 'very restricted' role of simply determining whether the [referee] acted 'unreasonably, arbitrarily, illegally or in abuse of [her] discretion.' " We disagree with Atos' claim.

We first set forth our own standard of review. "Determining the appropriate standard of review is a question of law, and as a result, it is subject to plenary review." *Crews* v. *Crews*, 295 Conn. 153, 161, 989 A.2d 1060 (2010).

In rendering her decision, the referee cited the well established standard for summary judgment set forth

in Practice Book § 17-49. "[Section] 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 moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . .

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist. . . . The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . Once the moving party has met its burden [of production] . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t [is] incumbent [on] the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. . . . The presence . . . of an alleged adverse claim is not sufficient to defeat a motion for summary judgment." (Citations omitted; internal quotation marks omitted.) *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, 302 Conn. 408, 421–22, 28 A.3d 302 (2011), cert. denied, 567 U.S. 924, 132 S. Ct. 2773, 183 L. Ed. 2d 653 (2012).

Atos' contention is that the Superior Court was obligated to afford "considerable deference" to the referee's determination that there were no genuine issues of material fact. In making this argument, Atos relies on

the substantial evidence rule governing judicial review of administrative fact-finding under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. It asserts that the referee had "a 'substantial basis of fact' on which to make her ruling" and cites *Rajasekhar* v. *Commission on Human Rights & Opportunities*, Superior Court, judicial district of New Britain, Docket No. CV-18-5024428-S (January 14, 2020), for the proposition that "[a] plaintiff who challenges an agency decision has the heavy burden of demonstrating that the department's *factual conclusion* lacks substantial support on the whole record." (Emphasis added; internal quotation marks omitted.) In contrast with the present summary judgment procedure, the factual findings in *Rajasekhar* were made by an investigator following a fact-finding hearing that involved sworn testimony from the plaintiff and three representatives of the plaintiff's former employer.[4] Id.

We are not persuaded by Atos' argument that the deferential standard employed to review administrative fact-finding extends to the determination of whether genuine issues of material fact existed in the summary judgment context. First, we note that, even with respect to judicial review of administrative agency actions, "[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). Second, with respect to summary judgment in general, "[i]ssue-finding, rather than issue-determination, is the key to

[4] Atos also cites *Barnes* v. *Premier Education Group, LP*, Superior Court, judicial district of New Britain, Docket No. CV-15-5016997-S (April 7, 2017). Unlike the present case, the decision in *Barnes* was rendered following a fact-finding conference during which both parties presented evidence, including witness testimony. Id.

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." (Internal quotation marks omitted.) *Hospital of Central Connecticut* v. *Neurosurgical Associates, P.C.*, 139 Conn. App. 778, 783, 57 A.3d 794 (2012); see also *Teodoro* v. *Bristol*, supra, 184 Conn. App. 374 ("[t]he court's task in reviewing the parties' submissions is *not* to decide any factual issues they raise, but only to decide if, in fact, they raise any such factual issues, as by demonstrating a potential inconsistency or conflict in the admissible evidence concerning one or more facts upon which the movant's right to judgment depends" (emphasis in original)).

Finally, it is axiomatic that a reviewing court conducts a plenary review of the record, viewing the evidence in the light most favorable to the nonmoving party, to determine whether a genuine issue of material fact exists such that summary judgment was improperly rendered. See *Windsor Federal Savings & Loan Assn.* v. *Reliable Mechanical Contractors, LLC*, 175 Conn. App. 651, 660, 168 A.3d 586 (2017); *Rivera* v. *CR Summer Hill, Ltd. Partnership*, 170 Conn. App. 70, 76, 154 A.3d 55 (2017); *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 625, 57 A.3d 391 (2012). On the basis of the foregoing legal principles, we conclude that the deferential standard advocated by Atos does not apply to the present case and that the Superior Court properly conducted a plenary review of the record in considering whether genuine issues of material fact existed.

Having resolved the issue of the Superior Court's standardof review, we next consider Atos' argument that the Superior Court improperly determined that genuine issues of material fact exist with respect to the plaintiff's claims. In accordance with the standard of review previously set forth, we conduct a plenary review of the

record. See *Rivera* v. *CR Summer Hill, Ltd. Partnership*, supra, 170 Conn. App. 76.

With respect to the plaintiff's discrimination and reasonable accommodation claims, the referee concluded that there were no genuine issues of material fact that the plaintiff was unable to perform the essential duties of her position and that a work from home accommodation was not reasonable. Specifically, the referee determined that Atos had made an affirmative evidentiary showing that there was no factual dispute that the plaintiff's essential job duties required her to be physically present at the Cheshire office.[5] Although Hamilton averred as much, the plaintiff averred that she had received the workplace accommodation of working from home and that she had, shortly before her employment was terminated, provided additional documentation, at Atos' request, in support of her *ongoing* work from home accommodation. The plaintiff further averred that she can perform the essential functions of the job. On appeal, Atos states that permitting the plaintiff to work from home permanently would be an unreasonable accommodation. It states that it "should not be punished, for exceeding its legal obligations by *permitting* [*the plaintiff*] *to initially work from home in her new role*." (Emphasis added.) Thus, Atos appears to acknowledge that the plaintiff worked from home in her new role.

"When the evidence in a summary judgment record reasonably is susceptible to competing inferences, it is

[5] The referee also concluded that, "[b]y her own admission, the [plaintiff's] ability to perform her job duties was impaired as a result of her short-term memory loss due to the medications she was taking for bipolar disorder and anxiety." The only evidence the referee identified in support of this conclusion consisted of the July, 2016 text messages. We agree with the Superior Court that there existed a genuine issue of material fact in light of the plaintiff's sworn assertion that she could perform the essential functions of the job.

improper for a trial court, in ruling on the summary judgment motion, to choose among those inferences." *Doe* v. *West Hartford*, 328 Conn. 172, 197–98, 177 A.3d 1128 (2018). Faced with competing affidavits, the referee improperly credited the statements contained in Hamilton's affidavit. See id., 197 ("[w]hen deciding a summary judgment motion, a trial court may not resolve credibility questions raised by affidavits or deposition testimony submitted by the parties"). Thus, we agree with the Superior Court that genuine issues of material fact existed.

Moreover, we agree with the Superior Court that there exists a genuine issue of material fact with respect to the stated reasons for terminating the plaintiff's employment. The plaintiff averred that she was told that her employment was terminated due to a reorganization, while Hamilton averred that he terminated her employment because she could not perform the essential functions of the position. Rather than merely identifying the factual dispute raised by the competing affidavits, the referee improperly decided the factual question by crediting the statements made in Hamilton's affidavit. See id.

Additionally, we note that the record lends support to the plaintiff's argument that Atos "has proffered two different and contradictory explanations at different times to explain its termination decision." Atos contends in its appellate brief that "[i]t has never been alleged that [the plaintiff's] termination was because the service desk technician position was being eliminated." It argues that "[i]t was her prior managerial position that was eliminated." Our review of the record reveals that, in the plaintiff's affidavit, she averred that Atos terminated her employment on October 17, 2016. In its answer, Atos denied this averment as stated and alleged that, "[o]n or about October 17, 2016, [the plaintiff's] position was eliminated." The plaintiff further

averred that Atos "told [her] that the termination was due to a 'reorganization' and that her 'job was no longer available.' " Notably, in its answer, Atos admitted this averment and further alleged that "[the plaintiff's] position was no longer needed in the [United States] due to offshore activity." Thus, Atos admitted having told the plaintiff that her termination was due to a reorganization and that her job was no longer available. In support of Atos' motion for summary judgment, however, Hamilton averred that he terminated the plaintiff's employment because "she could not perform an essential function of her job—physically presenting for work and she conceded she could not perform her duties."

The Superior Court concluded that the foregoing issues, among others,[6] constituted "genuine issues of material fact that arise directly from the competing affidavits of the [plaintiff] and . . . Hamilton. These issues go to the very heart of the discrimination and retaliation claims. The [referee's] decision clearly contains factual findings by the [referee] that are not appropriate in the context of a motion for summary judgment." We agree with the Superior Court. Faced with competing averments on the issues of the essential functions of the job, reasonable accommodations, and the reason for the termination of the plaintiff's employment, the referee erred in determining that there were no genuine issues of material fact. Thus, summary judgment was not properly rendered.

Lastly, Atos argues that the Superior Court improperly "based its reversal on factual arguments neither party raised . . . ." Specifically, it argues that the plaintiff and the commission both objected to summary judgment with "purely procedural arguments" and "neither

[6] We need not consider the other issues the Superior Court identified as genuine issues of material fact.

objection makes any reference whatsoever to the substance of [the plaintiff's] complaint nor do the objections set forth any allegedly disputed facts." We disagree that the court erred in determining whether genuine issues of material fact should have precluded summary judgment. Although the commission's objection focused exclusively on the referee's authority to render summary judgment, the plaintiff's objection included an argument that the early legal intervention decision to send the matter directly to a public hearing necessarily meant that there had been established the existence of genuine issues of material fact. Moreover, it is undisputed that the referee considered the substance of the plaintiff's affidavit in deciding the summary judgment motion. The referee expressly stated that she had "view[ed] the complaint and the submitted evidentiary materials in the light most favorable to the [plaintiff] . . . ." Accordingly, the Superior Court did not err in considering whether genuine issues of material fact existed.

The judgment is affirmed.

In this opinion the other judges concurred.

ELLIS ROBINSON ET AL. *v.* WILLIAM TINDILL ET AL.
(AC 43995)

Elgo, Cradle and Clark, Js.

Syllabus

The plaintiffs, who owned residential property adjacent to that of the defendants, T and E, sought declaratory and injunctive relief and damages for trespass resulting from T's construction of a fence that encroached on the plaintiffs' property. The parties previously had constructed privacy fences on their properties on opposite sides and within inches of a chain-link fence that was located on a portion of the boundary line between their backyards. T thereafter constructed an extension to the defendants' privacy fence and, without the plaintiffs' permission,

removed portions of the chain-link fence. T also constructed a split rail fence that extended the privacy fence along or near the boundary line. A surveyor thereafter found that a portion of the split rail fence encroached on the plaintiffs' property. The defendants filed special defenses alleging that they were entitled to establish a divisional fence, pursuant to statute (§ 47-43), on the boundary of their property. The defendants further claimed that § 47-43 permitted placement of the fence on the plaintiffs' property. The trial court granted the plaintiffs' motion for summary judgment as to liability, finding against the defendants on the plaintiffs' claim of trespass, and against T for conversion as to the chain-link fence. The court concluded that a majority of the length of the fences T constructed was not located on the dividing line of the parties' properties and, thus, could not be considered a divisional fence pursuant to § 47-43. After a hearing in damages, the court granted the plaintiffs injunctive relief and awarded them nominal damages for conversion as to the chain-link fence and for trespass as to the split rail fence. On appeal, the defendants claimed, inter alia, that the court erred in finding them liable for trespass because the fence at issue was compliant with § 47-43. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly found them liable for trespass, which was based on their assertion that their privacy fence was a divisional fence pursuant to § 47-43 and was within the permitted limit of intrusion on the plaintiffs' property: contrary to the defendants' assertion, the clear and unambiguous language of § 47-43 requires a divisional fence to be centered on the property line at issue, the parties did not dispute that the defendants' fence was not centered on the property line, and the defendants failed to demonstrate how any of the other statutes they cited pertaining to fences undermined the plain language of § 47-43; moreover, this court found unavailing the defendants' assertion that the placement of their fence did not constitute a trespass because the fence did not exceed the width permitted by § 47-43 for materials used to construct a divisional fence, as an interpretation of § 47-43 that allows a property owner to construct a divisional fence on a neighbor's property would render the centering language in § 47-43 superfluous; furthermore, it was undisputed that the split rail fence encroached on the plaintiffs' property, and the middle of the fence did not sit on the mutual boundary line of the parties' properties.

2. This court declined to review the defendants' unpreserved claim that the trial court improperly found E liable for trespass because the split rail fence was a fixture appurtenant to the property she owned, the defendants having failed to argue to the trial court that the plaintiffs did not properly raise or brief the issue of "trespass of ownership by fixture"; moreover, the two paragraphs of argument in the defendants' opposition to the plaintiffs' motion for summary judgment was devoid

of analysis or legal authority that was relevant to the bases on which they challenged on appeal the trial court's judgment as to E.

3. The trial court's judgment finding T liable for conversion could not stand, as the plaintiffs never pleaded conversion in their complaint or briefed it in their motion for summary judgment; because the plaintiffs' complaint alleged that T's conduct in dismantling portions of the chain-link fence constituted trespass, the defendants were never given notice or afforded an opportunity to defend a claim of conversion; accordingly, the judgment was reversed as to the court's finding that T was liable to the plaintiffs for conversion.

Argued April 15—officially released October 12, 2021

Procedural History

Action, inter alia, to recover damages for trespass, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Middlesex, where the court, *Domnarski*, *J.*, granted the plaintiffs' motion for summary judgment as to liability; thereafter, following a hearing in damages, the court, *Frechette*, *J.*, rendered judgment for the plaintiffs, from which the defendants appealed to this court. *Reversed in part*; *judgment directed.*

Michael A. Zizka, for the appellants (defendants).

Joshua C. Shulman, for the appellees (plaintiffs).

Opinion

CRADLE, J. This case arises from the erection of a fence by the defendants, William Tindill (Tindill) and Erika Tindill, between their property and the adjacent property owned by the plaintiffs, Ellis Robinson and Nicole Robinson. The defendants appeal from the judgment of the trial court rendered in favor of the plaintiffs after a hearing in damages and the court's prior order granting the plaintiffs' motion for summary judgment as to liability and finding both defendants liable for trespass and Tindill liable for conversion. On appeal, the defendants claim that the court erred (1) in finding

them liable for trespass because the fence at issue was a statutorily compliant divisional fence pursuant to General Statutes § 47-43, (2) in finding Erika Tindill liable for trespass, even though she played no role in erecting the fence, and (3) in finding Tindill liable for conversion because the plaintiffs failed to plead, or present any evidence in support of, a claim for conversion. We affirm in part and reverse in part the judgment of the trial court.

The following undisputed facts, as set forth by the court, and procedural history are relevant to our resolution of this appeal. The plaintiffs own property located at 113 Glen View Terrace in New Haven. The defendants reside at 119 Glen View Terrace. "The plaintiffs acquired their property in 2003, and . . . Erika Tindill acquired her property, [where she resides with Tindill], in 2004. There is a chain-link fence located on a portion of the mutual boundary line between the plaintiffs' and the defendants' properties. This chain-link fence, which had been installed prior to when the parties acquired their respective premises, can be described as located between the backyards of the two lots. Over the years, the plaintiffs and the defendants each constructed their own privacy fences on opposite sides of the chain-link fence. The sides of these privacy fences were very close to, meaning within inches of, the chain-link fence, resulting in the chain-link fence being sandwiched between the two closely built privacy fences.

"On July 8, 2017 . . . Tindill commenced a fence-building project. Between July 8 and 11, 2017, Tindill constructed a six foot high, approximately thirty foot long extension to his existing privacy fence. This extension made the [defendants'] entire privacy fence approximately sixty feet long. The privacy fence, as extended, runs along the mutual boundary line but is located entirely on Erika Tindill's property. To accommodate the post and panels for the extended privacy

fence, Tindill removed the end corner post, as well as the supporting top metal rod, of the chain-link fence." "[T]he plaintiffs never gave permission to, or authorized, Tindill to remove the fence post and top rod. There is no evidence that the removed fence parts have been reinstalled or replaced."

"Beginning on July 11, 2017, Tindill also constructed a three and one-half [foot] high split rail fence. The split rail fence extended from the privacy fence to a point in the vicinity of the sidewalk alongside Glen View Terrace. Thus, to summarize, from the undisputed facts, it appears that Tindill constructed three fences, total, along the mutual boundary line on three separate occasions: (1) the original privacy fence, (2) the extension to the privacy fence, and (3) the split rail fence. . . .

"Tindill [averred that he] installed the split rail fence 'along or near the [m]utual [b]oundary . . . .' After Tindill constructed the split rail fence, the plaintiffs hired Michael D. Phipps, a licensed surveyor, to survey the neighboring properties and officially establish the location of the mutual boundary line. The survey map [that] Phipps prepared, which both parties have submitted along with their respective motions for summary judgment, indicates that the mutual boundary line is 100 feet in length. . . . In an affidavit dated April 8, 2019, Phipps stated that the split rail fence [that] Tindill constructed encroaches on the plaintiffs' property. . . . Although it does not appear that the split rail fence encroaches on a large area of the plaintiffs' property, the defendants do not dispute that a 'few inches' of the split rail fence posts may lie on the plaintiffs' side of the mutual boundary line. . . . The defendants have not submitted their own professionally prepared survey, do not dispute Phipps' survey and, in fact, also rely on the survey in their efforts to prove their case." (Citations omitted.) "It is undisputed that at least one of the vertical posts of the split rail fence [that] Tindill

installed extends onto the plaintiffs' property. There is no evidence to establish that the plaintiffs gave the defendants permission to install a fence post that would be located on the plaintiffs' property."

On May 9, 2018, the plaintiffs commenced this action by way of a one count complaint, alleging that Tindill destroyed the chain-link fence that had existed on the boundary of the parties' properties and constructed a "new, approximately six foot high wooden stockade fence" in its place. The plaintiffs further alleged that Tindill also constructed "an approximately three and one-half foot wood rail fence" along another portion of the parties' property boundary. The plaintiffs alleged that Erika Tindill is the owner of the property at 119 Glen View Terrace and that, "acting through . . . Tindill, [she] caused the fence to be built such that it encroaches on the land of [the] plaintiffs . . . ." The plaintiffs sought a declaratory judgment establishing the boundary line of the parties' properties, an injunction requiring the defendants to remove their fence from the plaintiffs' land, and damages for trespass.

On July 12, 2018, the defendants filed an answer and two special defenses to the plaintiffs' complaint. In their first special defense, the defendants alleged that they were entitled to establish a divisional fence on the boundary of their property pursuant to General Statutes §§ 47-43 and 47-49, and, to the extent that it is located on the plaintiffs' property, "such placement is partial and no greater than allowable pursuant to the aforesaid statutes." In their second special defense, the defendants alleged that the plaintiffs had allowed the chain-link fence "to deteriorate and to become a useless, unsightly nuisance in violation of . . . § 47-43." They alleged that they were entitled to seek remedies for such nuisance pursuant to General Statutes § 47-51,[1]

[1] Despite this allegation, the defendants did not actually file a counterclaim alleging nuisance.

and that they were entitled to erect a divisional fence to replace it pursuant to §§ 47-43 and 47-49. The plaintiffs thereafter denied all of the allegations contained in the defendants' special defenses.

In April, 2019, both parties filed motions for summary judgment, each arguing that they were entitled to judgment as a matter of law. In support of their motions, both parties filed memoranda of law, affidavits and exhibits. Both parties represented to the court that the essential facts underlying their claims were not in dispute. Following a hearing on the parties' motions for summary judgment, the court, *Domnarski*, *J.*, issued a memorandum of decision filed October 8, 2019. The court rendered summary judgment in favor of the plaintiffs as to liability only, against both defendants on the plaintiffs' claim of trespass, and against Tindill for conversion as to the plaintiffs' claim related to the chain-link fence.

On February 20, 2020, the court, *Frechette*, *J.*, held a hearing in damages. On February 26, 2020, the court issued a written order awarding "injunctive relief in favor of the plaintiffs against the defendants as follows: within thirty days of the date of this order, at their sole expense, the defendants are to relocate the split rail fence and fence posts as depicted in exhibit 2, so as not to encroach on the plaintiffs' property. The defendants are to also repair any damages to the plaintiffs' property and restore it to its natural condition." The court also awarded nominal damages to the plaintiffs of $50 for "conversion of the chain-link fence," and nominal damages of $50 for trespass as to the split rail fence. This appeal followed.

I

The defendants first claim that, because the fence at issue was a divisional fence pursuant to § 47-43, the trial court erred in finding them liable for trespass.. The

defendants argue that the court erred in concluding that their fence was not a divisional fence because it was not centered on the mutual boundary line. They further contend that, although the fence was not centered on the property line, it was well within the limit of intrusion onto the plaintiffs' property that is permitted by § 47-43. We are not persuaded.

In concluding that the defendants' fence was not a divisional fence under § 47-43, the trial court set forth the following additional facts: "At some point in time, Phipps . . . installed stakes in the ground, which Tindill believed to be on the boundary line. The defendants have submitted photographs that show the survey stakes and the defendants' privacy fence. It is clear from one of the photographs that the defendants' original privacy fence, and the 2017 extension thereto, were installed on the defendants' side of the boundary line. . . . [Thus] a majority of the length of the fences [that] Tindill constructed were not located *on* the dividing line of the two properties. The survey map shows that, where the split rail fence begins, in the vicinity of the privacy fence, it is located on the defendants' side of the line. As the fence travels toward the sidewalk and the lot corner, however, it gradually approaches and then enters onto the plaintiffs' property. . . . [T]he defendants have not contested Phipps' statement in his affidavit that a portion of the split rail fence is on the plaintiffs' property.[2]

"In his affidavit, Tindill stated that he 'constructed a [split rail] fence along or near the [m]utual [b]oundary, running from the extended privacy fence to Glen View

[2] In their memorandum of law in support of their objection to the plaintiffs' motion for summary judgment, the defendants stated: "For the purposes of this case, the defendants are not contesting the accuracy of the plaintiffs' survey. That survey shows that the fences constructed by . . . Tindill lie along or within inches of the mutual property boundary."

Terrace.' . . . [Tindill] further state[d], 'Before installing the extension of the privacy fence and the [split rail] fence, I measured the distance of the line of installation from both the house on the Tindill [p]roperty and the house on the Robinson [p]roperty to be sure that the fence would be located on the [m]utual [b]oundary or within the Tindill [p]roperty.' . . . [T]he privacy fence and its extension are on the defendants' side of the boundary. These privacy fences constitute approximately two-thirds of the length of the fences between the two properties. It appears from the survey that only a portion of the split rail fence is actually located *on* the boundary line." (Citations omitted; emphasis in original; footnote added.)

The court further found: "[T]he mutual boundary line was established by the original subdivision map referred to on the subject survey and in . . . Erika Tindill's deed [to her property] . . . . Although the mutual boundary line had been established, it appears that Tindill did not accurately locate the boundary line when he took his measurements. As a result, he did not place all of the split rail fence on his side of the boundary, as he did with the other fences [that] he built. Furthermore, if there was an intention to construct a divisional fence, the split rail fence and the privacy fence should have been built on the established dividing line for its entire length." (Citation omitted.) The court concluded: "Thus . . . because most of the total length of the fences Tindill constructed is not on the dividing line, the fences cannot be considered a 'divisional fence' within the meaning of § 47-43 or the related fence statutes."[3]

[3] The defendants also claim that the trial court erred in finding that "the defendants' fence(s) cannot qualify as a divisional fence because a split rail fence is not one of the types of 'city' fences listed in [§ 47-43]." In light of our conclusion that the court correctly determined that the defendants' fence was not a divisional fence because it did not sit on the center of the mutual boundary line, we need not address this claim.

On appeal, the defendants argue that the trial court misinterpreted the language of § 47-43. Specifically, the defendants challenge the court's determination that § 47-43 requires that a divisional fence be centered on the mutual boundary line. "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider 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. . . . Furthermore, [t]he legislature is always presumed to have created a harmonious and consistent body of law . . . [so that] [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal." (Citations omitted; internal quotation marks omitted.) *State* v. *Bemer*, Conn. , , A.3d (2021).

With the foregoing principles in mind, we begin with the statutory language at issue in this case. Section 47-43 provides in relevant part: "The proprietors of lands shall make and maintain sufficient fences to secure their particular fields. . . . Adjoining proprietors shall

each make and maintain half of a divisional fence, *the middle line of which shall be on the dividing line* . . . .”[4] (Emphasis added.) The clear and unambiguous language of § 47-43 requires a divisional fence to be centered on the property line at issue. Here, it is undisputed that it is not.[5]

Our case law, although scant, has held that a fence that does not sit on the mutual boundary line is not a divisional fence. See *Grosby* v. *Harper*, 4 Conn. Cir. 196, 199, 228 A.2d 563 (hedge not divisional fence because only portion of it was centered on property line and remainder was on defendant’s property; divisional fence does not “apply to such fences as may be erected by each proprietor on his own land, though near and parallel to the boundary line”), cert. denied, 154 Conn. 718, 222 A.2d 810 (1966); *Hillgen* v. *Printz-Kopelson*,

[4] Section 47-43 also describes the types of fences that constitute divisional fences: “Within cities and adjacent to house lots, a tight board fence four and one-half feet high, an open picket fence four feet high, the opening between pickets not to exceed four inches, or a slat rail fence four feet high, the opening between slats not to exceed six inches, the lower slat not over six inches from the ground, a fence not less than four feet high of chain link galvanized wire not smaller than number nine gauge supported upon galvanized tubular steel posts set in concrete, all end and corner posts to be suitably braced, and all to be substantially erected, or any other fence which in the judgment of the selectmen or other officials charged with the duty of fence viewers is equal thereto, shall be a sufficient fence; in places outside of incorporated cities, a rail fence four and one-half feet high, a stone wall four feet high, suitably erected, a wire fence consisting of four strands not more than twelve inches apart, stretched tightly, the lower strand not more than twelve inches and the upper strand not less than four feet from the ground, with good substantial posts not more than sixteen feet apart, and any other fence which in the judgment of the selectmen is equal to such a rail fence, shall be a sufficient fence.” General Statutes § 47-43.

[5] In paragraph 11 of Phipps’ affidavit, he indicated that “[t]he 3.5 foot wood rail fence encroaches on the [plaintiffs’] property.” In paragraph 13, Phipps indicated that “[t]he center of the 3.5 foot wood rail fence is not on the mutual boundary line for the entirety, or even the majority, of its length.” As the plaintiffs correctly describe, the fence here at issue does not sit on the center of the mutual boundary line; it is a “diagonal fence that intersects with the boundary line.”

Docket No. CV-96-0383208-S, 2001 WL 589106, *3 (Conn. Super. May 11, 2001) (fence that ran only short distance along part of boundary line was not divisional fence).

Despite the plain and unambiguous language of § 47-43, the defendants nevertheless contend that the fact that the fence Tindill erected did not sit on the boundary line was not fatal to their claim that the fence was a divisional fence under § 47-43. The defendants argue that the court improperly interpreted the language of § 47-43, specifically, the language that provides that the middle line of a divisional fence "shall be on the dividing line," in that it "focused solely on that language without examining its context, either within § 47-43 or within the entirety of chapter 823 [of the General Statutes]."[6] Specifically, the defendants argue that "[t]he history and context of chapter 823 show that its intent was not to require a precise location for a divisional fence but to establish a joint duty to erect such fences, with the burdens to be equitably shared by abutting landowners." Aside from setting forth the language of other statutes pertaining to the erection or maintenance of fences, the defendants have failed to demonstrate how any of the other statutes to which they cite undermine the plain language of § 47-43. The requirements prescribed by § 47-43 governing the location and manner of erecting divisional fences do not frustrate or conflict with the goal of the statutory scheme, as argued by the defendants, to ensure that such fences are erected. More specifically, there is nothing in those other statutes that excuses noncompliance with the requirements of § 47-43 or supports the defendants' argument that a fence that is not centered on the property line and is "merely misaligned" may be considered a divisional fence. Indeed, as the defendants state in their brief to this court, "[t]he remaining provisions of . . . chapter [823] are merely supportive; they specify how the goal

[6] Chapter 823 of the General Statutes is titled: "Fences."

of erecting such a [divisional] fence may be achieved in a variety of different circumstances."[7]

The defendants further contend that, because the goal of § 47-43, and, the entirety of chapter 823, is to assure that a divisional fence will be constructed, "it makes little sense to conclude that the mere misalignment of a fence should be viewed as a trespass or should warrant a court['s] ordering its removal, especially where, as here, the 'intrusive' portion of the fence is well within the space that a properly aligned fence would have occupied on the plaintiffs' property." In asserting this argument, the defendants are referring to the portion of § 47-43 that contemplates the dimensional qualities of the various materials of which a divisional fence may be constructed. Section 47-43 provides that a divisional fence, "the middle of which shall be on the dividing line . . . shall not exceed in width, if a straight wood fence or hedge fence, two feet; if a brick or stone fence, three feet; if a crooked rail fence, six feet; and, if a ditch, eight feet, not including the bank, which shall be on the land of the maker." The defendants rely on this language to assert that, because their fence did not exceed the width permitted by § 47-43 and did not encroach on the plaintiffs' property for more than one-half of that width, the placement of their fence on the plaintiffs' property did not constitute a trespass. The fatal flaw in the defendants' argument is that the middle of their fence did not sit on the dividing property line as required by § 47-43. To interpret § 47-43 to allow a property owner to construct a divisional fence on a neighbor's property would render the centering language of the statute superfluous.[8]

[7] Moreover, the defendants' argument is belied by the plain and unambiguous language of § 47-43. Although we read each statute in the context of the entirety of the statutory scheme, it is not the prerogative of this court to ignore the plain language set forth in the statute.

[8] The defendants also argue that the plaintiffs failed to establish a prima facie claim of trespass because they failed to prove that the trespass was intentional or that it caused direct injury. Because these arguments were

The defendants repeatedly have acknowledged that, in constructing the fences in July, 2017, Tindill set out to extend their privacy fence. The trial court found, and it is undisputed, that neither the original privacy fence nor the extended privacy fence erected by the defendants were located on the mutual boundary line. They were both located wholly within the defendants' property. The split rail fence is on the defendants' property where it meets the second installment of the defendants' privacy fence but, then, as it approaches the road, crosses the property line and encroaches on the plaintiffs' property. Because the middle of the fence does not sit on the mutual boundary line, the trial court did not err in concluding that it was not a divisional fence.

II

The defendants also contend that the trial court erred in finding Erika Tindill liable for trespass. In addressing the plaintiffs' claim against Erika Tindill, and rejecting the defendants' argument that she cannot be liable for trespass because she did not personally install or direct the installation of the fence that encroached on the

neither raised before the trial court; see *Guiliano* v. *Jefferson Radiology, P.C.*, 206 Conn. App. 603, 622, A.3d (2021); nor briefed beyond a mere mention in the defendants' brief to this court; see *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); we decline to review them.

The defendants additionally contend that, because § 47-43 provides for various permissible intrusions on each property owner's land, the court erred in finding a trespass because the plaintiffs did not have exclusive possession of the land on which the fence was placed. As explained herein, the plain language of § 47-43 requires a divisional fence to be centered on the boundary line of the properties at issue, and the language of the statute that pertains to the overhang of the fence contemplates the varying dimensional widths, which are based on the materials used to construct the fence. That language does not allow, as the defendants argue, a divisional fence to be constructed exclusively on one of the properties that it is purporting to divide. There is nothing in the language of the statute that supports the defendants' argument that § 47-43 divests a property owner of the exclusive ownership of his or her land, and the defendants have provided no legal support for this argument.

plaintiffs' property, the trial court found that "the split rail fence at issue is a fixture that is appurtenant to the real estate Erika Tindill owns. Consequently, she is the owner of the fence, including those portions of the fence that trespass [on] the plaintiffs' property. As the owner of the property that continues to be a trespass on the plaintiffs' property, she, too, is liable to the plaintiffs for the trespass." The defendants argue on appeal that "[t]he issue of 'trespass by ownership of a fixture' was not properly raised or briefed and should have been deemed abandoned."[9] Because the defendants failed to present this argument to the trial court, which, in turn, did not address it, it was not properly preserved for our review.

"We have repeatedly held that this court will not consider claimed errors on the part of the trial court unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . [T]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge." (Citation omitted; internal quotation marks omitted.) *Noonan* v. *Noonan*, 122 Conn. App. 184, 190, 998 A.2d 231, cert. denied, 298 Conn. 928, 5 A.3d 490 (2010). It is a well settled principle that "[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted . . . but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks

[9] The defendants also claim that, "[e]ven if the issue of 'trespass by ownership of a fixture' had been properly raised, the trial court's decision was erroneous as a matter of law." In so arguing, the defendants appear to assert that, once the fence was erected by Tindill on the plaintiffs' property, the fence belonged to the plaintiffs and, therefore, could not have constituted a trespass by the defendants. We decline to address this baseless claim.

omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021).

In their memorandum of law in support of their objection to the plaintiffs' motion for summary judgment, the defendants argued that the plaintiffs "have offered no proof whatsoever that Erika Tindill approved, consented to, or otherwise had any influence whatsoever over [Tindill's] actions" and, thus, "cannot claim that . . . Tindill was acting as [Erika] Tindill's agent," and "[t]hat is . . . the sole allegation they made against [Erika] Tindill in their complaint." The defendants further argued: "Apparently recognizing their failure in this regard, the plaintiffs have attempted to shift their legal theory, claiming that [Erika] Tindill is somehow liable as the owner of a 'fixture' that is partially located on her property. Unsurprisingly, they have not cited a single precedent to back up this frivolous—and previously unpleaded—argument."[10] The defendants then argued that a trespass must be intentional and that, "even if . . . Tindill could reasonably be said to have 'trespassed' by constructing a split rail fence partially on [the] plaintiffs' side of the mutual boundary, but well within the parameters allowed by . . . § 47-43, there

[10] In their complaint, the plaintiffs alleged that Erika Tindill is the owner of the property at which she resides with Tindill. The plaintiffs further alleged that, "acting through . . . Tindill, [she] caused the fence to be built such that it encroaches on the land of [the] plaintiffs and is claiming for a boundary line a line that is not the true line." In their memorandum of law in support of their motion for summary judgment, the plaintiffs argued as to Erika Tindill: "Fences are fixtures: Our Supreme Court has long held that fences are fixtures to real property. . . . Erika Tindill is the record owner of the [defendants'] property, of which the fences are fixtures." (Citations omitted.) On that basis, the plaintiffs argued: "Even if the defendants will not admit that . . . Erika Tindill allowed or permitted the actions [that] . . . Tindill claims to have individually taken, she cannot escape the reality that a fixture on her property (split rail fence) encroaches on [the plaintiffs'] property. It does not matter if . . . Erika Tindill took any action to construct the fences herself. She owns and possesses the [defendants'] property, and a fixture on her property encroaches on the [plaintiffs'] property."

can be no claim against [Erika] Tindill absent evidence of her intent." (Emphasis omitted.)

The defendants now contend on appeal that, because the plaintiffs failed to assert this theory of "trespass by ownership of a fixture" in their complaint, the trial court erred in finding Erika Tindill liable on that basis. Although the defendants mentioned that this theory of liability was "previously unpleaded" by the plaintiffs and that the sole allegation against Erika Tindill was based on an allegation that she acted through Tindill, they did not distinctly argue to the trial court that it could not find Erika Tindill liable on this basis because the plaintiffs failed to plead it in their complaint. The defendants, likewise, provided no legal authority or analysis, pertaining to the interpretation or sufficiency of pleadings, to the trial court for its consideration of this contention. Consequently, the trial court did not address any alleged inadequacies in the plaintiffs' complaint.

The defendants also claim that "[t]he plaintiffs' failure to support [their] new theory with any authority should also have foreclosed any review by the trial court." The defendants did not argue, as they do now, that the trial court was precluded from reviewing the plaintiffs' claim because the plaintiffs had failed to provide any legal authority in support of it. Although the defendants argued, in a single sentence, that the plaintiffs had not cited any legal authority to support their claims against Erika Tindill, they did not argue that the plaintiffs' failure to do so precluded the trial court from reviewing the claim, nor did they cite any legal authority themselves in support of this notion.

In sum, in opposing summary judgment as to the plaintiffs' claim that Erika Tindill was liable for trespass because she owned the property to which the fence that encroached on the plaintiffs' property was an

appurtenant fixture, the defendants set forth two paragraphs of argument, which was devoid of analysis or legal authority that is relevant to the bases on which the defendants now challenge the judgment of the trial court as to Erika Tindill. Accordingly, because the defendants did not properly raise these arguments to the trial court, we decline to review them.[11]

III

The defendants also claim that the trial court erred in finding Tindill liable, and awarding the plaintiffs monetary damages, for conversion. They contend that the court erred in finding Tindill liable for conversion because the plaintiffs never pleaded conversion in their complaint or briefed it in their motion for summary judgment. We agree.

In their complaint, the plaintiffs alleged: "On or about July 9, 2017 . . . Tindill destroyed a chain-link fence along a portion of the boundary between the premises known as 113 Glen View Terrace and the premises known as 119 Glen View Terrace, New Haven, Connecticut. . . . Tindill constructed a new, approximately six foot high wooden stockade fence in place of [the] plaintiff[s'] chain-link fence that had been in place for more than a decade." The plaintiffs further alleged that Tindill "destroyed property of [the] plaintiffs, i.e., the chain-link fence."

In addressing the plaintiffs' claim regarding the chain-link fence, the trial court first noted that it was undisputed that Tindill removed the end corner post and top

[11] Moreover, this court has observed that, "[w]hile the lack of an appropriate pleading cannot be ignored, neither can it be ignored that there is no element of surprise to the defendant—at all times, the defendant has been on notice that this was an issue in the case, even if not properly pleaded . . . ." (Internal quotation marks omitted.) *Manzo-Ill* v. *Schoonmaker*, 188 Conn. App. 343, 349 n.7, 204 A.3d 1207, cert. denied, 331 Conn. 925, 207 A.3d 27 (2019). Here, the defendants had adequate notice of the plaintiffs' theory of liability as to Erika Tindill and were afforded ample opportunity to address it.

supporting metal rod of the chain-link fence and that both parties considered the chain-link fence to be on or near the mutual boundary line of their properties. The court determined that, "[b]ecause the chain-link fence is located on the mutual boundary line of the parties' properties, the chain-link fence is an appurtenant fixture attached to both properties. Thus, the owners of the adjoining lots are joint owners of the fence located on the mutual boundary line, and each had an ownership interest in the parts that Tindill removed." The court reasoned: "It is undisputed that the plaintiffs never gave permission to, or authorized, Tindill to remove the fence post and top rod. There is no evidence to establish that the removed fence parts have been reinstalled or replaced. As stated [previously], the plaintiffs had an ownership interest in the subject fence parts. Because Tindill has deprived the plaintiffs of their ownership interest in those fence parts by removing them without permission, he is liable to the plaintiffs for those fence parts." On that basis, the court found Tindill liable for conversion.

The defendants claim on appeal that the trial court erred in finding Tindill liable for conversion because the plaintiffs did not allege conversion in their complaint. "The tort of [c]onversion occurs when one, *without authorization*, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights." (Emphasis in original; internal quotation marks omitted.) *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 43–44, 761 A.2d 1268 (2000). "To establish a prima facie case of conversion, the plaintiff had to demonstrate that (1) the material at issue belonged to the plaintiff, (2) that the defendants deprived the plaintiff of that material for an indefinite period of time, (3) that the defendants' conduct was unauthorized and (4) that the defendants' conduct harmed the plaintiff." *Stewart* v. *King*, 121 Conn. App. 64, 74 n.4, 994 A.2d 308 (2010).

The plaintiffs contend that, although they did not expressly plead conversion in their complaint, the allegations contained therein may be liberally construed as sounding in conversion. "[T]he interpretation of pleadings is always a question of law for the court. . . . The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted; internal quotation marks omitted.) *Travelers Ins. Co.* v. *Namerow*, 261 Conn. 784, 795, 807 A.2d 467 (2002).

Here, although the plaintiffs alleged that Tindill destroyed their property when he dismantled portions of the chain-link fence, the plaintiffs' complaint alleges that Tindill's conduct constituted a trespass and sought damages only for trespass. At no time, either in their complaint or motion for summary judgment, did the plaintiffs allege that Tindill's conduct constituted conversion. In fact, in their memorandum of law in support of their motion for summary judgment, the plaintiffs argued that Tindill "committed a trespass" when he removed portions of the chain-link fence. Because the plaintiffs' claim pertaining to the chain-link fence was limited to an alleged trespass by Tindill, the defendants were never given notice of or afforded an opportunity to defend a claim of conversion.[12] Accordingly, the trial

[12] We note the contrast between the conversion claim, which was mentioned for the first time in the trial court's memorandum of decision, and the claim that Erika Tindill was liable for trespass by virtue of her status

court's judgment finding Tindill liable for conversion cannot stand.

The judgment is reversed with respect to the determination that William Tindill is liable for conversion and the case is remanded with direction to vacate that finding; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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as the owner of the property to which the fence was an appurtenant fixture, which was briefed and argued by the parties during the summary judgment proceedings.