# ANSONIA HOUSING AUTHORITY *v.* DARYL PARKS (AC 44894)

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

*Syllabus*

The plaintiff housing authority sought, by way of summary process, to regain possession of certain premises leased to the defendant tenant. The plaintiff sent the defendant a pretermination notice for nonpayment of rent, to which the defendant did not respond. The plaintiff then served the defendant with a notice to quit possession and, thereafter, served the defendant with a summons and complaint seeking immediate possession of the premises. The defendant filed a motion to dismiss for lack of subject matter jurisdiction on the ground that the pretermination notice was defective. The trial court granted the defendant's motion to dismiss and rendered a judgment of dismissal. Nineteen days after the court rendered the judgment of dismissal, the plaintiff filed a motion to reargue, which the court denied. Thereafter, the plaintiff appealed to this court, and the defendant filed a motion to dismiss the appeal for lack of subject matter jurisdiction on the basis that the appeal was untimely, which this court granted. *Held* that this court lacked subject matter jurisdiction to entertain the plaintiff's appeal, the plaintiff having failed to comply with the five day appeal period set forth in the applicable statute (§ 47a-35): the plaintiff could not prevail on its claim that the five day appeal period set forth in § 47a-35 applies only to a tenant and not to a landlord, as the clear and unambiguous language of the statute includes appeals by any party, and the legislative policy in favor of the swift resolution of summary process actions, as reflected in the plain language of the statute, applies whether the appeal is brought by the landlord or the tenant; moreover, because the plaintiff's motion to reargue was filed outside of the statutory five day appeal period, its denial did not give rise to a new appeal period from the underlying judgment, as allowing an appeal from the judgment of dismissal pursuant to the denial of the motion to reargue would circumvent the jurisdictional appeal period created by the legislature; furthermore, this court lacked jurisdiction to review the denial of the plaintiff's motion to reargue because the plaintiff's claims on appeal related only to the merits of the court's legal analysis in granting the defendant's motion to dismiss, and, therefore, permitting review of the denial of the motion to reargue would have required this court to review the merits of the underlying judgment and effectively would have extended the time to appeal from the underlying judgment of dismissal when the time to do so had expired by statute.

Considered January 5—officially released April 5, 2022

*Procedural History*

Summary process action, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Pierson, J.*, granted the defendant's motion to dismiss for lack of subject matter jurisdiction; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court; subsequently, this court granted the defendant's motion to dismiss the appeal. *Appeal dismissed.*

*J.L. Pottenger, Jr.*, with whom were *Richard Tenenbaum*, and *Alexandra Gonzalez* and *Ann Sarnak*, certified legal interns, in support of the motion.

*Andrew Marchant-Shapiro*, in opposition to the motion.

*Opinion*

BRIGHT, C. J. In this summary process action, the plaintiff, Ansonia Housing Authority, appeals from the judgment of dismissal and the denial of its motion to reargue the dismissal. The defendant, Daryl Parks, moves to dismiss this appeal for lack of subject matter jurisdiction on the ground that the plaintiff failed to timely appeal from the judgment of dismissal pursuant to General Statutes § 47a-35. The plaintiff opposes the motion on the grounds that (1) the five day appeal period set forth in § 47a-35 applies only to an appeal brought by a tenant and is not applicable to an appeal brought by a landlord, and (2) its motion to reargue created a new appeal period for the judgment of dismissal. For the reasons that follow, we conclude that § 47a-35 is applicable to landlords and tenants alike and that the plaintiff's motion to reargue does not save the appeal from dismissal because it was not timely filed.[1]

[1] By order dated January 5, 2022, this court granted the defendant's motion to dismiss for lack of subject matter jurisdiction, and indicated that an opinion would follow.

The following facts and procedural history are relevant to our review. The plaintiff leased the property located at 70 Woodlawn Avenue, Unit 65 in Ansonia (premises) to the defendant. The defendant occupied the premises and agreed to pay $350 per month for rent. On January 13, 2020, the plaintiff sent the defendant a pretermination notice for nonpayment of rent. The defendant did not respond to the pretermination notice. On February 7, 2020, the plaintiff served the defendant with a notice to quit possession for nonpayment of rent. The defendant did not quit possession. The plaintiff then served the defendant with a summary process summons and complaint on February 15, 2020, seeking immediate possession of the premises.

The defendant filed an answer to the complaint on February 19, 2020. On March 18, 2020, the defendant filed a motion to dismiss the summary process action for lack of subject matter jurisdiction on the ground that the pretermination notice was defective. The plaintiff objected to the motion to dismiss on April 16, 2020. On March 24, 2021, the trial court granted the motion to dismiss for lack of subject matter jurisdiction based on the defective pretermination notice and dismissed the action.

On April 12, 2021, nineteen days after the court rendered the judgment of dismissal, the plaintiff filed a motion to reargue, which the court denied on August 10, 2021. The plaintiff filed this appeal on August 13, 2021, challenging the court's judgment of dismissal and its denial of the motion to reargue. The defendant moved to dismiss this appeal for lack of subject matter jurisdiction on timeliness grounds on November 12, 2021,[2] and the plaintiff objected.

We begin by setting forth the relevant legal principles that apply to summary process proceedings. "Summary

[2] A motion to dismiss an appeal for lack of jurisdiction may be filed at any time. Practice Book § 66-8.

process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Summary process statutes secure a prompt hearing and final determination. . . . Therefore, the statutes relating to summary process must be narrowly construed and strictly followed." (Citations omitted; internal quotation marks omitted.) *Young* v. *Young*, 249 Conn. 482, 487–88, 733 A.2d 835 (1999).

"Appeals in summary proceedings are governed by the statutes specifically relating thereto rather than statutes relating to appeals generally. . . . Thus, *parties must comply with the five day appeal period* pursuant to § 47a-35, rather than with the general twenty day appeal period provided in Practice Book § 63-1 (a). The requirement that appeals in summary process actions comply with § 47a-35 is jurisdictional. . . . Therefore, compliance with its mandate is a necessary prerequisite to an appellate court's subject matter jurisdiction." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 488–89; see also *HUD/Barbour-Waverly* v. *Wilson*, 235 Conn. 650, 657, 668 A.2d 1309 (1995).

I

We first address the plaintiff's claim that the five day appeal period set forth in § 47a-35 applies only to a defendant tenant, and not to a plaintiff landlord.

The plaintiff's claim raises a question of statutory interpretation. "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." (Internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 648, 224 A.3d 147 (2020).

General Statutes § 47a-35 provides in relevant part: "(a) Execution shall be stayed for five days from the date judgment has been rendered, provided any Sunday or legal holiday intervening shall be excluded in computing such five days.

"(b) No appeal shall be taken except within such five-day period. If an appeal is taken within such period, execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken solely for the purpose of delay or unless the defendant fails to give bond, as provided in section 47a-35a. . . ."

In addressing whether the statutory five day period constitutes a limit on this court's subject matter jurisdiction, our Supreme Court held that "[i]n light of the plain language of § 47a-35, the fact that the summary process statutes are in derogation of common law and the legislative policy in favor of the swift resolution of disputes between landlords and tenants regarding rights of possession, we conclude that an appeal pursuant to § 47a-35 must be brought within five days of the rendering of a summary process judgment." *HUD/Barbour-Waverly* v. *Wilson*, supra, 235 Conn. 659.

These same principles apply with equal force to the issue of whether the five day period applies only to appeals taken by a tenant and not to appeals taken by a landlord. The plain language of § 47a-35 (b) is clear and unambiguous: the words "[*n*]*o appeal* shall be taken" include appeals by any party, including a landlord such as the plaintiff. (Emphasis added.) Furthermore, the legislative policy, in favor of the swift resolution of summary process actions, as reflected in the plain language of the statute, applies whether the appeal is brought by the landlord or the tenant. See *Henry Knox Sherill Corp.* v. *Randall*, 33 Conn. Supp. 522, 523, 358 A.2d 159 (App. Sess. 1976) (rejecting argument that five day appeal period in summary process actions applies only to appeals taken by tenant). Accordingly, the plaintiff was subject to the five day appeal period of § 47a-35.[3]

II

Next, we address whether the plaintiff's filing of a motion to reargue in the trial court affects our analysis. We conclude that, because the motion to reargue was filed outside of the statutory five day appeal period, it does not.

The court rendered a judgment of dismissal in the underlying summary process action on March 24, 2021. Pursuant to § 47a-35, the plaintiff was required to appeal from the judgment of dismissal no later than March 30,

[3] The plaintiff in its opposition to the motion to dismiss contends that the legislative history and original version of § 47a-35 indicate that the five day appeal period applies only to a tenant. Having determined that the statute is clear and unambiguous, we are prohibited from considering extratextual evidence regarding the meaning of the statute. See *State* v. *Bemer*, 339 Conn. 528, 541, 262 A.3d 1 (2021) (if "the meaning of [the language of the statute] is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered" (internal quotation marks omitted)).

2021.[4] Although the plaintiff did not file its appeal by March 30, 2021, it did file a motion to reargue in the trial court on April 12, 2021. The plaintiff contends that its motion to reargue gave rise to a new appeal period from the judgment. We are not persuaded.

Under Practice Book § 63-1 (c) (1),[5] if a motion that would render the judgment ineffective is filed within the appeal period, a new appeal period begins when the court issues a ruling on the motion. A motion to reargue is one such motion. In *Young* v. *Young*, supra, 249 Conn. 496, our Supreme Court held that a timely motion to reargue filed within the five day appeal period "tolled the five day appeal period in § 47a-35" until the motion to reargue was denied. In its analysis, the court specifically noted that the motion to reargue was filed within the five day appeal period. Id., 490 n.17.

In the present case, however, the plaintiff filed its motion to reargue on April 12, 2021, nineteen days after the judgment of dismissal was rendered and thirteen days after the five day appeal period expired on March 30, 2021. Thus, unlike in *Young*, the plaintiff's motion to reargue was not filed within the appeal period and, therefore, the denial of that motion on August 10, 2021, did not give rise to a new appeal period from the judgment of dismissal. Accepting the plaintiff's argument that an untimely motion to reargue gives rise to a new appeal period from the underlying judgment would allow a party, through its own actions, to confer jurisdiction on this court when it otherwise would not exist

[4] Because there was an intervening Sunday between March 24, 2021, and March 29, 2021, the appeal period did not expire until March 30, 2021. See General Statutes § 47a-35 (a).

[5] Practice Book § 63-1 (c) (1) provides in relevant part: "If a motion is filed within the appeal period that, if granted, would render the judgment . . . ineffective, either a new twenty day appeal period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion . . . ."

pursuant to the statute. For that reason, even though the plaintiff filed this appeal within five days from the denial of the motion to reargue, allowing an appeal from the judgment of dismissal pursuant to the denial would circumvent the jurisdictional appeal period created by the legislature. Accordingly, we conclude that the plaintiff's appeal from the underlying judgment of dismissal is jurisdictionally late and must be dismissed.

III

Finally, we address our dismissal of the plaintiff's appeal from the court's denial of its untimely motion to reargue.

Although the plaintiff's motion to reargue was filed too late to give rise to a new appeal period to challenge the judgment of dismissal, we generally will review on appeal whether the trial court abused its discretion in denying such an untimely motion. For example, in *Lopez* v. *Livingston*, 53 Conn. App. 622, 731 A.2d 335 (1999), this court considered an appeal taken from an untimely motion to open a judgment of possession rendered upon the defendants' default for failure to appear. This court concluded that "the defendants' failure to appeal within five days of the rendering of the judgment of possession does not deprive this court of subject matter jurisdiction to consider the defendants' appeal taken from the denial of their motion to open." Id., 623 n.1. This court then considered whether the trial court had abused its discretion in denying the motion to open and concluded that it had not, given the defendants' failure to make a showing of good cause, as required by Practice Book § 17-43, for their failure to appear. Id., 626–27. Thus, the issue on appeal in *Lopez* was not whether the court erred in rendering the underlying judgment, but whether it abused its discretion in denying the motion to open for reasons unrelated to the merits of the judgment.

Nevertheless, this general rule of exercising jurisdiction over appeals from a court's disposition of an untimely postjudgment motion has its limits. In *Tiber Holding Corp.* v. *Greenberg*, 36 Conn. App. 670, 652 A.2d 1063 (1995), this court dismissed an appeal taken from the denial of a motion for reconsideration filed outside the appeal period because the "claims on appeal all relate to the merits of the underlying judgment, rather than to whether the trial court abused its discretion in not reconsidering the judgment." (Footnote omitted.) Id., 672. We reasoned that allowing the defendant to use the untimely motion for reconsideration as a vehicle to challenge the merits of the underlying judgment would "in effect, extend the time to appeal." Id., 671.

Like the appellant in *Tiber Holding Corp.*, the plaintiff in the present case filed an untimely motion to reargue, contesting the propriety of the underlying judgment of dismissal. On appeal, the plaintiff's claims relate only to the merits of the court's legal analysis in granting the defendant's motion to dismiss. In particular, the plaintiff raises the following issues: (1) whether the court erred in applying the holding of *Presidential Village, LLC* v. *Perkins*, 332 Conn. 45, 65–66, 209 A.3d 616 (2019), to find that it lacked subject matter jurisdiction over the underlying case, and (2) whether the court erred in denying the plaintiff's motion to reargue. The plaintiff, in its motion to reargue filed in the trial court, argued only that the court misapplied *Presidential Village, LLC*. Thus, the only issue raised in the plaintiff's appeal is whether the court erred in rendering its judgment of dismissal. As in *Tiber Holding Corp.*, permitting review of the denial of the motion to reargue would require us to review the merits of the underlying judgment and effectively would extend the time to appeal from the underlying judgment of dismissal when the time to do so has expired by statute. Such a result is

particularly untenable when the statutory appeal period has been held by our Supreme Court to be a limit on this court's subject matter jurisdiction. A party cannot confer subject matter jurisdiction on this court that otherwise does not exist by filing a motion to reargue that raises the same arguments considered by the court when it rendered judgment. Accordingly, in the present case, we lack jurisdiction to review the denial of the plaintiff's motion to reargue.

The appeal is dismissed.

In this opinion the other judges concurred.

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## TOWN OF WETHERSFIELD EX REL. DEBORAH MONDE, ANIMAL CONTROL OFFICER *v.* SUZANNE ESER (AC 43705)

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

*Syllabus*

The plaintiff town filed a verified petition pursuant to statute (§ 22-329a) seeking, inter alia, custody in favor of the plaintiff of twenty-four animals that had been taken from the defendant by its animal control officer, M, and that allegedly were neglected and/or cruelly treated. The plaintiff also sought an order requiring the defendant to reimburse the plaintiff for its expenses in caring for the seized animals in the amount of $15 per day per animal in accordance with § 22-329a (h), which provides a direct remedy for a municipality seeking reimbursement for care that it provides to animals adjudicated as abused or neglected. M took custody of the animals after the animals were found in the defendant's van in filthy and unhygienic conditions following a traffic stop. The defendant moved to dismiss the plaintiff's petition, arguing that the trial court lacked subject matter jurisdiction because the plaintiff failed to file the petition within ninety-six hours of the plaintiff's having taken custody of the animals pursuant to § 22-329a (a). The trial court denied the defendant's motion to dismiss, reasoning that the ninety-six hour requirement in § 22-329a was directory rather than mandatory. Subsequently, the trial court held an evidentiary hearing on the verified petition and the court's order to show cause as to why the relief sought should not be granted. At the evidentiary hearing, the owner of a private kennel at which the animals were housed, testified that the defendant had paid

for the board and care of the animals at her kennel in the months following their seizure. The trial court determined that the animals were neglected and cruelly treated and transferred ownership of the animals to the plaintiff and declined to award the plaintiff any monetary compensation, concluding that the defendant voluntarily had paid for the care and custody of the animals at the private kennel, which exceeded $15 per day per animal. Following the trial court's judgment transferring ownership of the animals to the plaintiff, the surviving animals were placed in permanent adoptive homes. On her appeal to this court, the defendant seeks the relief of both having the animals returned to her and a hearing requesting compensation for the moneys that she had spent on the care of the animals following the plaintiff's taking custody of them. During the pendency of the present appeal, the plaintiff moved to dismiss the defendant's appeal as moot, arguing that there was no practical relief that this court could grant to the defendant. *Held*:

1. The plaintiff could not prevail on its claim that the appeal was moot on the ground that this court could not grant the defendant any practical relief because, following the trial court's judgment transferring ownership of the animals to the plaintiff, the defendant's animals either have died or were placed in permanent adoptive homes; there was practical relief that could have been afforded to the defendant should she have prevailed in this appeal in the form of a remand for a hearing regarding the amount of moneys she paid for the care and custody of the animals.
2. The trial court correctly determined that it had subject matter jurisdiction over the plaintiff's verified petition and properly denied the defendant's motion to dismiss claiming that the trial court lacked subject matter jurisdiction because the plaintiff failed to comply with the mandatory ninety-six hour requirement in § 22-329a (a): because of the strong presumption in favor of jurisdiction, there must be a strong showing of legislative intent to create a time limitation that, in the event of noncompliance, would act as a subject matter jurisdictional bar; an examination of the legislative history of § 22-329a (a) evidenced that the primary purpose of the statute was to protect animals from imminent harm and, therefore, if the failure to file a verified petition within the ninety-six hour time frame deprived the trial court of subject matter jurisdiction, animals would be returned to the environment in which they were in imminent harm, thwarting the very purpose of § 22-329a (a); moreover, although the statute's requirement to file a verified petition is stated solely in affirmative words, there is no language that expressly prohibited the plaintiff from filing a verified petition after ninety-six hours have passed; accordingly, the failure to comply with the ninety-six hour period for filing a verified petition in § 22-329a (a) did not divest the trial court of subject matter jurisdiction.
3. The defendant could not prevail on her unpreserved claim that her right to procedural due process under the fourteenth amendment to the United States constitution was violated because the plaintiff failed to file the

verified petition within ninety-six hours and a hearing was not held within fourteen days as required by § 22-329a (d), which deprived the defendant of funds that she was required to pay according to § 22-329a (h); although the defendant claimed that she suffered deprivation due to the procedures, namely, the increased cost of housing the animals at the private kennel, the defendant's claim failed under the third prong of *State* v. *Golding* (213 Conn. 233) because the defendant voluntarily paid for the care, custody, and other expenses of the seized animals, and, therefore, the defendant could not be constitutionally deprived of funds that she voluntarily paid.

Argued January 11—officially released April 5, 2022

*Procedural History*

Verified petition seeking, inter alia, custody in favor of the plaintiff of certain animals taken from the defendant's possession that were allegedly neglected and/or cruelly treated, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Aurigemma*, *J.*, denied the defendant's motion to dismiss; thereafter, the court, *Aurigemma*, *J.*, rendered judgment in part for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

*David V. DeRosa*, for the appellant (defendant).

*John W. Bradley, Jr.*, with whom, on the brief, were *A. Ryan McGuigan* and *Thomas A. Plotkin*, for the appellee (plaintiff).

*Opinion*

DiPENTIMA, J. In this animal welfare action, the defendant, Suzanne Eser, appeals from the judgment of the trial court rendered in favor of the plaintiff, the town of Wethersfield, following the court's denial of her motion to dismiss the plaintiff's verified petition for lack of subject matter jurisdiction. On appeal, the plaintiff argues that the appeal is moot, and the defendant claims that (1) the trial court incorrectly determined that the plaintiff's failure to file a verified petition within ninety-six hours of taking custody of the animals,

as required by General Statutes (Supp. 2022) § 22-329a (a),[1] did not deprive it of subject matter jurisdiction and, alternatively, (2) she was deprived of procedural due process. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant. On May 27, 2019, the plaintiff's animal control officer, Deborah Monde, took custody of twenty-four animals, including twenty-one dogs, two cats and one parrot, which were found, as a result of a traffic stop, to have been housed in the defendant's van in filthy and unhygienic conditions.[2] Upon the belief that the animals were in imminent harm and were neglected and/or cruelly treated, Monde took custody of them pursuant to § 22-329a (a). In a parallel criminal proceeding, the defendant was arrested and charged with eighteen counts of cruelty to animals in violation of General Statutes § 53-247 (a).

On July 18, 2019, the plaintiff filed a verified petition pursuant to § 22-329a (c),[3] seeking an order vesting in the plaintiff or the Department of Agriculture's animal control division (state animal control) the temporary and permanent custody of the seized animals and an

[1] We note that, although the legislature has amended § 22-329a since the events underlying this appeal; see Public Acts 2021, No. 21-90; those amendments have no bearing on the merits of this appeal. All references herein to § 22-329a are to the version of the statute codified in the 2022 supplement.

[2] At the evidentiary hearing, Gail Block, a veterinarian who testified for the plaintiff, characterized the condition of the animals as "horrific and upsetting and unsettling" and described the defendant's treatment of them as "neglect to the point of abuse . . . ."

[3] General Statutes (Supp. 2022) § 22-329a (c) provides: "Such officer shall file with the superior court which has venue over such matter or with the superior court for the judicial district of Hartford at Hartford a verified petition plainly stating such facts of neglect or cruel treatment as to bring such animal within the jurisdiction of the court and praying for appropriate action by the court in accordance with the provisions of this section. Upon the filing of such petition, the court shall cause a summons to be issued requiring the owner or owners or person having responsibility for the care of the animal, if known, to appear in court at the time and place named."

order that the defendant pay monetary compensation to the plaintiff or the state animal control in the amount of $15 per animal per day from the date that the animals were seized until the date that permanent ownership vests in the plaintiff or the state animal control. On July 19, 2019, the court issued an order to show cause why the relief sought in the verified petition should not be granted, commanding the defendant to appear before the court on August 19, 2019. By consent of both parties, the plaintiff filed on August 6, 2019, a motion for a continuance, which motion the court granted.

On August 30, 2019, the defendant filed a motion to dismiss the petition arguing that the court lacked subject matter jurisdiction because the petition had not been filed within ninety-six hours of the plaintiff's having taken custody of the animals as required by § 22-329a (a). The court denied the motion to dismiss for lack of subject matter jurisdiction, reasoning that the ninety-six hour requirement in § 22-329a was directory rather than mandatory.

Beginning on December 10, 2019, after the plaintiff filed a motion for an expedited hearing on the petition, the parties engaged in a two day evidentiary hearing before the court on the plaintiff's petition and the court's order to show cause. On December 11, 2019, the court issued its findings of fact and conclusions of law from the bench, finding that the animals were neglected and cruelly treated and transferring ownership of them to the plaintiff.[4] The court concluded that there was evidence that the amount that the defendant

[4] The plaintiff, in the verified petition, and the court in its December 11, 2019 oral ruling, referred to all of the animals as "dogs," even though two cats and one parrot were also seized from the defendant's van. General Statutes § 22-327 (1) defines "[a]nimal" as "any brute creature, including, but not limited to, dogs, cats, monkeys, guinea pigs, hamsters, rabbits, birds and reptiles . . . ." It is uncontested that the court's order encompassed the noncanine animals that were seized from the defendant's van.

voluntarily had paid for the care and custody of the animals exceeded $15 per day per animal and, accordingly, declined to award the plaintiff any monetary compensation. This appeal followed. Additional facts will be set forth as necessary.

I

As a preliminary matter, we address the issue of mootness. During the pendency of the present appeal, the plaintiff filed a motion to dismiss the appeal as moot. In that motion, the plaintiff argued that there is no practical relief that this court can grant to the defendant because, following the court's judgment transferring ownership of the animals to the plaintiff, the animals were transferred from the private kennel in which they were housed to the Connecticut Humane Society and subsequently were placed in permanent adoptive homes. This court denied the motion. At oral argument before this court, the plaintiff's counsel argued that this court should have granted the motion to dismiss the appeal as moot, arguing that there is no practical relief that we can afford to the defendant. We are not persuaded.

"The question of mootness . . . may be raised at any time . . . ." (Internal quotation marks omitted.) *Wozniak* v. *Colchester*, 193 Conn. App. 842, 852, 220 A.3d 132, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019). "Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the

appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary." (Citation omitted; internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 506–507, 970 A.2d 578 (2009). "It is well established that an appeal is considered moot if there is no possible relief that the appeals court can grant to the appealing party, even if the court were to be persuaded that the appellant's arguments are correct." *Wallingford Center Associates* v. *Board of Tax Review*, 68 Conn. App. 803, 807, 793 A.2d 260 (2002).

On appeal, the defendant seeks the relief of both having the animals returned to her and a hearing requesting compensation for the moneys that she had spent on the care of the animals following the plaintiff's taking custody of them.[5] The requested relief of the

[5] The plaintiff argues that the defendant "is judicially estopped from seeking [the] return of the animals, as she abandoned that claim expressly" in her opposition to the plaintiff's motion to dismiss the appeal as moot, wherein, according to the plaintiff, the defendant claimed that the appeal was justiciable because her sole requested remedy was the return of moneys she had spent on the care of the animals following their seizure. "Typically, judicial estoppel will apply if: 1) a party's later position is clearly inconsistent with its earlier position; 2) the party's former position has been adopted in some way by the court in the earlier proceeding; and 3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel. . . . We further limit judicial estoppel to situations where the risk of inconsistent results with its impact on judicial integrity is certain. . . . Thus, courts generally will not apply the doctrine if the first statement or omission was the result of a good faith mistake . . . or an unintentional error. . . . Because the rule is intended to prevent improper use of judicial machinery . . . judicial estoppel is an equitable doctrine invoked by a court at its discretion . . . ." (Citations omitted; internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 170–71, 2 A.3d 873 (2010). Although the defendant highlighted in her opposition that she was seeking the return of funds, she did not, as the plaintiff contends, abandon the ability to argue on appeal for the return of the animals. We decline the plaintiff's

return of the animals to the defendant raises multiple questions. First, because all of the animals either are deceased or have been placed in permanent adoptive homes,[6] the plaintiff no longer has an ownership interest in them. Additionally, the court file in the criminal proceedings, of which we take judicial notice,[7] reveals that on December 3, 2021, the criminal trial court sentenced the defendant to a total effective sentence of six years' incarceration, execution suspended, and three years' probation, including a special condition of probation that the defendant not possess any animals.[8] See *State* v. *Eser*, Superior Court, judicial district of New Britain, Docket No. CR-19-0321325-S (December 3, 2021). The defendant argues that, nonetheless, the animals somehow can be removed from their permanent homes and a constructive trust can be established wherein a third party would care for the animals until the defendant's probationary term ends, and she legally is permitted to care for them. We need not decide whether we are able to afford the defendant this relief because there is practical relief that can be afforded to her should she prevail in this appeal in the form of a remand for a hearing regarding the amount of moneys paid by the defendant for the care and custody of the animals. Accordingly, because there is some practical relief that we could afford to the defendant, the present appeal is not moot. In light of this, we turn our attention to the merits of the defendant's claims.

invitation to apply judicial estoppel for a number of reasons, including that the defendant's positions were not clearly inconsistent.

[6] Monde's affidavit, which was attached to the plaintiff's motion to dismiss the appeal as moot, contains this information.

[7] See, e.g., *In re David M.*, 29 Conn. App. 499, 507, 615 A.2d 1082 (1992) (at any stage of proceedings, including on appeal, court may take judicial notice of file in another case whether case is between same parties).

[8] The defendant entered into a plea agreement with the state, which the court accepted, wherein she pleaded guilty pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to nine counts of cruelty to animals in violation of § 53-247 (a).

II

The defendant first claims that the trial court erred in denying her motion to dismiss the verified petition for lack of subject matter jurisdiction. She contends that the statutory time requirement in § 22-329a (a), which provides that a verified petition be filed within ninety-six hours after the animals are seized, is mandatory, rather than directory as the court determined, and, therefore, the plaintiff's failure to comply with that requirement deprived the trial court of subject matter jurisdiction over the petition. We conclude that the trial court was not deprived of subject matter jurisdiction.

We first note our standard of review regarding motions to dismiss. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Filippi* v. *Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005).

The defendant argues that the proper legal analysis for determining whether the statutory time limitation at issue serves as a subject matter jurisdictional bar involves the question, as analyzed under the factors in *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 757–58, 104 A.3d 713 (2014), of whether the relevant statutory provision is mandatory or directory. We disagree. Because the gravamen of the defendant's argument is that the statutory time limitation is subject matter jurisdictional, we do not examine the factors in *Electrical Contractors, Inc.*, in order to address the defendant's argument. Rather, our analysis is guided by the standards articulated in

*Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 777 A.2d 645 (2001). In that case, our Supreme Court "clarified the analysis for deciding whether a time limit is subject matter jurisdictional." *Commission on Human Rights & Opportunities* v. *Savin Rock Condominium Assn., Inc.*, 273 Conn. 373, 379, 870 A.2d 457 (2005). The court stated that some prior cases incorrectly "confused the concepts of mandatory language and subject matter jurisdiction" and "at times [have] *equated* the intent of the legislature to create a mandatory limitation with the intent to create a subject matter jurisdictional limit." (Emphasis in original.) *Williams* v. *Commission on Human Rights & Opportunities*, supra, 268.

In *Williams*, the court held that the proper analysis for determining whether a statutory time limitation is a subject matter jurisdictional bar is as follows. "The question of whether a statutory time limitation is subject matter jurisdictional is a question of statutory interpretation. . . . Thus, we look to whether the legislature intended the time limitation to be jurisdictional. The legislative intent is to be discerned by reference to the language of the statute, its legislative history and surrounding circumstances, the policy the limitation was designed to implement, and the statute's relationship to the existing legislation and common law principles governing the same subject matter. . . . In light of the strong presumption in favor of jurisdiction, we require a strong showing of a legislative intent to create a time limitation that, in the event of noncompliance, acts as a subject matter jurisdictional bar." (Internal quotation marks omitted.) Id., 267.

"Although . . . mandatory language may be an indication that the legislature intended a time requirement to be jurisdictional, such language alone does not overcome the strong presumption of jurisdiction, nor does such language alone prove strong legislative intent to

create a jurisdictional bar. In the absence of such a showing, mandatory time limitations must be complied with absent an equitable reason for excusing compliance, including waiver or consent by the parties. Such time limitations do not, however, implicate the subject matter jurisdiction of the agency or the court." Id., 269–70.

We first turn to the statutory language. "As with any issue of statutory interpretation, our initial guide is the language of the statute itself." Id., 270; see also General Statutes § 1-2z. General Statutes (Supp. 2022) § 22-329a (a) provides in relevant part: "Any animal control officer or regional animal control officer . . . may take physical custody of any animal when such animal control officer has reasonable cause to believe that such animal is in imminent harm and is neglected or is cruelly treated . . . and, not later than ninety-six hours after taking physical custody, shall proceed as provided in subsection (c) of this section . . . ." Subsection (c) pertains to the filing of a verified petition alleging the neglect or cruel treatment of the animal. See General Statutes (Supp. 2022) § 22-329a (c).[9]

The use of the word "shall" in the statute is not dispositive. See *Doe* v. *West Hartford*, 328 Conn. 172, 184, 177 A.3d 1128 (2018). Although the statute provides that an animal control officer "*not later than* ninety-six hours after taking physical custody, shall proceed as provided in subsection (c) of this section"; (emphasis added) General Statutes (Supp. 2022) § 22-329a (a); the requirement to file a verified petition is otherwise stated solely in affirmative terms with no language expressly prohibiting an animal control officer from filing a verified petition after ninety-six hours have passed. Significantly, the statute does not invalidate or otherwise impose penalties in the event that a plaintiff fails to

[9] See footnote 3 of this opinion.

satisfy the ninety-six hour time frame for filing a verified petition. See, e.g., *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 465–66, 692 A.2d 742 (1997) ("if there is no language that expressly invalidates any action taken after noncompliance with the statutory provisions, the statute should be construed as directory" (internal quotation marks omitted)). "Traditionally, it is strong mandatory language . . . [that] is consistent with the notion of a subject matter jurisdictional limit." (Internal quotation marks omitted.) *Commissioner of Mental Health & Addiction Services* v. *Saeedi*, 143 Conn. App. 839, 850, 71 A.3d 619 (2013). We conclude that § 22-329a (a) does not contain strong mandatory language. See id.

We next turn to the legislative history of § 22-329a (a). "In light of the strong presumption in favor of jurisdiction, we require a strong showing of a legislative intent to create a time limitation that, in the event of noncompliance, acts as a subject matter jurisdictional bar." (Internal quotation marks omitted.) *Williams* v. *Commission on Human Rights & Opportunities*, supra, 257 Conn. 267. We find no such strong showing of legislative intent.

The legislative history of § 22-329a reveals that the 2007 amendment to that statute; see Public Acts 2007, No. 07-230, § 1; substantially revised it in response to Judge Berger's criticism of the prior version of the statute in *State ex rel. Griffin* v. *Thirteen Horses*, Docket No. CV-06-4019747-S, 2006 WL 1828459 (Conn. Super. June 16, 2006).[10] In that decision, Judge Berger noted that portions of the statute were "difficult to understand because if the court has found probable cause to believe that an animal is neglected or cruelly treated, then leaving the animal in the owner's custody pending a hearing

[10] See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 14, 2007 Sess., p. 4426, remarks of Senator Andrew J. McDonald.

would only perpetuate its suffering. . . . One could argue that . . . the legislature did not intend to require a judicial finding in advance of the seizure . . . . If the legislature does intend to vest the seizure decision in the animal control officer, rather than in the court, the statute should be redrafted accordingly, with provisions for immediate filing of the petition and a speedy hearing." (Citations omitted.) Id., *4-5. Judge Berger concluded with respect to the prior revision of the statute that, "despite the deficiencies of the statute, the state successfully complied with its twofold obligation of obtaining a judicial determination of reasonable cause prior to seizure . . . and following the filing process . . . the state obtained the search and seizure warrant from the court . . . and filed its petition with the court . . . ." Id., *5.

When discussing the 2007 amendment on the floor of the House of Representatives, Representative Gerry Fox explained the origins of the amendment: "This bill came to us from the Commissioner of Agriculture and requested a change to the way that animal control officers currently handle situations where animals are treated cruelly or neglected. Presently, when an animal control officer sees a situation that may appear to be dangerous to an animal, they're required to go to court and get a warrant. What this would allow is if there's reasonable cause to believe that an animal [is] in imminent harm of being cruelly or negligently treated, the animal control officer may, at that time, seize the animal." 50 H.R. Proc., Pt. 25, 2007 Sess., p. 8077, remarks of Representative Gerry Fox. In support of the legislation, Representative Urban stated: "This bill makes it much easier when there is an animal that is being subjected to cruel treatment or a cruel situation to get in and to mitigate that situation and be able to move the horse, the dog, the cat, the puppy, whatever it happens to be, out of that situation and into a place where they will

be able to receive the treatment they need." Id., pp. 8078–79, remarks of Representative Diana Urban. In the judiciary committee, the then Commissioner of Agriculture, F. Philip Prelli, explained that "the Department of Agriculture is the lead agency in investigation of animal cruelty and negligence. . . . Even if it's done on a local level, the department is involved with those. The primary purpose of [this] legislative proposal is to better define and clarify the section to enable animal control officers to take physical custody of animals that animal control officers have a reasonable cause to believe are in imminent harm and are neglected and/or being cruelly treated. One of the things that we've noticed about the law that's there, it's been a while since it's been modified, and the language tends to be language that was written a number of years ago. . . . Usually, the animal control officers will go in there and try to work with the people to either get the animals fed, get the treatment up right, so they're treated correctly, and then go to the steps. And if they still feel they need to take those steps, they will get a warrant first. So the steps we're defining here are never going to be the norm. But there are times when our animal control officers will see an animal that is truly in jeopardy of dying, and we've seen that. We've seen horses down, and we've seen cows down, where we've had to try to seize those animals and then go and get the court order. So what this does is then sets up the procedure that will give us the opportunity to seize the animals. Then within [ninety-six] hours, we will have to get a court order . . . ." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 14, 2007 Sess., pp. 4422–23, remarks of Commissioner of Agriculture F. Philip Prelli.

According to the legislative history, the process in § 22-329a (a) for taking physical custody of animals in imminent harm is not the norm. Rather, the usual process is codified in § 22-329a (b), which provides in relevant part that "[a]ny animal control officer or regional

animal control officer . . . may take physical custody of any animal upon issuance of a warrant finding probable cause that such animal is neglected or is cruelly treated . . . and shall thereupon proceed as provided in subsection (c) of this section . . . .'' General Statutes (Supp. 2022) § 22-329a (b). Accordingly, when, prior to taking physical custody of an animal, a warrant is issued finding probable cause that such animal is neglected or cruelly treated, there is no statutory time frame for the filing of a verified petition.

It is evident that the ninety-six hour time frame in § 22-329a (a) serves to expedite the process of filing a verified petition in situations where, without first obtaining a warrant, an animal control officer takes physical custody of an animal that is reasonably believed to be in imminent harm. Although the ninety-six hour time frame serves to protect the interest of the owner in situations involving imminent harm where a warrant is not first obtained, it is clear from the legislative history that the primary purpose of § 22-329a (a) is not the protection of the owner, but rather the protection of animals from imminent harm. There is no indication from the legislative history that the legislature intended in such circumstances for the petition to be filed within the ninety-six hour time frame or not at all. If the failure to file a verified petition within the ninety-six hour time frame deprived the trial court of subject matter jurisdiction, then animals would be returned to the environment in which they were in imminent harm. This would thwart the very purpose of § 22-329a (a) by returning animals to the imminently harmful situation from which the statute sought to protect them.

The defendant argues, however, that the legislature intended the ninety-six hour time frame in § 22-329a (a) to be subject matter jurisdictional in order to reduce the costs incurred by an owner and to ensure that the animals are not kept in kennels for long periods of time.

Although animals may need to be in permanent homes in order to thrive and, although an owner is responsible, pursuant to § 22-329a (h),[11] for expenses incurred by the state or municipality for the care and custody of animals if the court finds that the seized animals have been neglected or cruelly treated, the defendant's argument is weakened by the fact that there is no such time requirement in § 22-329a (b) for the filing of a petition in situations in which an animal is seized pursuant to a warrant.

In light of the statute's text, its relationship to other statutes, its legislative history and purpose, we determine that a failure to comply with the ninety-six hour period for filing a verified petition in § 22-329a (a) does not divest the trial court of subject matter jurisdiction. Accordingly, we conclude, albeit for different reasons, that the trial court correctly concluded that it had subject matter jurisdiction over the verified petition and correctly denied the defendant's motion to dismiss.

[11] General Statutes (Supp. 2022) § 22-329a (h) provides: "If the court finds that the animal is neglected or cruelly treated, the expenses incurred by the state or a municipality in providing proper food, shelter and care to an animal it has taken custody of under subsection (a) or (b) of this section and the expenses incurred by any state, municipal or other public or private agency or person in providing temporary care and custody pursuant to an order vesting temporary care and custody, calculated at the rate of fifteen dollars per day per animal or twenty-five dollars per day per animal if the animal is a horse or other large livestock until the date ownership is vested pursuant to subdivision (1) of subsection (g) of this section shall be paid by the owner or owners or person having responsibility for the care of the animal. In addition, all veterinary costs and expenses incurred for the welfare of the animal that are not covered by the per diem rate shall be paid by the owner or owners or person having responsibility for the animal."

According to § 22-329a (h), an owner is not responsible for expenses incurred after the date that ownership vests pursuant to § 22-329a (g) (1), which provides: "If, after hearing, the court finds that the animal is neglected or cruelly treated, it shall vest ownership of the animal in any state, municipal or other public or private agency which is permitted by law to care for neglected or cruelly treated animals or with any person found to be suitable or worthy of such responsibility by the court." General Statutes (Supp. 2022) § 22-329a (g) (1).

## III

The defendant next claims in the alternative that her right to procedural due process under the fourteenth amendment to the United States constitution was violated. Specifically, she argues that she "paid a shocking amount of money in this case because the [plaintiff] . . . ignored the 96 hour provision to initiate an action to seize these animals and waited 52 days, and then a hearing was not held within 14 days as required by . . . § 22-329a (d) but 198 days after the [plaintiff] seized the animals."[12] We reject this unpreserved claim.

Pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989),[13] as modified by *In re Yasiel R.*, 317 Conn.

[12] General Statutes (Supp. 2022) § 22-329a (d) provides: "If physical custody of an animal has been taken pursuant to subsection (a) or (b) of this section and it appears from the allegations of the petition filed pursuant to subsection (c) of this section and other affirmations of fact accompanying the petition, or provided subsequent thereto, that there is reasonable cause to find that the animal's condition or the circumstances surrounding its care require that temporary care and custody be immediately assumed to safeguard its welfare, the court shall either (1) issue an order to show cause why the court should not vest in some suitable state, municipal or other public or private agency or person the animal's temporary care and custody pending a hearing on the petition, or (2) issue an order vesting in some suitable state, municipal or other public or private agency or person the animal's temporary care and custody pending a hearing on the petition. A hearing on the order issued by the court pursuant to subdivision (1) or (2) of this subsection shall be held not later than fourteen days after the issuance of such order. The service of such order may be made by any officer authorized by law to serve process, state police officer or indifferent person and shall be served not less than forty-eight hours prior to the date and time of such hearing. If the owner or owners or person having responsibility for the care of the animal is not known, notice of the time and place of the hearing shall be given by publication in a newspaper having a circulation in the town in which such officer took physical custody of such animal not less than forty-eight hours prior to the date and time of such hearing."

[13] Although the defendant did not affirmatively request review pursuant to *Golding* of her unpreserved claim, we nonetheless examine the claim pursuant to that doctrine because she "need only raise that claim in [her] main brief, wherein [s]he must present a record that is [adequate] for review and affirmatively [demonstrate] that [her] claim is indeed a violation of a fundamental constitutional right." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 755, 91 A.3d 862 (2014).

773, 781, 120 A.3d 1188 (2015), "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists . . . and (4) if subject to harmless error analysis, the [plaintiff] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The first two [*Golding*] requirements involve a determination of whether the claim is reviewable; the second two requirements involve a determination of whether the defendant may prevail." *State* v. *George B.*, 258 Conn. 779, 784, 785 A.2d 573 (2001).

The record is adequate for review and the defendant alleges a violation of a constitutional right. Thus, we turn to the third prong in *Golding*, and focus on whether the alleged constitutional violation exists. The defendant's constitutional argument is based on the premise that § 22-329a fails to provide a meaningful postdeprivation remedy for the loss of her property. Postdeprivation remedies generally occur as a way of providing an owner with due process *after* property has been permanently disposed of out of necessity due to the lack of time to conduct a predeprivation hearing. See, e.g., *Gilbert* v. *Homar*, 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997) (United States Supreme Court has "recognized, on many occasions, that where a [s]tate must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the [d]ue [p]rocess [c]lause"); *Brown* v. *Hartford*, 160 Conn. App. 677, 687–88, 127 A.3d 278 (city code that allowed for demolition of building that posed immediate danger to life or property did not violate due process where property owner

afforded postdeprivation process), cert. denied, 320 Conn. 911, 128 A.3d 954 (2015). An owner may have seized animals returned pursuant to § 22-329a (g) (3), if, after a hearing, the court finds that the animals were not cruelly treated or neglected. Thomas Richard Cherry, an attorney whose practice was limited to pro bono animal advocacy, stated in his affidavit, which was attached to the plaintiff's motion for an expedited hearing on the petition, that the seized animals had been held in kennels following the defendant's arrest and that they could not be placed in permanent homes without a determination of ownership. Because a possible outcome of the procedures in § 22-329a is the return to the owner of the animals, the hearing at issue is not a postdeprivation remedy, which remedy typically follows a permanent deprivation. Nevertheless, our review of the defendant's procedural due process claim is guided by the following well established test.

"In *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court indicated that to determine the level of procedural due process necessary, we must consider three factors: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedure used and the probable value, if any, of additional substitute procedural safeguards and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Kostrzewski* v. *Commissioner of Motor Vehicles*, 52 Conn. App. 326, 336–37, 727 A.2d 233, cert. denied, 249 Conn. 910, 733 A.2d 227 (1999).

"The fundamental requisite of due process of law is the opportunity to be heard. . . . The hearing must be at a meaningful time and in a meaningful manner. . . .

Inquiry into whether particular procedures are constitutionally mandated in a given instance requires adherence to the principle that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation omitted; internal quotation marks omitted.) *GMAC Mortgage Corp.* v. *Glenn*, 103 Conn. App. 264, 273–74, 931 A.2d 290 (2007).

Applying the *Mathews* criteria to the present case, we conclude that although the defendant has a private interest in the ownership of her animals, the risk of erroneous deprivation from the application of the procedures in § 22-329a is low. The defendant's argument focuses on the timing of the hearing. She contends that she was not given an opportunity to be heard at a meaningful time and in a meaningful manner and that the delays in the process leading up to the hearing caused her to be "deprived . . . of $118,000 of funds, she was required to pay according to . . . § 22-329a (h)."

The defendant's argument focuses on two distinct time frames: (1) the time from the seizure of the animals until the filing of the verified petition and (2) the time from the filing of the petition until the December, 2019 evidentiary hearing on the plaintiff's petition for temporary and permanent custody of the animals and the court's order to show cause. It is not clear from the record why the plaintiff did not file the verified petition within ninety-six hours of the animal control officer taking physical custody of them. Although we do not countenance such delay, for the reasons that follow, we conclude that the defendant was not deprived of procedural due process. Regarding the second time frame, the record reveals that the defendant's own tac-

tics[14] in the parallel criminal proceedings played a role in the delay of the December, 2019 hearing in the present case.[15] One day after the filing of the verified petition, the court, on July 19, 2019, ordered that a hearing be held on August 19, 2019, to show cause why the relief in the verified petition should not be granted. The plaintiff filed a motion for a continuance of that hearing by consent of both parties and after it became clear that a global settlement involving the defendant's willing surrender of the animals was not possible, the plaintiff filed on November 15, 2019, a motion for an expedited hearing in the present proceeding. In an affidavit attached to the plaintiff's motion for an expedited hearing, Cherry stated that, in the criminal matter, the defendant, whom Cherry described as an "animal hoarder," consistently sought delay of all disposition hearings and, as a result of such delay in the proceedings, the animals continued to remain under the de facto care of the defendant who was paying for private kennels for the animals. Cherry further stated that the defendant was able to gain access to the animals and feed them "inappropriate food" until the criminal court ordered that she have no contact with the animals as a condition of her release.

[14] At oral argument before this court, the defendant's counsel stated, regarding the delay following the filing of the verified petition until the December, 2019 hearing, that "we don't have complete clean hands in that part of the process."

[15] The plaintiff contends that the defendant waived her due process claim by acquiescing in the delay in the proceedings, by failing to take affirmative steps to expedite the proceedings and by pursuing strategies that further delayed a hearing on the petition. In response to the plaintiff's waiver argument, the defendant in her reply brief took a position contradictory to that in her main brief and stated that she "did not challenge the delays in the hearing, only the delay in initiating the postdeprivation process, as the defense counsel did below. That is where this case begins and ends." "Waiver is the intentional relinquishment of a known right." (Internal quotation marks omitted.) *Jacobson* v. *Zoning Board of Appeals*, 137 Conn. App. 142, 150, 48 A.3d 125 (2012). Nothing in the record indicates that the defendant knowingly waived her right to claim on appeal that her right to procedural due process had been violated.

Notwithstanding the causes of the delay in the hearing, whether due to the actions of the plaintiff or the defendant, it is undisputed that the defendant *voluntarily* paid for the care, custody and other expenses of the seized animals. At the evidentiary hearing, Helen Larkin, the owner of Larkin's Run kennel, at which the animals were housed, testified as a witness for the defendant. She stated that, starting on July 5, 2019, the defendant paid for the board and care of the animals at her kennel. She also testified as to the amount of money spent by the defendant in that regard. The court determined that "there's been evidence that the amount [the defendant] has paid or has obligated herself to pay exceeds the $15 per day per animal so the court is not going to award anything to the town on that score." The deprivation that the defendant claims to have suffered due to the procedures employed in the present case, namely, the increased cost of housing the animals at the kennel, was an obligation that the defendant assumed when she voluntarily paid for the private kenneling of the animals. It is axiomatic that the defendant cannot be unconstitutionally deprived of funds that she *voluntarily* paid.

Turning to the final factor in *Mathews* v. *Eldridge*, supra, 424 U.S. 335, we consider the plaintiff's interest, including any fiscal and administrative burdens that the additional procedural requirements would entail. The plaintiff has a significant interest in protecting the welfare of neglected or cruelly treated animals that are in imminent harm by allowing animal control officers to take physical custody of such animals immediately. On the basis of the foregoing, we conclude that the procedures set forth in § 22-392a provided the defendant with sufficient due process and consequently the defendant's claim fails under the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

# DIGITAL 60 & 80 MERRITT, LLC *v.* BOARD OF ASSESSMENT APPEALS OF THE TOWN OF TRUMBULL ET AL.
## (AC 44296)

Alvord, Prescott and DiPentima, Js.

*Syllabus*

The defendant town of Trumbull and its Board of Assessment Appeals appealed to this court from the judgment of the trial court sustaining the plaintiff's appeals from the decisions of the board, which upheld the town's tax assessments levied against the plaintiff's real property. In 2010, the plaintiff purchased the real property with the intent of leasing it out as a data center, a location to house and secure electronic data. It organized the building into colocation suites, each of which were occupied by multiple users. The plaintiff provided the space, the raised floors, power, cooling, Internet connectivity, security, and the redundancy required to store the electronic data, and the colocation customers either provided their own computers or leased them from the plaintiff. In 2011, the plaintiff decided to remediate and expand the property to, inter alia, build two additional data suites, Suite 210 and Suite 220. The plaintiff intended each suite to be occupied by a single wholesale customer, who would supply its own computers and racks. The plaintiff, however, was unable to find wholesale customers for the new suites and, by mid-2013, it was leasing space within Suite 210 to colocation customers. The construction on Suite 220 was never completed. By the time of trial, it remained raw space with only an unfinished concrete floor, walls, and a ceiling in place. As a result, the plaintiff claimed that the suite was unfit to be leased even as powered base building (PBB) space, which would require the plaintiff to supply a space with completed exterior construction, power, and connectivity, while the customer would build out the interior to its own specifications. The town assessed the property as part of its revaluation for its 2011 grand list. It then conducted interim reassessments of the property in 2013 and 2014, pursuant to the applicable statute (§ 12-53a), to take into account the new construction. Following these reassessments, the town assessor determined that the fair market value of the property, based on its physical condition as of October 1, 2013, and October 1, 2014, respectively, and market conditions as of October 1, 2011, was approximately $145,446,000. The plaintiff appealed the assessor's 2013 and 2014 valuations to the board, which denied its appeals. The plaintiff then appealed to the trial court, which found that the fair market value of the property, based on its physical condition as of October 1, 2013, and October 1, 2014, and market conditions as of October 1, 2011, was $109,000,000, and, accordingly, it sustained the plaintiff's appeals with

respect to its claims of excessive valuation. On the defendants' joint appeal to this court, *held*:

1. The trial court's determination that Suite 220 had no income and no income potential in 2011 was not clearly erroneous:

a. Contrary to the defendants' claim, there was evidence in the record to support the trial court's factual finding that there was no market for Suite 220 in Trumbull in 2011, namely, the testimony of L, the appraiser serving as the plaintiff's trial expert, and D, one of the plaintiff's executives, which the court found to be credible.

b. The defendant's argument that Suite 220 clearly added value to the property, as allegedly confirmed by L's cost approach analysis, rested on a faulty premise: the trial court found that the income capitalization approach, rather than the cost approach, was the most reliable and appropriate valuation method for the property, and the defendants conceded that, under such an approach, the income producing potential of the suite was determinative of its value; accordingly, because there was evidence in the record that there was no actual or market rent for Suite 220, this court could not conclude that the trial court's finding that no income potential existed was erroneous.

c. Despite the defendants' request, this court declined to usurp the role of the trial court and reweigh the evidence relating to the market for Suite 220 in Trumbull in 2011 in their favor, as such evidence was before the trial court and carefully considered by it, and it was the role of the trial court to determine the credibility of such evidence.

d. Contrary to the defendants' claim, it was not improper for the trial court to consider evidence of the Trumbull data center market in 2013 or 2014 in determining that there was no market for Suite 220 in Trumbull in 2011: that evidence was relevant because S, the appraiser serving as the defendants' trial expert, considered information regarding market rent and market conditions through October 1, 2014, in his analysis; moreover, although the trial court referenced the plaintiff's argument concerning the lack of success in renting the suite within the years immediately prior to trial, it made clear that such argument was not material to its decision and that it instead relied on evidence of the data market in Trumbull in 2011, 2013 and 2014 in determining that there was no market for Suite 220 as of the revaluation date; furthermore, the defendants failed to provide this court with any legal support for their argument that the trial court's consideration of the market through S's 2014 cutoff date was improper; accordingly, the trial court did not err in concluding that none of the evidence credibly supported the defendants' claim that Suite 220 was marketable as PBB space in 2011, 2013 and 2014.

e. Contrary to the defendants' assertion, the trial court's finding that there was no market for Suite 220 was not inconsistent with its market rent analysis: evidence in the record, namely, the plaintiff's investment committee memoranda and D's testimony, supported the trial court's conclusion that any market for the property would lie exclusively with

Connecticut based customers; moreover, although the court found that the Trumbull market was comparable to the Boston market with respect to the size of potential tenants, it determined that demand in Trumbull was limited by the inherent characteristics of the Connecticut market, which finding was not unfounded or contrary to the trial court's market rent analysis.

f. Despite the defendants' claim, there was evidence in the record indicating that Suite 220's square footage made it unmarketable as PBB space, including D's and L's testimony, which the trial court found to be credible, and the plaintiff's form 10-K annual reports, filed with the Securities and Exchange Commission in 2011 and 2013, which included information regarding the average number of total square footage of the plaintiff's new and renewal PBB leases.

2. There was sufficient evidence in the record to support the trial court's determination that the highest and best use of Suite 210 was as wholesale space: although the trial court credited S's testimony that colocation was becoming more popular, it determined that such testimony did not preclude it from agreeing with L's conclusion that the highest and best use of the suite was as wholesale space, especially in light of D's testimony regarding the various factors that made colocation rentals less desirable than wholesale rentals; moreover, contrary to the defendants' assertion, the trial court properly considered Suite 210's actual rent in determining its fair market value, however, because the existing leases were for colocation customers, the court applied market rental rates to determine the suite's fair market value as wholesale space; furthermore, the court's conclusion that the highest and best use of Suite 210 was as wholesale space did not contradict its conclusion that there was no market for PBB space in Trumbull in 2011, as such conclusion did not preclude the court from also finding that there was demand for a wholesale lease of a fully built out suite, like Suite 210.

3. The trial court's application of a capitalization rate of 8 percent to the property's net income in determining its market value was supported by evidence in the record: the trial court determined that the capitalization rate proposed by L was essentially correct; moreover, in making its determination, the trial court properly gave credence to one appraiser's method of calculating the capitalization rate over the other's and determined an appropriate capitalization rate based on the evidence in the record, which included information regarding capitalization rates for various other transactions throughout the country that were detailed in industry newsletters and reports; accordingly, to arrive at its capitalization rate, the trial court adjusted the rate proposed by L to ensure that sufficient consideration was given to the effect of the electrical infrastructure installed on the property during its remediation and expansion.

4. Contrary to the defendants' assertions, the trial court's alleged failure to consider the plaintiff's internal property valuations did not make its

determination of the fair market value of the property clearly erroneous: the trial court determined that the plaintiff's 10-K annual reports for 2013 and 2014 reflected the book value of the property, rather than the fair market value, and, as a result, such statements were not relevant to its calculations; moreover, the trial court determined that the valuation set forth in the plaintiff's 2014 impairment analysis of the property, which was based on optimistic assumptions and a best case scenario and included the value of various items of personal property located on the property, was consistent with its own valuation; accordingly, the trial court considered, but did not place weight on, the plaintiff's internal valuations.

Argued December 1, 2021—officially released April 5, 2022

*Procedural History*

Appeals from the decisions of the named defendant upholding the valuations made by the assessor of the defendant town of Trumbull of certain of the plaintiff's real property, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of New Britain, where the appeals were consolidated and tried to the court, *Hon. Stephen F. Frazzini*, judge trial referee; judgments sustaining the appeals, from which the defendants filed a joint appeal with this court. *Affirmed.*

*Mario F. Coppola*, with whom were *Matthew L. Studer* and, on the brief, *Gregory S. Kimmel*, for the defendants (appellants).

*Charles D. Ray*, with whom were *Shawn S. Smith* and, on the brief, *Angela M. Healey*, for the plaintiff (appellee).

*Opinion*

DiPENTIMA, J. In this joint real estate tax appeal, the defendants, the Board of Assessment Appeals of the Town of Trumbull (board) and the town of Trumbull (town), appeal from the judgments of the trial court sustaining the appeals[1] brought by the plaintiff, Digital

[1] The plaintiff filed two separate appeals with the Superior Court in the judicial district of Fairfield pursuant to General Statutes § 12-117a. In the first appeal, Docket No. CV-14-6025041-S, the plaintiff appealed from the 2013 valuation of the board, which valued 60 and 80 Merritt Boulevard at

60 & 80 Merritt, LLC,[2] and ordering the reduction of the defendants' tax assessment levied against the plaintiff's property located at 60 Merritt Boulevard in Trumbull (property). On appeal, the defendants challenge the court's determination of the fair market value of the property, which they claim is based on certain clearly erroneous factual findings made by the court. Specifically, the defendants claim that the court erred in (1) failing to impute income to Suite 220 of the property, (2) valuing Suite 210 of the property at the suite's wholesale rate, (3) applying a capitalization rate of 8 percent, and (4) disregarding the plaintiff's internal valuations. We affirm the judgments of the trial court.

We begin by setting forth the following relevant facts, as found by the trial court, in addition to the relevant procedural history.[3] The property includes five acres of land on which a building of approximately 200,000 square feet[4] sits (building). The building is connected to a building on another property, located at 80 Merritt

a true and actual value of $145,446,143. In the second appeal, Docket No. CV-15-6029300-S, the plaintiff appealed from the 2014 valuation of the board, which valued 60 and 80 Merritt Boulevard at a true and actual value of $145,446,145. The appeals were consolidated on May 9, 2014, and transferred to the judicial district of New Britain.

[2] The plaintiff is a subsidiary of Digital Realty Trust, Inc., which is a publicly traded company. Digital Realty Trust, Inc., as its name suggests, is a real estate investment trust, formed in 2004.

[3] The court issued its memorandum of decision on August 4, 2020. The plaintiff subsequently filed a motion to correct the memorandum of decision to correct "five minor errors." The defendants objected to the second of the five requested corrections. The plaintiff then withdrew the second requested correction. The court granted the first, third, and fifth requested corrections and granted the fourth in part. On February 16, 2021, the court issued its corrected memorandum of decision, correcting the scrivener's errors in the original decision.

[4] At trial, the parties' experts disagreed as to the precise square footage of the building. The plaintiff's expert, John Leary, concluded that the square footage of the building was 204,024 square feet while the defendants' expert, Russell Sterling, reached a conclusion of 193,650 square feet. The court determined that Leary's conclusion was more reliable and credible. The property's square footage is not an issue on appeal.

Boulevard in Trumbull, which is a separate tax parcel not subject to this appeal. The buildings share a common entrance, security station, and parking lot.

The property was originally the site of a printing company facility, developed in the late 1960s. NASDAQ Stock Market, Inc. (NASDAQ), bought the property in 1996, demolished the printing facility, and, in 1997, constructed the building, a corporate data center, on the site. NASDAQ connected the building to the building located at 80 Merritt Boulevard, which it also owned at the time. In August, 2006, NASDAQ sold both the property and 80 Merritt Boulevard to Sentinel Properties-Trumbull, LLC (Sentinel). Sentinel then began converting the property into a multi-tenant data center facility. In 2010, the plaintiff bought both the property and 80 Merritt Boulevard. The plaintiff undertook an expansion of the property, constructing a 70,000 square foot addition to the building, which was completed in late 2012 or early 2013.

A "data center" is a building, or a portion thereof, that various organizations use to house and secure electronic data. Data is stored on computers, often stacked several shelves high in storage racks. These racks sit on a " 'raised floor' " that is constructed of perforated tile, sitting approximately three feet above the actual floor. Between the raised floor and the actual floor, power and cooling is installed to supply the computers. Cooling is a vital feature of a data center, as it prevents overheating, which can be caused by the large amount of power supplied to the computers. Another imperative characteristic of a data center is " 'redundancy.' " Redundancy refers to the inclusion of a second source of power, or backup power, to run the computers and cooling systems in the event that the primary source of power fails. In other words, components of the electrical system are duplicated to prevent the computers from going off-line.

A data center can be designed with individual rooms referred to as data suites. The data center located at the property is organized into individual data center suites. An individual data suite within a data center may have different occupancy arrangements, such as "wholesale" or "colocation." A wholesale suite is occupied by a single user that provides its own computers and racks, while the building owner supplies the space, raised floor, power, cooling, internet connectivity, security, and redundancy. A colocation suite, on the other hand, is occupied by multiple users. Colocation customers may provide their own computers and racks, or lease them from the building owner. Like wholesale customers, colocation customers rely on the building owner to supply the space, raised floor, power, cooling, internet connectivity, security, and redundancy.

Space within a data center can also be leased as "powered shell space," which is a data suite that is not fully "built out." Rather, the space is a data suite " 'with exterior construction completed, available power and connectivity, but with the interior left as raw space to be finished by the customer.' " The plaintiff has trademarked this type of space as "powered base building" (PBB) space. When a customer leases PBB space, it builds out the space to its own specifications while the building owner provides internet connectivity, power, security, and redundancy.

Sometime before 2010, the plaintiff privately approached Sentinel about purchasing its New England operations, despite the fact that none of Sentinel's properties was for sale on the open market at the time. In 2010, the plaintiff and Sentinel entered into a contract whereby the plaintiff agreed to pay Sentinel $375 million for two data center properties in Massachusetts in addition to both the property and 80 Merritt Boulevard in Trumbull. The sales price included the plaintiff's purchase of the leases at each property, the workforce in place, rights

of expansion, a time limited noncompete agreement with Sentinel, and goodwill.

Although the plaintiff believed at the time of purchase that the property had full redundancy—the capacity to continue to provide power and cooling if there was a power outage impairing the primary source of power—an off-site explosion in early 2010 revealed that this belief was misguided. The redundancy system did not perform as anticipated, leaving the property without power for a short time. The plaintiff hired a third party to evaluate its electrical system, at which point the plaintiff learned that the system was undersized and was incapable of providing the amount of power that the plaintiff was contractually obligated to provide to existing customers and that was necessary to operate the facility safely. Following the third-party evaluation, the plaintiff learned that the system did not offer any redundancy. This posed a serious problem for the plaintiff. The lack of redundancy violated lease commitments and subjected the plaintiff to rent credits, reputational harm, and the possibility of lost customers.[5] The plaintiff decided to replace the existing electrical system with its own system, referred to as a Turnkey Data system. The plaintiff originally estimated that the project would cost approximately $20,250,000. The budget was subsequently increased to $33,521,442 to account for higher than expected engineering and construction costs and for costs paid to the utility company to complete off-site work.

In 2011, the plaintiff also decided to build a 70,000 square foot expansion to the property that would contain three data suites—one on the first floor (Suite 110) and two on the second floor (Suites 210 and 220). The original budget for the expansion was $27,687,500. An

[5] For example, as a result of the power outage, one tenant was given a 20 percent monthly rent abatement of $22,869.

internal memorandum describing the expansion stated that the new space would " 'be positioned to attract financial tenants from Fairfield County' " and noted that a current tenant in the original building was considering moving into the expansion space once it was built and occupying two suites therein. The memorandum also provided that the plaintiff projected " 'an average return on incremental cost of approximately 20 percent' " from the expansion, which would " '[help] increase the overall building returns which [would] be diluted by 18 percent because of the [electrical] remediation project. By building the expansion, [the plaintiff] [would] strive to increase the building [return on investment] over time to what it is today, roughly 10 percent.' " The expansion budget was also later increased to $52,962,157. The electrical remediation and the building expansion were completed by late 2012 or early 2013.

The plaintiff projected that one data suite in the expansion space would be occupied in the first year after construction was completed and would produce additional annual net operating income of more than $2 million annually. The plaintiff also projected that two other data suites in the expansion would be occupied by the end of the second year after construction was completed, resulting in additional annual net operating income of $6 million beyond that received from the original building. As the trial court noted, "[t]hese rosy projections, however, proved unfounded." One tenant did move from the original building to the first suite in the expansion space, Suite 110, in 2013 but did not occupy two suites as the plaintiff had hoped. Additionally, the plaintiff was unable to find a wholesale tenant to lease the second built out suite in the expansion space, Suite 210. By mid-2013, the plaintiff began leasing Suite 210 to colocation tenants. The third data suite within the expansion space was never completely built

out, having only unfinished concrete floors, walls, and a ceiling in place.

The court explained: "These disappointed expectations, including the need to rent the second expansion suite as colocation space to gain tenants, led [the plaintiff] to include [the] property in a 2014 review of 'potentially underperforming' properties in its portfolio." As part of this internal review, the plaintiff completed a " 'dynamic valuation' " of both the property and 80 Merritt Boulevard by completing a ten year cash flow analysis based on certain optimistic assumptions. The review resulted in a valuation of $120 million for the two properties. The plaintiff's dynamic valuation process then required the property to be classified into one of three categories—hold, further analysis, or sell. The two properties were placed into the hold category.

The town typically conducts town wide revaluations of real property in the town every five years, as such revaluations are required by state law. See General Statutes § 12-62 (b) (1). A revaluation establishes "the present true and actual value" of property as of a specific assessment date. General Statutes § 12-62 (a) (5). Towns use that information for the purpose of levying property taxes for the tax assessment year of the revaluation and also for each subsequent tax assessment year that follows, until the next revaluation. General Statutes § 12-62 (b) (1). The town conducted a town wide revaluation effective for the October 1, 2011 grand list.[6] The 2011 revaluation assessment, therefore, was applicable to the 2013 and 2014 tax years, the years at issue in this tax appeal.[7]

[6] A grand list is a listing of all taxable property located within a town as of the relevant tax year. See General Statutes § 12-55 (a).

[7] The town had conducted the previous town wide revaluation in 2005, meaning the next town wide revaluation was to occur in 2010. That revaluation, however, was delayed one year from 2010 to 2011. In its 2011 town wide revaluation, the assessor of the town concluded that the fair market value of the property was $66,124,600. The plaintiff appealed this assessment, and the parties subsequently stipulated to a fair market value of $62,450,000.

Pursuant to General Statutes § 12-53a, however, the town was permitted to conduct an interim reassessment and change its 2011 assessment to take into account the new construction on the property—the electrical remediation and the construction of the expansion—which occurred after the revaluation date. See General Statutes § 12-53a (a) (1) ("[c]ompleted new construction of real estate completed after any assessment date shall be liable for the payment of municipal taxes based on the assessed value of such completed new construction from the date the certificate of occupancy is issued or the date on which such new construction is first used for the purpose for which [the] same was constructed, whichever is the earlier, prorated for the assessment year in which the new construction is completed"); see also *ZML 301 Tresser Ltd. Partnership* v. *Stamford*, 67 Conn. App. 697, 699–700, 789 A.2d 538 ("§ 12-53a . . . authorizes an interim reassessment if a taxpayer has made physical improvements to the property" (footnote omitted)), cert. denied, 260 Conn. 902, 793 A.2d 1091 (2002).

For the 2013 and 2014 tax years, the assessor of the town (assessor) was thus tasked with determining the fair market value[8] of the property based on physical conditions of the property as of October 1, 2013, and October 1, 2014, but based on market conditions as of October 1, 2011. The assessor concluded that the fair market value of the property as of October 1, 2013, and

The next revaluation occurred in 2015, in accordance with the regular five year schedule.

[8] Market value is "[t]he most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress." Appraisal Institute, The Appraisal of Real Estate (12th Ed. 2001) p. 22.

October 1, 2014, was approximately $145,446,000.[9] The assessor also concluded that the fair market value of 80 Merritt Boulevard was $18,038,429 as of October 1, 2013, and $18,137,429 as of October 1, 2014. The plaintiff appealed all four of these valuations and assessments to the board. The appeals were denied.

The plaintiff then filed two separate appeals from the decisions of the board in the Superior Court; see footnote 1 of this opinion; contesting the valuations of both the property and 80 Merritt Boulevard on the town's 2013 and 2014 grand lists and the board's refusal to reduce the corresponding tax assessments. In the first appeal, the plaintiff contested the valuations of the property and 80 Merritt Boulevard on the town's 2013 grand list and, in the second appeal, the plaintiff contested the valuations of the property and 80 Merritt Boulevard on the town's 2014 grand list. The plaintiff's complaints sounded in six counts: (1) excessive valuation of the property, (2) disproportionate tax burden of the property, (3) wrongful assessment of the property, (4) excessive valuation of 80 Merritt Boulevard, (5) disproportionate tax burden of 80 Merritt Boulevard, and (6) wrongful assessment of 80 Merritt Boulevard. The parties subsequently stipulated that, for the purposes of the assessment of 80 Merritt Boulevard on the town's 2013 and 2014 grand lists, that tax parcel had a fair market value of $10,650,000. The plaintiff accordingly withdrew counts four, five, and six of its tax appeals, which related to the 80 Merritt Boulevard property.

Prior to trial, both the plaintiff and the defendants hired tax appraisers to complete appraisal reports of the property. The plaintiff hired John Leary of Advisra

[9] The assessor concluded that the assessed value was $101,812,300. Pursuant to General Statutes § 12-62a, the assessed value of a property is 70 percent of the appraised/fair market value.

Consulting, LLC. The defendants hired Russell Sterling of Sterling, DiSanto, and Associates. These appraisals were "retrospective" appraisals, meaning the appraisals determined the property's value as of a date in the past. Appraisal Institute, The Appraisal of Real Estate (12th Ed. 2001) p. 54. The appraisers sought to determine the property's fair market value based on physical conditions of the property as of October 1, 2013, and October 1, 2014, but market conditions as of October 1, 2011. In completing their reports, the appraisers used different cutoff dates.[10] The court explained the reason for the differing cutoff dates: "Sterling maintained that there was 'no significant difference' between market conditions for the property on the revaluation date than on October 1, 2013, and 2014. . . . He thus used information about the building's tenants, income, and expenses for 2013 and 2014 and also considered information about market rents and conditions through October 1, 2014. Leary testified, on the other hand, that market conditions after 2012 were too different to be considered for an appraisal based on market conditions existing in 2011." (Citation omitted; footnote omitted.)

[10] The Appraisal Standards Board's Advisory Opinion 34 states: "A retrospective appraisal is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal. Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date. The appraiser should determine a logical cut-off for the data to be used in the analysis because at some point distant from the effective date, the subsequent data will no longer provide an accurate representation of market conditions as of the effective date. This is a difficult determination to make. Studying the market conditions as of the date of the appraisal assists the appraiser in judging where he or she should make this cut-off. With market evidence that data subsequent to the effective date was consistent with market expectations as of the effective date, the subsequent data should be used. In the absence of such evidence, the effective date should be used as the cut-off date for data considered by the appraiser." Appraisal Standards Board, Appraisal Foundation, 2016–2017 Uniform Standards of Professional Appraisal Practice (2016) p. 194.

Leary thus established a cutoff date of December 31, 2012.

The appeals from the town's valuation and assessment of the property on the 2013 and 2014 grand lists were tried before the court over the course of twenty-three days between October, 2018, and March, 2019. The issues presented at trial were whether the property had been overvalued and, if so, what was the fair market value of the fee simple interest[11] in the property, based on physical conditions of the property as of October 1, 2013, and October 1, 2014, and based on market conditions as of October 1, 2011. At trial, the court heard testimony from Mark DeVestern, the town's assessor; Sterling, an appraiser serving as the town's expert; Leary, an appraiser serving as the plaintiff's expert; David Lucey, the plaintiff's Vice President Portfolio Manager for the East Region; and William Eaton, a Senior Data Center Manager for the plaintiff. On December 19, 2018, the court conducted a site visit to the property.

In a memorandum of decision dated August 4, 2020, the court concluded that the "plaintiff [had] proven that the property was overvalued for tax assessment purposes and [was] therefore aggrieved. The court further [found] that the fair market value of the fee simple interest in [the property], reflecting the physical condition of that property as of October 1, 2013, and October 1, 2014, and based on market conditions as of October 1, 2011, was $109,000,000." In accordance with this conclusion, the court sustained the first count of each of the plaintiff's appeals.[12] The court deemed both the sec-

[11] A fee simple interest means "absolute ownership unencumbered by any other interest or estate . . . ." Appraisal Institute, supra, p. 68; see also *Frank Towers Corp.* v. *Laviana*, 140 Conn. 45, 52, 97 A.2d 567 (1953) (fee simple interest means "whole or unlimited estate").

[12] The court exercised its discretion not to award interest to the plaintiff, explaining that "this is a complex property presenting many issues affecting valuation."

ond and third counts abandoned for inadequate briefing. The defendants then filed a motion to reargue, reopen, and set aside the judgments of the trial court. The court denied the motion and this joint appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the well settled legal principles underlying a tax appeal brought pursuant to General Statutes § 12-117a, as well as our standard of review. "Section 12-117a, which allows taxpayers to appeal the decisions of municipal boards of tax review to the Superior Court, provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property . . . ." (Internal quotation marks omitted.) *Ress* v. *Suffield*, 80 Conn. App. 630, 631–32, 836 A.2d 475 (2003), cert. denied, 267 Conn. 920, 841 A.2d 1191 (2004). "In § 12-117a tax appeals, the trial court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the [taxpayer's] property. . . . At the de novo proceeding, the taxpayer bears the burden of establishing that the assessor has overassessed its property. . . . Once the taxpayer has demonstrated aggrievement by proving that its property was overassessed, the trial court [will] then undertake a further inquiry to determine the amount of the reassessment that would be just. . . . The trier of fact must arrive at [its] own conclusions as to the value of [the taxpayer's property] by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value . . . ." (Internal quotation marks omitted.) *Aetna Life Ins. Co.* v. *Middletown*, 77 Conn. App. 21, 26, 822 A.2d 330, cert. denied, 265 Conn. 901, 829 A.2d 419 (2003), and cert. denied, 265 Conn. 901, 829 A.2d 419 (2003).

"The goal of property valuation is to determine the present true and actual value of the subject property.

. . . The process of valuation at best is a matter of approximation." (Citations omitted; internal quotation marks omitted.) *First Bethel Associates* v. *Bethel*, 231 Conn. 731, 738, 651 A.2d 1279 (1995). General Statutes § 12-63 provides in relevant part that "[t]he present true and actual value . . . shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof . . . ."

General Statutes § 12-63b governs the valuation of rental income real property and provides guidance in producing a valuation that best approximates the true and actual value of a property. Section 12-63b (a) provides in relevant part: "The assessor or board of assessors in any town, at any time, when determining the present true and actual value of real property as provided in section 12-63, which property is used primarily for the purpose of producing rental income . . . shall determine such value on the basis of an appraisal . . . ." Section 12-63b (a) specifies three different methods of valuation to determine the true and actual value of real property: (1) the comparable sales approach, (2) the income capitalization approach, and (3) the cost approach. See *Walgreen Eastern Co.* v. *West Hartford*, 329 Conn. 484, 497, 187 A.3d 388 (2018); see also *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, 94 Conn. App. 696, 702, 894 A.2d 349 (2006).

"A property's highest and best use is commonly accepted by real estate appraisers as the starting point for the analysis of its true and actual value. . . . [U]nder the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value of the land. . . . A property's highest and best use is commonly defined as the use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate. . . . The highest and best use determination is

inextricably intertwined with the marketplace because fair market value is defined as the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use. . . . The highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable. Finally, a trier's determination of a property's highest and best use is a question of fact that we will not disturb unless it is clearly erroneous." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 25–26, 807 A.2d 955 (2002). Here, both appraisers agreed that the highest and best use of the property was as a data center.

Both appraisers likewise agreed that, in the present case, the only appropriate appraisal methods were the cost approach and the income capitalization approach. "[N]o one method of valuation is controlling and . . . the [court] may select the one most appropriate in the case before [it]." (Internal quotation marks omitted.) *Sakon* v. *Glastonbury*, 111 Conn. App. 242, 248–49, 958 A.2d 801 (2008), cert. denied, 290 Conn. 916, 965 A.2d 554 (2009). The court determined, and the defendants do not challenge on appeal, that the proper method for assessing the property in this specific case was the income capitalization approach.

"In the income capitalization approach, an appraiser analyzes a property's capacity to generate future benefits and capitalizes the income into an indication of present value." Appraisal Institute, supra, p. 471. Under this approach, appraisers "develop an indication of market value by applying a rate or factor to the anticipated net income from a property. . . . Appraisers arrive at

the anticipated net income by considering the property's actual rental income, as well as the rental income for comparable properties in the vicinity, property expenses, and allowances for vacancy and collection losses." (Citation omitted; internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, supra, 262 Conn. 17 n.9. The income capitalization approach produces a valuation using "capitalization of net income based on market rent for similar property . . . ." General Statutes § 12-63b (a) (2).

"Section 12-63b (b) explains the meaning of market rent as it is used in the income capitalization approach. Specifically, § 12-63b (b) provides: For purposes of subdivision (2) of subsection (a) of this section and, generally, in its use as a factor in any appraisal with respect to real property used primarily for the purpose of producing rental income, the term market rent means the rental income that such property would most probably command on the open market as indicated by present rentals being paid for comparable space. In determining market rent the assessor shall consider the actual rental income applicable with respect to such real property under the terms of an existing contract of lease at the time of such determination." (Emphasis omitted; internal quotation marks omitted.) *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 497. Section 12-63b (b) "requires that, in determining a property's market rent, the assessor and, therefore, the court, in determining the fair market value of the property, must consider both (1) net rent for comparable properties, and (2) the net rent derived from any existing leases on the property." (Emphasis omitted; internal quotation marks omitted.) *First Bethel Associates* v. *Bethel*, supra, 231 Conn. 740. This approach "is based on the principle that the amount of net income a property can produce is related to its market value." (Internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v.

*Norwalk*, 172 Conn. App. 160, 165 n.9, 159 A.3d 684, cert. denied, 326 Conn. 901, 162 A.3d 724 (2017).

"The income capitalization approach consists of the following seven steps: (1) estimate gross income; (2) estimate vacancy and collection loss; (3) calculate effective gross income (i.e., deduct vacancy and collection loss from estimated gross income); (4) estimate fixed and operating expenses and reserves for replacement of short-lived items; (5) estimate net income (i.e., deduct expenses from effective gross income); (6) select an applicable capitalization rate; and (7) apply the capitalization rate to net income to arrive at an indication of the market value of the property being appraised." *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, supra, 94 Conn. App. 702 n.9.

Having set forth the underlying facts and governing legal principles, we turn to our standard of review on appeal. "We review a court's determination in a tax appeal pursuant to the clearly erroneous standard of review. Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Grolier, Inc.* v. *Danbury*, 82 Conn. App. 77, 78, 842 A.2d 621 (2004). "In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 172 Conn. App. 170.

"We afford wide discretion to the court's determination of the value of property in a property tax appeal. . . . When the court acts as the fact finder, it may accept or reject evidence regarding valuation as it deems appropriate." (Citation omitted.) *Grolier, Inc.* v. *Danbury*, supra, 82 Conn. App. 80. "Because a tax appeal is heard de novo, a trial court judge is privileged to adopt whatever testimony he reasonably believes to be credible." (Internal quotation marks omitted.) Id., 79. Thus, "credibility determinations are within the exclusive province of the court." *Ress* v. *Suffield*, supra, 80 Conn. App. 633.

"Conversely, we review de novo a trial court's decision of law. [W]hen a tax appeal . . . raises a claim that challenges the propriety of a particular appraisal method in light of a generally applicable rule of law, our review of the trial court's determination whether to apply the rule is plenary. . . . To be sure, if the trial court rejects a method of appraisal because it determined that the appraiser's calculations were incorrect or based on a flawed formula in that case, or because it determined that an appraisal method was inappropriate for the particular piece of property, that decision is reviewed under the abuse of discretion standard. . . . Only when the trial court rejects a method of appraisal as a matter of law will we exercise plenary review."[13] (Internal quotation marks omitted.) *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 493–94. Keeping

[13] At oral argument, the defendants stated that the only claim for which plenary review would be appropriate is its claim that the court violated Advisory Opinion 34, in that it considered evidence after the established cutoff date. See Appraisal Standards Board, Appraisal Foundation, 2016–2017 Uniform Standards of Professional Appraisal Practice (2016), p. 194. This claim challenges the *implementation of* a particular appraisal method—the income capitalization approach—rather than the *propriety* of the appraisal method and, thus, does not "[reject] a method of appraisal *as a matter of law* . . . ." (Emphasis added; internal quotation marks omitted.) *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 494. Therefore, we decline to apply plenary review to this claim.

these well established principles in mind, we turn to our resolution of the defendants' claims.

I

The defendants first claim that the court erred in failing to impute income to Suite 220 of the property. Specifically, the defendants claim that the court's factual finding that Suite 220 had no income potential is clearly erroneous because (1) Suite 220 adds value to the property, (2) the record is devoid of testimony that there was no market for Suite 220 in Trumbull in 2011, (3) Leary's assertion that there was no market for Suite 220 was not credible and was contradicted by the fact that the plaintiff invested millions of dollars into the suite and actually marketed the suite for lease, (4) the court considered post hoc information, (5) the court's finding that there was no market for Suite 220 is inconsistent with its market rent analysis, and (6) the record is devoid of any evidence indicating that the suite's square footage made it unmarketable.[14] The plaintiff contends that the court's decision not to impute any income to Suite 220 is not clearly erroneous because there was evidence in the record that there was no market for Suite 220 in Trumbull in 2011—namely, Leary's testimony, which the court found credible. We agree with the plaintiff.

The following additional facts are relevant to the resolution of this claim. Suite 220 is located in the expansion space of the property. As the suite existed in 2013 and 2014, it had no raised floor and no sidewalls. At trial, the parties' experts disagreed as to the nature of Suite 220. Leary opined that the suite was not PBB space because " 'the raised floor and at least the sidewalls would be in place in a [PBB] scenario and not the unfinished state of Suite 220 . . . as it existed in

[14] For the sake of clarity and ease of discussion, we address the defendants' arguments in a different order from which they were briefed.

2013 and 2014 . . . . Money would have to be spent to bring the power and fiber connectivity, the raised floor and the sidewalls to that space in order to lease it as PBB space.' " Sterling, the defendants' expert appraiser, categorized the suite as PBB space. The court ultimately concluded that "nothing in the evidence rule[d] out Sterling's characterization of the unbuilt suite as PBB space."

There was also differing testimony at trial about whether Suite 220 was marketable. As previously noted, both appraisers determined that the highest and best use of the property was its continued use as a data center. Because the highest and best use of the property was determined to be a data center, Leary testified that using Suite 220 for general storage would be impractical considering the security concerns associated with the operation of a data center.[15] At trial, Leary testified that he did not attribute any potential income to Suite 220 for the 2013 and 2014 tax years because there was no demand for the suite in Trumbull in 2011. Sterling, however, imputed potential income in the amount of $838,450 per year to Suite 220 for the 2013 and 2014 tax years.

In its memorandum of decision, the court ultimately credited Leary's assertion that there was no market for Suite 220 in Trumbull in 2011 and concluded that "[t]he evidence showed that there was no income or potential income from [Suite 220] in 2011 but rather an anticipated 100 percent vacancy rate." We address each of the defendants' claims attacking this factual finding in turn.

A

The defendants contend that there is no evidence in the record to support the court's factual finding that,

[15] Specifically, Leary testified that the use of Suite 220 as storage space "would violate all the conditions associated with the confidentiality of all the data center tenants . . . ."

under the market conditions of 2011, Suite 220 had no income potential. We reject this contention.

At trial, during the following exchange between the defendants' counsel and Leary, Leary explained that he did not allocate any income to Suite 220 based on market rental rates in his appraisal report:

"Q. —with regard to Suite 220, is it correct that you did not attribute any income in your appraisal for Suite 220 as of the '13 and '14 grand list dates?

"A. That is correct."

The defendants' counsel asked Leary to explain the market rental rates in his appraisal report:

"Q. So, Mr. Leary, just to clarify for the record and also help for, for my understanding as well. Gross leasable area, as referenced in your appraisal, is similar to finished leasable area. Correct?

"A. No. Huh, okay? The rental rate that I used—90 to 95 dollars per square foot—is a rental rate per square foot of gross leasable area. When multiplying it times the area available in the subject building, I am using—I am multiplying it by the finished leasable area, because that's all that's finished at this point in time. So it's a—it's a unit price per square foot of gross leasable area. If the other portion of the space were already fit out, it would be a higher number that I was multiplying it by. That's all. It's, it's the same unit of comparison: price per square foot of gross leasable area. . . .

"Q. So, Mr. Leary, we're looking at the first page on the board, and after the expansion there was a new addition at the subject property. The gross leasable area is 182,766 square feet. Correct?

"A. Will be 182,766 square feet because that includes the space that's not yet fit out.

"Q. I understand that you made a distinction between finished leasable area and unfinished leasable area. However, the 17,598 square feet in Suite 220 is area that [the plaintiff] could lease today. Correct?

"A. I doubt it."

The court then sought the following clarification from Leary:

"Q. So . . . your . . . direct capitalization approach didn't assign a value to the unfinished space?

"A. Correct. I considered it. Frankly, if you look at the space, there is only one potential use for that space. If you see Photo I-12, which will be at this point some kind of dead storage. As a matter of fact, it looks like they're using it partially for that. There's some old furniture and stuff in there.

"So the question was, do I apply a dead storage rental to that space? But then, you have to think of the context—within a data center, with all this security and everything else like that and with raised floor going into the hallway that leads to this space, would the other tenants and would the owner want somebody trucking in and out of here with, you know, old furniture or whatever would go into a dead storage unit? The answer to me was absolutely not.

"You, you—[the plaintiff] could not rent to anybody using it for dead storage and, therefore, I assigned no rent to it at this point in time."

At another point during trial, Leary stated that "[b]y 2013, 2014, [the plaintiff] discovered that [it] couldn't rent [Suite 210, which it] had built out as a wholesale data center. So [it] reverted to colocation rentals, and [it] held off on building [Suite 220], because there was no demand for that data center." The following colloquy

then occurred between the defendants' counsel and Leary:

"Q. Mr. Leary, you've now, in your last few responses, talked about market demand for data center—data center space in 2013 and '14. Correct?

"A. Yes.

"Q. Okay. But you didn't consider the market for data center space in 2013 and 2014 in your appraisal. Correct?

"A. I considered the market demand in 2011. Correct."

Counsel for the defendants then indicated that the average rate per square foot of net rentable area for new leases rented in 2011 for other properties owned by the plaintiff was approximately $39 and asked Leary why he did not impute a market rental rate of this amount to Suite 220. Leary explained that he had no idea where the plaintiff's other leased properties were located or what the market conditions were in those locations. Leary testified that he would need to know the location, size of the space, and the demand in the marketplace for each leased property to determine whether the rental rates were an appropriate indicator of a market rental rate for the purposes of imputing income to Suite 220. Without further information, Leary stated that he could not determine if the $39 per square foot rate was an appropriate indicator of market value for Suite 220. Leary testified, "I do know that in Trumbull, Connecticut, there's no market for this space."

Lucey also testified regarding the demand for data center space in the Trumbull market. When asked if there was "demand in the market in '13 and '14 for another half [suite] of data center space in Trumbull," Lucey responded, "[n]o."

Thus, Leary's and Lucey's testimony regarding the lack of a market for Suite 220 contradicts the defen-

dants' claim that there is no evidence to support the court's finding that there was no market for Suite 220 in Trumbull in 2011. See *United Technologies Corp.* v. *East Windsor*, supra, 262 Conn. 23 ("[a] finding of fact is clearly erroneous when there is no evidence in the record to support it" (internal quotation marks omitted)). Leary's and Lucey's testimony plainly supports the court's finding.

B

The defendants next argue that the court's decision not to impute income to Suite 220 is clearly erroneous because "Suite 220 clearly adds value to the property." The defendants contend that "Leary's own cost approach analysis confirms that Suite 220 contributes value to the property."

The defendants' argument rests on a faulty premise. As previously explained, the court found the income capitalization approach most reliable. Under the income capitalization approach, the value of the property is based on the property's income producing potential, considering both actual rent and market rent. See *United Technologies Corp.* v. *East Windsor*, supra, 262 Conn. 17 n.9. Had the court concluded that another valuation method, such as the cost approach, was most appropriate, then the value of the suite could have been determined by its cost. The defendants conceded at oral argument that the income producing potential of the suite is determinative of the value of the suite under the income capitalization approach. Because there was evidence in the record that there was no actual or market rent for Suite 220, we cannot conclude that the court's finding that no income potential existed was clearly erroneous.

C

Despite arguing that there was no evidence in the record to support the court's finding that there was no

market for Suite 220 in Trumbull in 2011, the defendants also argue that the court erred in crediting Leary's testimony to that effect. Specifically, the defendants argue that the court erred in crediting Leary's testimony because it was contradicted by two pieces of evidence at trial—the undisputed facts that the plaintiff invested millions of dollars in the construction of Suite 220 and actually marketed Suite 220 as leasable space. We decline to usurp the role of the trial judge.

"The trier of fact must arrive at [its] own conclusions as to the value of [the taxpayer's property] by weighing the opinion of the appraisers . . . ." (Internal quotation marks omitted.) *Aetna Life Ins. Co.* v. *Middletown*, supra, 77 Conn. App. 26. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court [judge] is privileged to adopt whatever testimony he reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *Sakon* v. *Glastonbury*, supra, 111 Conn. App. 252. "Because a tax appeal is heard de novo, a trial court judge is privileged to adopt whatever testimony he reasonably believes to be credible." (Internal quotation marks omitted.) *Grolier, Inc.* v. *Danbury*, supra, 82 Conn. App. 79. Thus, "credibility determinations are within the exclusive province of the court." *Ress* v. *Suffield*, supra, 80 Conn. App. 633.

Evidence that the plaintiff invested money in the construction of the suite and that it marketed the suite was presented to the court at trial. There was also, however, testimony from Leary that there was no market for PBB space in Trumbull in 2011. In concluding that Suite 220

had no income potential, the court carefully considered all of the evidence before it and clearly credited Leary's testimony that there was no market for PBB space in Trumbull in 2011. Although the defendants essentially invite this court to reweigh the evidence in its favor and credit Sterling's testimony that Suite 220 was rentable and capable of generating income based on 2011 market conditions, we decline to do so.[16] See *Abington, LLC* v. *Avon*, 101 Conn. App. 709, 719, 922 A.2d 1148 (2007) ("[T]he determination of the credibility of expert witnesses and the weight to be accorded their testimony is within the province of the trier of facts, who is privileged to adopt whatever testimony he reasonably believes to be credible. . . . [I]t is the proper function of the court to give credence to one expert over the other." (Internal quotation marks omitted.)).

D

The defendants argue that the court's determination that there was no market for Suite 220 in Trumbull in 2011 is clearly erroneous because the court relied on post hoc information in making this determination. We reject this claim.

After concluding that Suite 220 constituted PBB space, the court stated that "[t]he more difficult question is whether the space was marketable. The fact that it was vacant does not resolve this question, for, as the town correctly points out, potential gross income comprises

[16] The defendants also argue that Leary did not provide any support for his assertion that there was no market for Suite 220 in Trumbull in 2011. The defendants have not preserved this claim for appellate review. The defendants did not object to Leary's testimony that there was no market for Suite 220 in Trumbull in 2011 at trial. See *State* v. *Crocker*, 83 Conn. App. 615, 653, 852 A.2d 762 (when "defendant never objected to the court's admitting [the witness'] testimony into evidence," defendant's claim that it was improper for court to admit witness' testimony was unpreserved), cert. denied, 271 Conn. 910, 859 A.2d 571 (2004). Accordingly, we decline to review the defendants' unpreserved claim.

. . . market rent for vacant . . . space. . . . Leary testified credibly, however, that in 2011 there was no market for PBB space in Trumbull. Lucey testified, also credibly, that such space is usually rented on a building wide basis. That testimony and the economics of PBB space cast substantial doubt on whether PBB space with 16,000 rentable square feet would be marketable in the Trumbull area. *In its briefs*, [*the plaintiff*] *asserts that the lack of success the last few years in renting the space or even attracting potential customers to consider it shows it to be the poster child for the poor state of the data center market in Trumbull.* . . . None of the evidence about the Trumbull data center market in 2011, 2013 or 2014 credibly supports the town's claim that Suite 220 was marketable as PBB space then." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.)

Although the court referenced "[the plaintiff's] assert[ion] that the lack of success the *last few years* in renting the space or even attracting potential customers to consider it shows it to be the poster child for the poor state of the data center market in Trumbull"; (emphasis added; internal quotation marks omitted); the court went on to conclude that "[n]one of the evidence about the Trumbull data center market *in 2011, 2013 or 2014* credibly supports the [defendants'] claim that Suite 220 was marketable as PBB space then." (Emphasis added.) The defendants argue that the suite's marketability as of October 1, 2013, and October 1, 2014, is not relevant to the determination of the suite's marketability as of the revaluation date. The suite's marketability as of October 1, 2013, and October 1, 2014, was relevant, however, because Sterling considered information about market conditions through October 1, 2014. Because Sterling used a cutoff date of 2014, considering information about market rent and market conditions through October 1, 2014, it was not improper for the court to

consider evidence of the Trumbull data center market in 2013 or 2014.[17]

The defendants also argue that the court erred in considering evidence of the suite's marketability as of the trial date and " 'the last few years' " prior to trial. Although the court refers to the plaintiff's argument concerning "the lack of success the last few years in renting the space," the court's acknowledgement of this argument was not material to its decision. The court makes clear in the subsequent sentence that it specifically found that "[n]one of the evidence about the Trumbull data center market *in 2011, 2013 or 2014* credibly supports the town's claim that Suite 220 was marketable as PBB space then." (Emphasis added.) Thus, the court clearly relied on evidence of the data market in Trumbull in 2011, 2013, and 2014 to make its finding that there was no market for Suite 220 as of the revaluation date.

Our case law makes clear that, "[i]n a tax appeal, the court may consider any facts that are relevant to determining whether a taxpayer actually has been overassessed." (Internal quotation marks omitted.) *Ress* v. *Suffield*, supra, 80 Conn. App. 634. The court here did just that. Although the defendants take exception to the court's consideration of the market through the cutoff date, they have not provided this court with any legal support that this was improper. We therefore conclude that the court did not err in concluding that none of the evidence credibly supported the defendants' claim that Suite 220 was marketable as PBB space in 2011, 2013, and 2014.[18]

[17] See footnote 10 of this opinion.

[18] The defendants also contend that Leary impermissibly relied on post hoc information by testifying that, "had there [been] a market . . . then Suite 220 might well have been rented by now." According to the defendants, Leary's reliance on what occurred between 2013 and 2019 was antithetical to the Appraisal Standards Board's Advisory Opinion 34; see Appraisal Standards Board, Appraisal Foundation, 2016–2017 Uniform Standards of Professional Appraisal Practice (2016), p. 194; see also footnote 10 of this opinion; and his cutoff date of December 31, 2012. We conclude that the defendants

E

The defendants argue that the court's finding that there was no market for Suite 220 is inconsistent with its market rent analysis. Specifically, the defendants argue that the court's conclusion that the demand for PBB space was limited by the inherent characteristics of the Connecticut data center market is unfounded and contrary to its own market rent analysis. We find no inconsistency.

In completing his market rent analysis, Leary indicated that there was no specific market rent information available in the Connecticut market. Therefore, to determine what market rental rate to apply to the property, Leary applied market rental rates from the Boston data center market, finding that the Boston market was most comparable to the market in Trumbull. Leary examined five recent leases of wholesale data center spaces in the Boston area. Leary used this data, along with the data of the contract rents at the property for 2011, to determine the income potential of the property as of October 1, 2011. Leary, however, did not impute the Boston market rate to Suite 220 because he found that there was no market for that space in Trumbull in 2011.

The court found that "[t]he evidence supports and confirms Leary's conclusion that the Trumbull data center market was comparable to the Boston one in 2011 and that comparable properties in the Boston market in the relevant time period showed a range in market rate rents from $90 to $105 per square foot of rentable space." The court used this market rate in calculating

have not preserved this claim for appellate review, as the defendants did not object to Leary's testimony at trial. See *State* v. *Crocker*, 83 Conn. App. 615, 653, 852 A.2d 762 (when "defendant never objected to the court's admitting [the witness'] testimony into evidence," defendant's claim that it was improper for court to admit witness' testimony was unpreserved), cert. denied, 271 Conn. 910, 859 A.2d 571 (2004). Accordingly, we decline to review the defendants' unpreserved claim.

the income potential of the property. The court, however, did not apply this rate to Suite 220. The court found that, although there was a national market and national demand for PBB space in 2011, there was no market for PBB space in Trumbull in 2011. The court explained that "the evidence showed that the market for this facility would lie exclusively in Connecticut based customers, and [the plaintiff] was aware of that limitation in its potential customer base. Leary's assertion that there was no market for such space in Trumbull in 2011 is therefore found to be credible."

In explaining its conclusion that the market for data center space in Connecticut was limited to Connecticut based customers, the court stated that "[t]he high cost of electricity in Connecticut and the greater 'latency'[19]—the delay in the amount of time it takes to send and receive electronic information between Connecticut and New York City, as compared to [that] between suburban New Jersey and New York City—limit the appeal of data centers in this state to Connecticut based customers." (Footnote in original.)

The defendants argue that "[t]he suggestion that demand for PBB space was limited by the inherent characteristics of the Connecticut data center market is unfounded . . . ." We disagree. The court cited to evidence in the record—specifically, the plaintiff's

[19] "Sterling's appraisal explained the importance of latency for data center operations: The highest percentage of users of data center space are entities that . . . require transaction processing and eCommerce. Transaction processing includes financial services firms using high speed trading that require low latency so trades can be processed in milliseconds. Latency, simply defined, is the delay in the amount of time it takes to send and receive electronic information. For capital markets speed is essential since markets are volatile. In addition, traders want to be able to execute trades faster than their competitors. Physical distance from the servers as well as other factors such as bandwidth through the internet connections affect the speed of a transmission. So, the closer the brokerage offices are to the financial exchanges, the lower the latency." (Internal quotation marks omitted.)

Investment Committee Memoranda[20] and Lucey's testimony[21]—that supported its conclusion. Therefore, we conclude that the court's conclusion that the market for the property would lie exclusively in Connecticut based customers was supported by evidence in the record.

The defendants also contend that the court's conclusion that the demand for PBB space was limited by the

[20] The plaintiff's Investment Committee Memoranda provide in relevant part: "This facility will be positioned to attract financial tenants from Fairfield County. . . . Sales report demand of approximately 2.0 MW from other financial investment companies who have future requirements commencing in the next 24 months in the Trumbull area."

"The Connecticut sect of the Metro-NY market . . . operates outside the parameters of the NJ datacenter market, which provides low latency relief for businesses operating in the high rent and utility districts of Manhattan. Businesses that choose to locate their critical infrastructure in Connecticut have an implicit desire to be there, and in many instances cannot locate their infrastructure in NJ either because of application latency issues or tariff issues.

"The Connecticut data center market is characterized by uncertainties surrounding utility infrastructure and the high cost of power. This is evidenced by the limited number of datacenter providers within the state.

* * *

"Market research and customer sentiment regarding the Trumbull, CT area indicates that a leasing strategy targeting local businesses will yield better results when compared to offering this facility as an alternative to NY/NJ market offerings. The high total cost of occupancy in the CT market creates a demand profile that requires customers to locate there."

[21] The court stated that it found the following testimony from Lucey to be credible: "[T]he size of the market in the greater Trumbull, Connecticut area and the size of the Boston market is very similar. New Jersey is very different. It's got a different customer base. It's got a different—a much different size market. The New Jersey market is probably three times the size of either the Boston or the Trumbull markets, and it has a very different user profile. There are financial service firms that, that do contract with us as, as, of course, you know. Those firms, though, tend to be, um—frankly, they don't tend to do it much anymore—but those that do, they tend to be—and this is the same— the same is true in Boston. The financial service firms—and, and our customers generally in both the Trumbull and Boston markets are typically local. They're people that are in the Boston market or within a certain—you know, probably a relatively narrow radius of either the Boston data center or the Trumbull data center."

inherent characteristics of the Connecticut market is contrary to its market rent analysis. The defendants claim that the court should have imputed income to Suite 220 on the basis of a lease of PBB space in Somerville, Massachusetts, signed in May, 2011, because the lease was a relevant indicator of market demand and rent for PBB space in Trumbull. We disagree.

The court's conclusion that the demand for the property was limited by the inherent characteristics of the Connecticut market is not contrary to its market rent analysis. Leary explained at trial that the size of the potential tenants in both the Boston and Trumbull data center markets was what made them similar. Although the court found that the Trumbull market was comparable to the Boston market in that respect, the court concluded that the demand for the property was limited by the inherent characteristics of the Connecticut market, which, as previously noted, was supported by the plaintiff's Investment Committee Memoranda and Lucey's testimony. We therefore conclude that the court's conclusion that the demand for PBB space was limited by the inherent characteristics of the Connecticut market is not contrary to its market rent analysis.

F

The defendants argue that the record is devoid of any evidence indicating that Suite 220's square footage made it unmarketable as PBB space. The record reveals the contrary.

At trial, Leary testified that, "normally, this PBB . . . applies to a whole building. There are cases in which, you know, a subset of a building might be leased on a PBB basis, but, normally, you're looking at the whole building, and it's kind of a . . . situation where, basically, the main building [has] infrastructures in place, and then the tenant goes in and . . . does their customized finish afterward. So just, you know, the size of

these things implies that, you know, it's whole buildings. . . . [A]nd one of the things I had pointed out in my summary here was of all these large facilities, only one of them was in New England, and that was the 90,000 square foot facility . . . in Boston. Most of this occurs in other places in the market."

At trial, Lucey also testified to the marketability of the suite based on its square footage. The following exchange occurred between the plaintiff's counsel and Lucey:

"Q. [D]oes [the plaintiff] have [PBB space] that it rents in the northeast?

"A. Yes.

"Q. Give us an idea of what the typical size is of what [the plaintiff] has in the northeast?

"A. Let's see, in the northeast, probably the smallest one . . . it's probably 50 to 60,000 square feet. The largest being [between 230,000 and] 240,000 square feet.

"Q. Okay. And the, the unbuilt space in the expansion at . . . [the property], would you classify that as [PBB] space?

"A. The way it's built right now, the power is brought . . . to the shell, or we could bring the power to the shell. So . . . the short answer is, we could certainly turn that into a [PBB] shell for that 17,000 square feet. Yeah, we could do that.

"Q. Do you think it's rentable on that basis?

"A. Highly unlikely.

"Q. Why?

"A. I, I won't say it's impossible, but highly unlikely. Typically, when customers rent PBB [space] . . . they're looking for a much larger footprint. The reason

for that is, because we don't operate the data center—I mean we—we bring power to the exterior, and then the rest of it is yours. You have to staff up. You have to have people there to operate that data center. And it would be very cost ineffective for someone to have a 17,000 square foot [PBB] shell and have to have all the staffing you need to operate a data center for—there's not enough square footage to spread the cost."

The defendants also introduced the plaintiff's 2011 and 2013 Form 10-K Annual Reports, filed with the Securities and Exchange Commission (SEC), into evidence. Both documents contain the number and square footage of new and renewable PBB leases signed in those years.

In its memorandum of decision, although the court acknowledged that, theoretically, PBB space could be as small as 5000 square feet, the court found that the "testimony and the economics of PBB space cast substantial doubt on whether PBB space with 16,000 rentable square feet would be marketable in the Trumbull area." The court therefore concluded that none of the evidence supported the defendants' claim that Suite 220 was marketable in Trumbull in 2011. In making this conclusion, the court found both Lucey's and Leary's testimony credible. The court also relied on the plaintiff's 10-K financial statements for 2011 and 2013. The court explained that the average number of total square footage of new and renewal PBB leases signed supported Leary's and Lucey's testimony that tenants typically want larger space when renting PBB space. We conclude that, because the trial court set forth its careful consideration of the expert testimony and reports and its findings are amply supported by the record, its determination that Suite 220 had no income and no income potential in 2011 is not clearly erroneous.

II

The defendants next claim that the court's determination that the highest and best use of Suite 210 was as wholesale space was clearly erroneous. Specifically, the defendants argue that the court's determination of the suite's highest and best use (1) is not supported by the evidence, (2) is inconsistent with the court's determination that there was no market for PBB space in Trumbull in 2011 due to the inherent limitations of the Connecticut based data center market, and (3) fails to take into account the plaintiff's existing leases and actual rent generated by those leases in its market rent analysis. We disagree.

Suite 210 is located in the expansion of the property and is a fully built out data center suite. After the expansion was completed, the plaintiff was unable to find a wholesale tenant to lease Suite 210 as it had hoped. As a result, the plaintiff began leasing the suite to colocation tenants in mid-2013. By 2014, 41 percent of Suite 210's raised floor space was leased to seven colocation tenants. The average rent paid by these tenants in 2014 was $404 per square foot.

In their appraisal reports and at trial, Sterling and Leary disagreed on the highest and best use of Suite 210 and, therefore, on what market rental rate to apply to calculate the suite's income potential. Sterling was of the opinion that, as of the date of valuation, the highest and best use of Suite 210 was as colocation space. Leary, on the other hand, concluded that the highest and best use of Suite 210 was as wholesale space.

In its memorandum of decision, the court concluded that the highest and best use of Suite 2010 in 2011 was as wholesale space and, accordingly, determined that market rent for Suite 210 properly should be regarded as based on wholesale data rates in 2011. In reaching this conclusion, the court first noted that the fact that

the plaintiff was not leasing Suite 210 as colocation space in 2011 and the plaintiff's intention to lease the suite for wholesale use was not conclusive of the suite's highest and best use: "The fact that [the plaintiff] itself did not begin marketing colocation space until 2012 does not preclude colocation from being the highest and best use of Suite 210 in 2011." The court did not find credible Leary's opinion that there was no market for colocation space in Trumbull in 2011. Rather, the court found credible Sterling's description of the colocation space as an evolving " 'sweet spot' " of the data center market. The court credited Sterling's testimony that colocation was becoming more popular. The court determined, however, that Sterling's testimony did not preclude the court from agreeing with Leary's conclusion that the highest and best use of the suite was as wholesale space, especially in light of Lucey's testimony. The court found Lucey's testimony to be credible, particularly with regard to his "catalogue of reasons that colocation rentals are less desirable than wholesale rentals . . . ." This catalogue, according to the court, included the fact that colocation leases tend to involve (1) a shorter duration, (2) smaller amounts of power, (3) tenants who occupy less space, (4) increased risk due to tenants who are typically less creditworthy, (5) greater periods of time between leases, (6) higher transactional costs due to higher turnover rates, and (7) flat rates based on the amount of kilowatts provided to tenants rather than both such flat rates and the pro rata add-ons paid by wholesale customers for their share of certain building and common area expenses and electricity. The court found that the plaintiff's seven colocation leases in 2013 and 2014 shared some of these characteristics. The court also credited Lucey's testimony that the difference in rental market rates between colocation and wholesale customers is " 'not as great as people think.' "

On the basis of our review of the record, we have little difficulty concluding that the court's finding was supported by evidence in the record. On direct examination, Lucey explained why colocation leases were less desirable to the plaintiff than wholesale leases: "[T]hey were unable to lease [Suite 210] for wholesale. So they had to go into a [colocation] leasing arrangement where you have multiple tenants, which . . . it's typically a longer lease-up process. It also tends to be much more hands-on and, and resource demanding just because . . . people are leasing very small bits of power and space. You also have the transactional cost and the transactional volume increases. You have to do many, many more leases, and your lease-up time tends to be extended, and you don't typically get long terms."

During cross-examination, Lucey explained that, despite the perceived price difference between colocation and wholesale leases, the actual difference is not very significant: "Generally speaking, I would say . . . that a [colocation] customer would pay . . . a premium to . . . a wholesale customer. . . . The reasons are . . . [colocation] customers tend to . . . lease [a] smaller amount . . . . [Colocation] leases typically are shorter. So you charge a premium, because you're not getting the term. You also tend to not get the same credit quality. So you try to charge a premium for that. In addition to that, they're just leasing much less. So you would tend to try to charge a premium for that. Now, what's offset in the [colocation] world is your transaction costs are much higher because you're turning over the space far more often. So you've got more downtime baked into it. In addition to that you're paying more brokerage commissions. . . . [W]hen you lease [colocation] space, it's typically done on an all-in basis. . . . [Y]ou're not going to see another bill from us for electricity or anything else. . . . Wholesale is . . . typically priced differently. . . . [O]n wholesale . . .

you pay a base rate. So maybe you're paying 140 a kilowatt versus the [colocation] customers [who are] paying 200 a kilowatt. But as the wholesale customer, you're also being charged a pro rata share of a building's expenses, common area expenses, like . . . janitorial, plowing, all of that stuff. You pay a pro rata share of that. In addition to that, you also pay a separate charge for any electricity you use in your space above and beyond the contracted-for power. . . . Light bulbs. You run computers. People have offices, command centers. . . . [T]here are a number of additional add-ons to the . . . wholesale person that don't apply to [colocation]. . . . [S]o there is a price difference. It's not as great as people think. . . . Yes . . . you definitely charge a premium, but when you . . . strip it all back, the . . . differences aren't that great . . . ."

This evidence was sufficient to support the court's finding. Nevertheless, the defendants argue that the court erred by failing to consider the plaintiff's existing leases and the actual rent from those leases in its market rent analysis. The defendants contend that Suite 210 was devoted to the use for which it was best adapted—colocation—and, therefore, the court erred by not applying the actual rent from the plaintiff's 2013 and 2014 colocation leases to determine the suite's income potential.

As previously explained, "[p]ursuant to § 12-63b (b), the court is required to consider both market rent and actual rent when determining fair market value using the income capitalization method. . . . [I]f the property is devoted to the use for which it is best adapted and is in a condition to produce or is producing its maximum income, the actual rental is a very important element in ascertaining its value." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *Pilot's Point Marina, Inc.* v. *Westbrook*, 119 Conn. App. 600, 603–604, 988 A.2d 897 (2010). Here, on the basis

of the evidence in the record, the court concluded that the suite was not devoted to the use for which it was best adapted. Although the suite was being leased as colocation space in 2013 and 2014, the court concluded that the suite's highest and best use was to be leased as wholesale space. Contrary to the defendants' assertion, the court did consider the plaintiff's existing leases and actual rent from those leases. Because those leases were for colocation customers, however, the court did not use the actual rent from those leases to determine the suite's fair market value. Rather, the court properly applied market rental rates to determine the suite's fair market value as wholesale space. We therefore conclude that the court properly considered both the suite's actual rent and market rent. See id.

The defendants also contend that the court's determination of the highest and best use of Suite 210 is inconsistent with its determination that there was no market for PBB space due to the inherent limitations of the Connecticut based data center market. In concluding that there was no market for PBB space in Trumbull in 2011, the court found that the demand for such space would lie exclusively with Connecticut based customers because these customers often had more localized demand. The court also noted that the customers were often smaller users. The court found Lucey's testimony that PBB space is usually rented on a building wide basis credible. Although the court found that Connecticut based customers tend to be smaller users with more localized demand, the court nevertheless concluded that 16,000 rentable square feet of PBB space was not marketable to those customers. The court's conclusion that there was no market for *PBB space* in Trumbull in 2011 does not contradict its conclusion that the highest and best use of Suite 210, *a fully built out suite*, would be wholesale space. The court's conclusion that there was no demand for PBB space in Trumbull in

2011 does not preclude it from also finding that there was demand for a wholesale lease of a fully built out suite. We therefore conclude that the court's determinations are not contradictory.

On the basis of the evidence in the record, we conclude that the court's determination that wholesale use was the highest and best use of Suite 210 in 2011 was not clearly erroneous.

III

The defendants next argue that the court erred in applying a capitalization rate of 8 percent. Specifically, the defendants contend that the court applied an "unsubstantiated" capitalization rate.[22]

The last two steps in the income capitalization approach include selecting an applicable capitalization rate and applying that capitalization rate to the property's net income to arrive at an indication of the market value of the property being assessed. See *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, supra, 94 Conn. App. 702 n.9. "The capitalization rate is considered the rate a reasonable investor would seek on his capital or equity . . . . In other words, the capitalization rate is a projection of the buyer's return on investment based upon a comparison of the property's income producing capacity to its purchase price." (Citation omitted; internal quotation marks omitted.) *Fairfield Merrittview*

[22] To the extent the defendants challenge Leary's appraisal report or his testimony regarding the appropriate capitalization rate, we decline to review this claim. The defendants failed to object to the admission of Leary's appraisal report containing calculations of his capitalization rate and likewise failed to object to his testimony concerning these calculations. See *State* v. *Crocker*, 83 Conn. App. 615, 653, 852 A.2d 762 (when "defendant never objected to the court's admitting [the witness'] testimony into evidence," defendant's claim that it was improper for court to admit witness' testimony was unpreserved), cert. denied, 271 Conn. 910, 859 A.2d 571 (2004). Accordingly, we decline to review the defendants' unpreserved claim.

*Ltd. Partnership* v. *Norwalk*, supra, 172 Conn. App. 166 n.14. "It is generally recognized that the most difficult element to determine, and so far as results are concerned the most important, in any computation of value based on earning power is the rate at which the earnings are to be capitalized." *Burritt Mutual Savings Bank of New Britain* v. *New Britain*, 146 Conn. 669, 676, 154 A.2d 608 (1959). "Determination of the capitalization rate is both critical and highly subjective." 1 Powell on Real Property (M. Wolf ed., 2017) § 10B.06 [4] [c] [v], p. 10B-111.

The two appraisers, Sterling and Leary, used different methodologies for selecting an applicable capitalization rate. Sterling used the band of investment technique.[23] The band of investment technique recognizes the presence of both the debt and equity components of commercial real estate. See Appraisal Institute, supra, p. 535 (explaining that band of investment technique is "[a] technique in which the capitalization rates attributed to components of a capital investment are weighted and combined to derive a weighted-average rate attrib-

[23] The defendants argue that, "[g]iven the lack of information available on data center sales, the appropriate technique for calculating the property's capitalization rate was the band of investment technique utilized by the [defendants'] appraiser [Sterling]." At oral argument, when asked to which claims plenary review applies, the defendants did not refer to this claim.

We conclude that plenary review does not apply to this claim. The court did not reject either appraiser's approach to calculating the appropriate capitalization rate *as a generally applicable rule of law*. See *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 493–94. We also conclude that the abuse of discretion standard does not apply to this claim because the court did not conclude that either "appraiser's calculations were incorrect or based on a flawed formula in [the] case, or because it determined that an appraisal method was inappropriate" for the property. Id. Rather, the court was confronted with conflicting methods and calculations of the appropriate capitalization rate and properly gave credence to one over the other as the trier of fact. See *Connecticut Coke Co.* v. *New Haven*, 169 Conn. 663, 666, 364 A.2d 178 (1975); see also *Abington, LLC* v. *Avon*, supra, 101 Conn. App. 719. Thus, we apply the clearly erroneous standard of review in reviewing this claim.

utable to the total investment"). Using this technique, Sterling applied a capitalization rate of 6.91 percent.[24]

Leary reached his capitalization rate by analyzing sales of like properties and reviewing recognized market surveys of investors in such properties. See Appraisal Institute, supra, p. 530 ("[o]verall capitalization rates can be estimated with various techniques"); id., p. 530 n.2 ("[s]urveys of overall capitalization rates based on the market expectations of lenders and owners are available, but such data should be rigorously scrutinized"). Leary analyzed information on capitalization rates of like properties in the United States with similar types of income streams. Specifically, he reviewed certain newsletters from professional real estate organizations that focused on data centers, which included published capitalization rates from the sale of

[24] The court explained how Sterling employed the band of investment technique to reach a capitalization rate of 6.91 percent: "He described his first step as determin[ing] . . . an appropriate rate . . . for the mortgage component of that overall capitalization rate. . . . To do so, he examined investment bulletins and surveys from the life insurance industry, RERC, Price Waterhouse Coopers Korpacz (PwC), and the mortgage lending industry, along with yield on the monthly average for ten year treasury bills. Using this data, he determined that there is support for a mortgage with an interest of 5.25 percent as of October 1, 2011, which he mathematically converted to a mortgage constant of 7.19 percent. . . . For the return on equity component, he again focused on his conclusion that the space can be marketed to the highest quality tenants increasing the quantity, quality and durability of the future income . . . and considered short-term treasury bills, corporate bonds, and extrapolated equity dividend rates from the life insurance tables he used. . . . He had previously opined in his 2011 appraisal that a return on equity rate of 8 percent was appropriate for the property. . . . For the current appraisal, he said that he decided that an equity dividend rate of 6.5 percent is appropriate because of the installation of new electrical infrastructure for the remediation, the construction of a new 70,000 square foot addition, and [the plaintiff's] decision to begin marketing to colocation tenants. . . . Blending these two components, he arrived at a capitalization rate of 6.91 percent, which he determined was appropriate after comparing reported capitalization rates for the highest value properties, such as large offices and large industrial investments." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.)

seven data centers across the United States. Using this information, Leary concluded that an appropriate capitalization rate for the property was between 8.25 and 8.5 percent.[25]

The court noted that, although both techniques were commonly used methods for determining an appropriate capitalization rate, "[t]here [were] some concerns about each appraiser's methodology." The court ultimately concluded that the appropriate capitalization rate was 8 percent, finding that Leary's capitalization rate was "essentially correct, although it [did] not give enough consideration to the effect of the brand new electrical infrastructure installed with the remediation and the expansion."

The defendants contend that the court's finding that 8 percent represented an appropriate capitalization rate

[25] The court explained how Leary determined that a capitalization rate between 8.25 and 8.5 percent was appropriate: "Leary began by examining excerpts from certain newsletters from professional organizations in the real estate business that focused on data center information. . . . Those newsletters reported sales of seven data centers in the United States during 2011 and 2012 that displayed an overall capitalization rate . . . range of 6.2 percent to 10.2 percent. . . . The two lowest rates involved one purchaser who bought two properties in California and Virginia at the same time . . . in very active markets. . . . Leary said he believed this investor clearly had some investment criteria that were different than the majority of the transactions . . . and that those purchases, in Leary's opinion, appear to be below market based on the remaining five transactions. . . . The remaining five transactions display cap rates that range from 8.1 percent to 10.2 percent and average 8.8 percent. . . . The next two lowest capitalization rates were in Georgia, which he said has lower utility costs than Connecticut, and, thus, less risk, [and] a lower cap rate . . . and the highest was in Michigan, which has higher costs. He also considered investor reports from the Real Estate Research Corporation (RERC) Quarterly Real Estate Report. Although the RERC information did not contain data about data centers, he decided the industrial/R&D category, industrial/research and development was the closest of these categories to what might being considered a data center. . . . So I used that category, and I looked at the eastern U.S. market for the third quarter of 2011, and it showed a range of 6 percent to 10.5 percent in the market, which, ironically, was pretty close to the range of the data from the sales, and it showed an average of 8.6 percent. . . . He then testified: Well, I used both sets of data to conclude that the

was clearly erroneous. The defendants take issue with the court's capitalization rate because, in their view, the newsletters and surveys Leary relied on and, therefore, on which the court relied in finding Leary's capitalization rate " 'essentially correct,' " rely on "unsubstantiated and unverified market data." Specifically, the defendants argue that Leary could not verify certain information about the seven data centers in the market newsletters, including (1) their square footage, (2) the square footage of their raised floor area, (3) their electrical capacity, (4) their age, (5) their condition, and (6) their income and expenses. Thus, the defendants argue that Leary could not confirm whether the data centers referenced in the newsletters were comparable to the property, and it was clearly erroneous for the court to rely on such newsletters in determining a proper capitalization rate for the property. We disagree.

Where "the trial court is confronted with conflicting accounting methods . . . giving credence to one over the other is a proper exercise of its function as a trier of fact." *Connecticut Coke Co.* v. *New Haven*, 169 Conn. 663, 666, 364 A.2d 178 (1975). "In arriving at the value of property, no one method is controlling, and there is no rule of law that any particular method of valuation must be followed. It is a matter of opinion based on all the evidence and, at best, is one of approximation." (Internal quotation marks omitted.) *Housing Authority* v. *CB Alexander Real Estate, LLC*, 107 Conn. App. 167, 180, 944 A.2d 1010 (2008). "In reviewing valuations, we must bear in mind that the process of estimating the value of property for taxation is, at best, one of approximation and judgment, and that there is a margin for a difference of opinion." (Internal quotation marks omitted.) *Connecticut Coke Co.* v. *New Haven*, supra, 668.

appropriate capitalization rate for this property, given the fact a third of the building is new, would be slightly below that average or 8.25 to 8.5 percent as the basis for converting that income into value." (Citations omitted; internal quotation marks omitted.)

"We will disturb the trial court's determination of valuation, therefore, only when it appears on the record before us that the court misapplied or overlooked, or gave a wrong or improper effect to, any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) *New Haven Savings Bank* v. *West Haven Sound Development*, 190 Conn. 60, 70, 459 A.2d 999 (1983).

Here, the court properly gave credence to one appraiser's method of calculating the capitalization rate over the other and determined an appropriate capitalization rate based on evidence in the record. The record includes excerpts from the Avision Young Data Center Practice newsletter, which reported seven transactions referencing capitalization rates for those sales.[26] The newsletter reported an overall capitalization rate range from 6.2 percent to 10.2 percent. Leary testified that the two lowest rates involved one purchaser who bought two properties in California and Virginia "at the same time . . . in very active markets." Leary testified that he believed the investor "clearly had some investment criteria that were different than the majority of the transactions" and those transactions "appear to be below market based on the remaining five transactions." The remaining five transactions reported in the newsletter had capitalization rates ranging from 8.1 percent to 10.2 percent. Leary testified that the two lowest

[26] Leary summarized the data on these seven sales in the following table:

| Location | Building Square Footage | Date | Capitalization Rate |
|---|---|---|---|
| Rancho Cordova, CA | 69,000 | 2011 | 9.0% |
| Atlanta, GA | 338,000 | 2011 | 8.2% |
| Norcross, GA | 33,000 | 2012 | 8.1% |
| Southfield, MI | 53,000 | 2012 | 10.2% |
| Austin, TX | 62,000 | 2012 | 8.5% |
| Vienna, VA | 225,038 | 2012 | 6.2% |
| San Diego, CA | 166,892 | 2012 | 7.5% |

capitalization rates from these five transactions were located in Georgia, which has lower utility costs than Connecticut and less risk, resulting in a lower capitalization rate. The transaction with the highest capitalization rate was located in Michigan, which Leary testified has higher utility costs.

The record also included a Real Estate Research Corporation Quarterly Real Estate Report (RERC report). Both Leary and Sterling referenced the RERC report in their appraisal reports.[27] The RERC report includes capitalization rates for different types of properties in the eastern United States within different categories including, inter alia, "[o]ffice," "[w]arehouse," and research and development.[28] The capitalization rate ranges for first tier[29] properties were 5.5 percent to 10 percent with an average of 7.9 percent for suburban offices and 5 percent to 12 percent with an average of 8.2 percent for research and development properties.[30] The capitalization rate for second tier research and development properties ranged from 6 percent to 10.5 percent with an average of 8.6 percent.

In reaching its conclusion that 8 percent was an appropriate capitalization rate, the court stated that the

[27] Notably, the RERC report was admitted into evidence as part of Sterling's appraisal report.

[28] Leary testified that he concluded the research and development category to be the most applicable to the property.

[29] The court explained the difference between first tier and second tier properties: "[F]irst tier refers to new or newer quality construction in prime to good locations; second tier refers to aging, formerly first tier properties in good to average locations." (Internal quotation marks omitted.)

[30] Leary summarized the capitalization rates reported in the RERC report for first tier properties in the eastern United States:

| Regional - Eastern: 1st Tier | Suburban Office | Research and Development |
|---|---|---|
| Range | 5.5%–10% | 5%–12% |
| Average | 7.9% | 8.2% |

property had characteristics of both a first tier and a second tier property. The court explained that the expansion and electrical remediation were characteristics of a first tier property, while the location in Trumbull was a characteristic of a second tier property. The court found that Sterling too easily dismissed the threat of obsolescence in the data center industry, while Leary's classification of the property as a second tier property recognized the potential for obsolescence. The court concluded that Leary's capitalization rate was essentially correct, although his capitalization rate did not give enough consideration to the effect of the brand new electrical infrastructure installed with the remediation and the expansion. The court thus concluded that the appropriate capitalization rate, properly taking the new electrical infrastructure into consideration, was 8 percent, slightly lower than Leary's range of 8.25 percent to 8.5 percent.

Because the court's capitalization rate was supported by evidence in the record, we conclude that its finding was not clearly erroneous.

IV

The defendants' final claim is that the court's determination of the fair market value of the property is clearly erroneous because the court disregarded the plaintiff's internal valuations, which clearly undermine the court's valuation of the property. The defendants point to the plaintiff's 10-K Forms for the 2013 and 2014 years, in which the plaintiff reported the property and 80 Merritt Boulevard as having a combined book value of $163,486,000 and $165,596,000 for 2013 and 2014, respectively. The defendant also relies on an asset "impairment analysis" completed by the plaintiff in 2014, which the defendant argues shows that the value of the property was $180,293,972 as of 2014, based on market conditions as of 2011.

In its Form 10-K Annual Reports submitted to the SEC, the plaintiff reported that the combined book value of the property and 80 Merritt Boulevard was $163,486,000 in 2013 and $165,596,000 in 2014. The defendants contend that the court erred in disregarding these book values in determining the property's fair market value. Lucey, however, testified that the values reported to the SEC in the 10-K Forms represented the book value, rather than the fair market value, of the property.[31] As the trial court explained in its memorandum of decision, the plaintiff's 10-K filings show " 'book value', not fair market value, and have little relation to the issues here."

The defendants also contend that the asset "impairment analysis" completed by the plaintiff in 2014 shows that the value of the property was $180,293,972 as of 2014, based on market conditions as of 2011, undermining the court's valuation of the property. The defendants rely on a document created by the plaintiff as part of this analysis, which states that, on the basis of the ten year cash flow of the property and 80 Merritt Boulevard, the properties were valued at $198,200,119 in 2014 and $212,744,378 in 2015.

As previously described, the plaintiff's projected returns on its investment into the property did not come to fruition. The property was included in a 2014 review of potentially underperforming properties. The plaintiff's accounting group then undertook an " 'impairment

[31] When asked to explain what the $165,596,000 value reported in the SEC form 10-K for 2014 represented, Lucey testified, "[F]or our reporting purposes to the SEC, we report on book value of our assets, which essentially means what we've invested in the asset." Lucey testified that the $165,596,000 did not represent the fair market value of the property because the plaintiff "report[s] on book value. So this is just based on what we've invested in the property, not what the property would sell for. . . . The value of that property—the fair market value, what someone would pay, could be dramatically higher or dramatically lower than that number. It depends on a whole host of conditions that have very little to do with what we've invested in the property."

analysis.' " As part of the impairment analysis, the plaintiff completed a recoverability test. This test involved a "dynamic valuation" of both the property and 80 Merritt Boulevard and included a ten year cash flow analysis based on certain optimistic assumptions. The plaintiff's internal documents show that the ten year dynamic valuation of cash flow of the property and 80 Merritt Boulevard was $198,200,119 in 2014 and $212,744,378 in 2015. The defendants argue that subtracting the parties' stipulated value for 80 Merritt Boulevard results in a value of $186,371,800 for the property for 2014. After applying the 3 percent discount factor used by Leary, the defendants contend that the value of the property was $180,293,972.

At trial, however, Lucey described the ten year dynamic valuation of cash flow analysis as a "best case scenario . . . ." The plaintiff describes the process as an "optimistic projection, establishing the upper limit of [return on invested capital]." The analysis did not take into account variables such as leasing pace, structural vacancy, structural free rent, carrying costs, new development capital, or portfolio changes during lease-up of vacant space. The analysis also assumed 95 percent occupancy by 2017.

Also as part of this analysis, the plaintiff estimated the combined fair market value of the property and 80 Merritt Boulevard to be $120,000,000. At trial, Lucey explained that this fair market value included not only both properties but also personal property, such as equipment on site.

In its memorandum of decision, the trial court stated that the "$120 million estimation of fair market value used during the 2014 Return on Invested Capital analysis was placed on the combined properties and personalty within and, together with the parties' stipulations about the fair market value of 80 Merritt Boulevard, is

consistent with this court's valuation for [the property]." The court reasoned that the ten year dynamic valuation of cash flow was based on optimistic assumptions and a best case scenario. Thus, the court clearly considered but did not place weight on the plaintiff's internal valuations.

After reviewing the record, including the thorough and well reasoned memorandum of decision, we conclude that the court's determination of the fair market value of the property was not clearly erroneous.

The judgments are affirmed.

In this opinion the other judges concurred.

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## CHRISTOPHER WILLIAMS, ADMINISTRATOR (ESTATE OF JOHN WILLIAMS) *v.* LAWRENCE + MEMORIAL HOSPITAL, INC., ET AL.
## (AC 44065)

Cradle, Clark and Flynn, Js.

*Syllabus*

The plaintiff, as administrator of the estate of the decedent, sought to recover damages for medical malpractice from the defendant B, an emergency medicine physician who treated the decedent for injuries sustained in a motorcycle accident that ultimately led to his death. At the conclusion of the plaintiff's case-in-chief, the plaintiff moved to admit into evidence certain excerpts from a medical text known as the Advanced Trauma Life Support guidelines, which the plaintiff contended constituted exceptions to the rule against hearsay as statements in learned treatises, pursuant to the applicable provision (§ 8-3 (8)) of the Connecticut Code of Evidence. The basis for the plaintiff's motion was that two of his medical experts had recognized those guidelines as an authoritative treatise in the field of trauma medicine and had relied on specific portions of the guidelines in providing their expert testimony. The court denied the plaintiff's motion on the ground that the relevant excerpts could confuse the jurors as to the relevant standard of care. Following the jury's verdict for B, the plaintiff appealed to this court, claiming that § 8-3 (8) creates a presumption of admissibility, that the guidelines met the requirements for admission, and, accordingly, that the trial court

lacked a legal basis upon which to exclude them. *Held* that the trial court did not abuse its discretion in precluding admission of the guidelines excerpts; although Connecticut permits the admission of learned treatises into evidence, the court had the discretion to exclude evidence that carried the danger of misunderstanding or misapplication by the jury, and the court correctly determined that, had the excerpts been admitted, the jury could mistakenly have assessed B's conduct only in light of the guidelines rather than determining whether B deviated from the standard of care in treating the decedent, as, throughout the trial, the plaintiff repeatedly and erroneously contended that the guidelines set forth the relevant standard of care.

Argued November 16, 2021—officially released April 5, 2022

*Procedural History*

Action to recover damages for medical malpractice, and for other relief, brought to the Superior Court in the judicial district of New London, where the action was withdrawn as against the named defendant et al.; thereafter, the matter was tried to the jury before *Swienton, J.*; subsequently, the court denied the plaintiff's motion to admit certain evidence; verdict and judgment for the defendant Peter Bertolozzi, from which the plaintiff appealed to this court. *Affirmed.*

*Dana M. Hrelic*, with whom were *Stacie L. Provencher*, and, on the brief, *Karen L. Dowd*, for the appellant (plaintiff).

*Logan A. Carducci*, with whom was *Frederick J. Trotta, Sr.*, for the appellee (defendant Peter Bertolozzi).

*Opinion*

CRADLE, J. In this medical malpractice action, the plaintiff, Christopher Williams, administrator of the estate of John Williams (decedent), appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant, Peter Bertolozzi, an emergency

medicine physician.[1] On appeal, the plaintiff claims that the trial court abused its discretion by declining to admit into evidence certain excerpts from the Advanced Trauma Life Support (ATLS) guidelines, which the plaintiff argues were admissible under § 8-3 (8) of the Connecticut Code of Evidence. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In the early afternoon hours of August 9, 2015, the decedent was operating his motorcycle when he collided with an oncoming vehicle. He sustained critical injuries to his lower body[2] and was transported by ambulance to Lawrence + Memorial Hospital (hospital) in New London, where he was placed under the care of, and treated by, the defendant.

Shortly after arriving at the hospital, the decedent lost consciousness. The defendant intubated the decedent and ordered a blood transfusion.[3] Concerned that the decedent was bleeding internally and had suffered head trauma, the defendant sent the decedent for a CT scan in order to locate the source of the hemorrhaging and to diagnose other potential injuries. The defendant also consulted with David Reisfeld, the onsite surgeon, to determine whether the decedent could be effectively stabilized at the hospital or whether he required transfer to a designated trauma facility. Specifically, Reisfeld and the defendant determined that, if the decedent was bleeding abdominally, Reisfeld could operate onsite at

[1] Although the plaintiff's complaint initially named David Reisfeld, a general surgeon, and Lawrence + Memorial Hospital, Inc. (hospital) as defendants, the plaintiff subsequently withdrew his claims against Reisfeld and the hospital. Neither Reisfeld nor the hospital are parties to this appeal. Accordingly, all references to the defendant are to Bertolozzi only.

[2] Specifically, the decedent suffered a femoral fracture and an "open book" pelvic fracture, along with other injuries to his head and chest.

[3] Although the defendant ordered that the decedent receive four units of blood, it was later established, during cross-examination, that the decedent was administered only two units of blood.

the hospital. If, however, the decedent presented with intracranial bleeding or a lower extremity or vascular issue, Reisfeld and the defendant concluded that the decedent would need to be transferred to a designated trauma facility.

After the decedent underwent the CT scan, the defendant spoke with the hospital's orthopedic surgeon, who concluded that the decedent likely was suffering from a vascular issue. The defendant also discussed the results of the CT scan with the hospital's radiologist. After conferring with both the orthopedic surgeon and the radiologist, the defendant concluded that the decedent had suffered injuries beyond the hospital's capacity for treatment and required transfer to a designated trauma facility for further diagnoses and treatment. The defendant then arranged for the decedent to be transported via helicopter to Yale New Haven Hospital. Shortly after air medics arrived at the hospital to transport the decedent, he suffered cardiac arrest and was pronounced dead later that day.

The plaintiff commenced the present action on July 22, 2016, by way of a three count complaint against the defendant, Reisfeld, and the hospital. On November 25, 2019, the plaintiff filed a third revised complaint[4] against the defendant alleging, inter alia, that the defendant deviated from the applicable standard of care[5] in two ways. First, the plaintiff alleged that the defendant failed to recognize that the decedent's condition required an immediate transfer to a designated trauma facility. Second, the plaintiff alleged that the defendant failed to

[4] The third revised complaint is the operative complaint in this matter.

[5] The standard of care for medical malpractice actions is set forth in General Statutes § 52-184c (a), which provides in relevant part: "The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."

follow appropriate protocols for the care and treatment of a trauma patient.[6] The defendant denied both allegations.

A ten day jury trial commenced on November 12, 2019. At trial, the plaintiff argued that the defendant deviated from the standard of care by failing to follow the ATLS guidelines, a medical text promulgated by the American College of Surgeons that sets forth procedures, protocols, and practices for emergency medical professionals to follow when treating trauma patients.

In support of his claim that the defendant deviated from the standard of care by failing to follow the ATLS guidelines, the plaintiff presented the testimony of two expert witnesses, Kevin Brown, a board-certified emergency medicine physician, and Ronald Simon, a board-certified trauma surgeon.[7] Brown testified that the ATLS guidelines are an authoritative resource that sets forth the best practices for the initial stabilization of trauma patients. As an ATLS instructor, Brown explained that the ATLS guidelines are taught to emergency medical

[6] Prior to trial, the defendant filed a motion in limine seeking to preclude evidence or argument which improperly (1) substituted " 'safety rules' " for the statutorily defined standard of care set forth in General States § 52-184c, (2) invited jurors to use their own common sense in determining the standard of care rather than relying on expert testimony, or (3) invited the jury to consider itself the " 'conscience of the community' " in deciding whether the defendant deviated from the prevailing standard of care. Specifically, the defendant argued that admitting " 'safety rules' " would confuse the jury because such rules imply that physicians are held to a higher standard than the statutorily defined duty of care owed by a physician to his or her patient. After hearing argument from both parties on the defendant's motion in limine, the court ruled that it "would not allow any argument to the jur[ors] which would imply that they were setting the standard of care as it relates to the medical treatment of [the decedent], or that their decision carries weight outside of the courtroom, or any other argument which is in conflict with the statutory requirement and definition of the standard of care."

[7] The plaintiff also repeatedly referenced the ATLS guidelines during opening and closing argument, contending that the guidelines were an "algorithmic" procedure and a "proven cookbook" that emergency medical professionals are required to follow when treating trauma patients.

professionals in a biannual, two day course, which includes both practical instruction and clinical scenarios, and that the successful completion results in a three year ATLS certification. Brown also testified that the ATLS guidelines are an evolving text that changes every three years in line with contemporary medical research.

In the context of the present case, Brown testified that the ATLS guidelines establish standardized procedures for the initial care of trauma patients, patients diagnosed with severe pelvic injuries, and patients who require transfer to a separate trauma facility. Relying on the guidelines, Brown opined that the defendant deviated from the standard of care by (1) failing to administer appropriate resuscitative blood to the decedent, (2) failing to immediately transfer the decedent to a designated trauma facility, (3) ordering a CT scan instead of less time intensive procedures, and (4) failing to use a "pelvic binder" device to stabilize the decedent's pelvic fracture and reduce bleeding. On redirect examination, Brown clarified that, although the ATLS guidelines set forth specific procedural steps, physicians retain discretion in treating trauma patients. Specifically, he testified that the ATLS guidelines "don't cover every single . . . possibility that there is . . . when there are straightforward kind of protocols to implement or approaches to implement you follow along the protocol and you can still use judgment . . . . So it's not one or the other. There are guidelines throughout medicine and [applying those guidelines] has to be reasonable to that case . . . [s]o we have so many guidelines for so many different conditions."

Simon testified that the ATLS guidelines were intended to provide emergency medical professionals with a uniform, international standard to follow during the initial care of trauma patients. He testified further that the guidelines set forth a "well-defined algorithm" that assists emergency medicine professionals to identify and treat

injuries that present the most immediate threat to a patient's life. Simon opined that, had the ATLS procedural steps been followed in the present case, the decision to transfer the decedent to a designated trauma facility would have been expedited. Specifically, Simon testified that the defendant should have performed a Focused Assessment with Sonography for Trauma (FAST) examination to determine whether the decedent was bleeding internally.[8] By contrast, Simon testified that the CT scan was time intensive and unsafe because the procedure required that the patient be alone in a room until the scan was completed.

On cross-examination, Simon conceded that FAST examinations generally are less accurate than CT scans, especially when performed on larger patients and patients diagnosed with pelvic fractures, such as the decedent. He also testified that only trauma surgeons are required to "remain current in ATLS" while emergency medicine physicians, such as the defendant, are not required to recertify. Nevertheless, Simon testified that the ATLS guidelines informed the standard of care with regard to the defendant's treatment of the decedent.

The plaintiff also called the defendant to testify as to the ATLS guidelines. The defendant testified that he had become ATLS certified in 2010 and, despite electing not to recertify, had kept abreast of the evolving guidelines. The defendant testified that the ATLS guidelines are "a good primer and . . . very good for people who don't work in emergency department[s], or are not surgeons . . . ." The defendant clarified that he "consider[s] many things authoritative . . . [but] would not say ATLS is the most authoritative trauma . . . resource . . . ."

At the conclusion of the plaintiff's case-in-chief, the plaintiff's counsel moved, pursuant to § 8-3 (8) of the

[8] FAST is a limited bedside ultrasound performed by emergency physicians to quickly detect abdominal fluid or cardiac complications.

Connecticut Code of Evidence, to admit into evidence certain excerpts from the ATLS guidelines.[9] The basis for the plaintiff's motion was that Brown and Simon recognized the ATLS guidelines as an authoritative treatise in the field of trauma medicine and relied on specified portions of the guidelines in providing their expert testimony. The defendant objected, arguing that admitting "medical article[s] into evidence . . . [would be] inappropriate." The court, *Swienton*, *J.*, denied the plaintiff's motion on the ground that the admission of the relevant excerpts could confuse the jurors as to the relevant standard of care. Specifically, the court stated, "I think it's the court's discretion and I think that . . . [Brown and Simon have] testified from these portions [of the ATLS guidelines] already, and I think having the texts themselves in the jury . . . deliberation room

[9] Section 8-3 (8) of the Connecticut Code of Evidence is known as the statement in learned treatises exception to the rule against hearsay. It provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (8) Statement in learned treatises. To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in the field by the witness, other expert witness or judicial notice." Conn. Code Evid. § 8-3 (8).

The commentary to § 8-3 (8) of the Connecticut Code of Evidence further clarifies that "[§ 8-3 (8)] explicitly permits the substantive use of statements contained in published treatises, periodicals or pamphlets on direct examination or cross-examination under the circumstances prescribed in the rule. In the case of a journal article, the requirement that the treatise is recognized as a 'standard authority in the field' . . . generally requires proof that the specific article at issue is so recognized. . . . There may be situations, however, in which a journal is so highly regarded that a presumption of authoritativeness will arise with respect to an article selected for publication in that journal without any additional showing. . . . Although most of the earlier decisions concerned the use of medical treatises . . . Section 8-3 (8), by its terms, is not limited to that one subject matter or format. . . . Connecticut allows the jury to receive the treatise, or portion thereof, as a full exhibit. . . . If admitted, the excerpts from the published work may be read into evidence or received as an exhibit, as the court permits." (Citations omitted.)

. . . could just lead to some confusion by the jurors, and I'm not going to admit them as full into evidence as full exhibits."

The defendant also presented testimony from two standard of care experts, William Dalsey, a board-certified emergency medicine physician, and George Velmahos, a board-certified surgeon. Both Dalsey and Velmahos addressed the ATLS guidelines during their testimony.

Dalsey testified that he was an ATLS instructor from 1981 through the early 2000s. He also testified that the purpose of the ATLS course and guidelines is "to begin the initial education and training of health-care providers in the treatment of trauma" and that ATLS is "primarily focused on people that don't take care of patients that are trauma victims on a regular basis." Specifically, Dalsey clarified that "[ATLS] is useful for physicians who don't work in emergency departments, who don't take care of trauma patients . . . ."

Dalsey further testified that emergency physicians are not required to maintain ATLS certification because "the training [that] an emergency physician goes through is beyond what the ATLS [guidelines teach] and is beyond the scope of the beginning education that ATLS tries to provide." Accordingly, Dalsey opined that "ATLS [does not set] a standard of care [and] was never intended to set a standard of care [because] . . . emergency physicians are trained past the point of the basic algorithms of ATLS . . . ."

On cross-examination, the plaintiff's counsel asked Dalsey whether the ATLS guidelines were "a reasonable standard of care for this jury to adopt." The defendant objected to the question, at which point the court dismissed the jury from the courtroom. Outside the presence of the jury, the defendant's counsel explained his objection, stating, "The court's mindful of my objection

that the jury doesn't adopt the standard of care. . . . These physicians all qualified will come in and testify as to their impression of [the] standard of care. The jury isn't the people adopting the standard of care . . . . They're going to define the case based upon the evidence in front of them." In response, the plaintiff's counsel contended that the ATLS guidelines not only inform the standard of care but that they are "de facto . . . the standard of care. In other words . . . when you have a [trauma] patient, you follow [the ATLS] algorithm." The court agreed with the defendant's counsel, stating, "I'm concerned that the jurors are going to want to look at ATLS to read and say . . . this is what the standard of care is. Now, obviously, this is a manual and we've heard from different people exactly what it is, and then each doctor has had their own interpretations and then . . . indicates what the standard of care is based on their training and experience not on that manual. . . . I don't believe in any case that there's a book out there that sets [the] standard of care." The court also expressed concern that the question asked by the plaintiff's counsel may have caused the jurors to incorrectly believe that they were responsible for determining the standard of care rather than relying on expert testimony.

The defendant's counsel then requested a curative instruction indicating that "ATLS is not the standard of care" and that the ATLS guidelines "[don't] even apply to [the defendant] . . . ." The court declined to so instruct the jury, but rather invited both parties to submit alternative proposed curative instructions on the issue.[10]

After the jury reentered the courtroom, the court reiterated, pursuant to General Statutes § 52-184c (a),

[10] The parties filed supplemental requests to charge regarding the ATLS excerpts on November 22, 2019.

that "the prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." The court also clarified that the jury was not responsible for "setting" the standard of care and explained to the jurors that "it's going to be your job at the end of this case to determine or to decide which one of these competing expert opinions you choose to believe."

After Dalsey testified, the defendant called Velmahos to testify as to the relevant standard of care. Velmahos testified that he currently teaches the ATLS course and described the ATLS guidelines as "one of the most wonderful things . . . in the world." Specifically, Velmahos testified that the ATLS guidelines "produced a standardized language that can be universally applied around the world to care for the majority of trauma patients." Velmahos clarified, however, that the ATLS guidelines were only intended as a "starting place" for the care of trauma patients and that the guidelines "cannot arrive at the sophistication that sometimes is required because [they have] to apply everywhere in the world." Velmahos opined that the defendant did not deviate from the standard of care by ordering a CT scan and met the standard of care regarding his duty owed to the decedent.

Before the close of evidence, the court held a charging conference off the record. During that conference, the plaintiff asked the court to reconsider its ruling regarding the admissibility of the ATLS guideline excerpts. Later, on the record, the court explained that, during the charging conference, it had reexamined its earlier decision to exclude the ATLS excerpts but was going to reserve its final ruling until it heard argument from both parties. Thereafter, the defendant's counsel

renewed his objection to the admission of the ATLS excerpts, arguing that their admission would confuse the jury due to their "unfair characterization of the state of emergency medicine . . . ." The defendant's counsel also contended that admitting the ATLS excerpts would prejudice his defense because he "crafted [his] examination of . . . witness[es] . . . based upon the status of the evidence and the relatively clear decision by the court that those various little snippets of the several hundred page [ATLS guidelines] weren't going to come in." In response, the plaintiff's counsel, citing *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 124 A.3d 501 (2015), argued that Connecticut law favors the admission of learned treatises.[11]

Ultimately, the court concluded that it would not admit the ATLS excerpts. The court determined that the excerpts were "thoroughly discussed and examined by all the experts and . . . to have them admitted at this point . . . would cause confusion to the jury."

After both parties rested, the court charged the jury on the appropriate standard of care in medical malpractice actions and issued a curative instruction regarding the ATLS guidelines. The court instructed, inter alia, that "[§ 52-184c (a)] . . . provides that . . . [i]n any

[11] In *Filippelli*, our Supreme Court clarified that, unlike most other jurisdictions, which limit the use of learned treatises to an "oral reading in connection with an expert witness' testimony," Connecticut's learned treatise rule permits such treatises "to be taken into the jury room as . . . full exhibit[s]." (Internal quotation marks omitted.) *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 135. The court explained that the "Connecticut rule . . . has the advantage of allowing the jurors to examine more fully the text of what frequently is a technical and complicated discussion that may be unfathomable to a nonexpert juror who merely heard a single oral recitation." (Internal quotation marks omitted.) Id., 135–36. However, as we discuss later in this opinion, the Connecticut rule does not circumscribe a trial judge's discretion to limit or exclude learned treatise evidence that has the tendency to mislead the jury or cause confusion. Id., 139–40. Indeed, our Supreme Court in *Filippelli* upheld the trial court's ruling restricting the plaintiff's use of a learned treatise on cross-examination. Id., 140–41.

civil action to recover damages resulting from personal injury in which it is alleged that such injury resulted from the negligence of a health care provider . . . the claimant shall have the burden of proving by a preponderance of the evidence that the alleged actions of the health care provider represented a [deviation from] the prevailing professional standard of care for that health care provider.

"The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers . . . .

"Now, you have heard testimony from the medical experts regarding the standard of care. . . . You have also heard from counsel and testimony from experts about ATLS . . . and the standards and guidelines set forth therein. ATLS does not establish the standard of care. Rather, the standard of care is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

"However, if you find based on the facts of this case that the ATLS standards and guidelines comport to the medical standard of care applicable in this case as determined by the medical testimony of the experts, then the ATLS guidelines may be properly considered by you as evidence when determining whether [the defendant] deviated from the standard of care."

After deliberation, the jury found that the plaintiff failed to prove, by a preponderance of the evidence, the prevailing professional standard of care applicable to the defendant with regard to his treatment of the

decedent.[12] Accordingly, the jury returned a verdict in favor of the defendant.

On December 23, 2019, the plaintiff filed a motion to set aside the verdict and for a new trial. The plaintiff argued, inter alia, that the court had abused its discretion by refusing to admit the ATLS excerpts into evidence. Relying on § 8-3 (8) of the Connecticut Code of Evidence and *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 135, the plaintiff contended that Connecticut law favors the admission of learned treatises and, accordingly, that the court lacked a sufficient legal basis to exclude the excerpts. The defendant subsequently filed an objection to the plaintiff's motion to set aside the verdict and for a new trial.

On February 4, 2020, the trial court heard argument on the plaintiff's motion to set aside the verdict and for a new trial. Again, the plaintiff argued that the court had erred in excluding the ATLS excerpts because, in his view, the ATLS guidelines actually set forth the relevant standard of care applicable to the facts in the present action. The plaintiff also contended that the court's curative instruction clarifying that the ATLS guidelines were not the standard of care, but rather could be seen as informing the statutorily mandated standard of care, actually created additional confusion amongst the jurors. In response, the defendant argued that the jury heard ample testimony regarding the ATLS guidelines from expert witnesses on both sides and, therefore, did not need the actual excerpts admitted into evidence. The defendant also cautioned that the jurors could have placed too much emphasis on the ATLS guidelines during deliberations, had the guidelines been admitted.

[12] Having found this, the jury did not reach the additional questions of whether the defendant deviated from the standard of care and whether that was the proximate cause of the decedent's death.

On March 6, 2020, the court denied the plaintiff's motion to set aside the verdict and for a new trial. In its memorandum of decision, the court clarified that it excluded the ATLS excerpts in order to prevent misunderstanding or misapplication of the relevant standard of care by the jury. The court further reasoned that, "[b]ecause the ATLS guidelines do not establish the requisite professional standard of care, and because the plaintiff was afforded the opportunity to question his experts as to the ATLS guidelines and make reference to the appropriate excerpts, the plaintiff was not deprived of the ability to fully litigate the issue of the standard of care in this matter. The excerpts the plaintiff sought to introduce were read to the jury on multiple occasions during trial, and reference was made to them during the questioning of his experts, as well as the defendant's experts." This appeal followed.

On appeal, the plaintiff claims that the court abused its discretion by refusing to admit the ATLS guidelines excerpts into evidence at trial. Relying on *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 135, the plaintiff contends that the ATLS guidelines satisfied the two foundational requirements for admission under § 8-3 (8) of the Connecticut Code of Evidence. Specifically, the plaintiff argues that, because the ATLS guidelines were " '[1] recognized as a standard authority in the field by . . . [an] expert witness . . . and . . . [2] relied on by that expert during direct examination,' " the excerpts should have been admitted into evidence. We are not persuaded.

We begin our analysis by setting forth the appropriate standard of review and the relevant principles of law that govern the plaintiff's claim on appeal. "It is well settled that [w]e review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . Under the abuse of discretion standard, [w]e [must]

make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . . Moreover, [b]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . [A]n evidentiary impropriety in a civil case is harmless only if we have a fair assurance that it did not affect the jury's verdict. . . . A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial." (Citations omitted; internal quotation marks omitted.) *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 119.

"Under § 8-3 (8) of the Connecticut Code of Evidence, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art may be admitted into evidence as an exception to the hearsay rule if two foundational requirements are satisfied. First, the work must be recognized as a standard authority in the field by the witness, other expert witness or judicial notice, and, second, the work must either be brought to the attention of the witness on cross-examination or have been relied on by that expert during direct examination. . . .

"Connecticut's learned treatise rule differs from that of most other jurisdictions, including the federal rule, in that we allow the material to be taken into the jury room as a full exhibit. . . . Most other jurisdictions bar such material from the jury room, limiting their use to an oral reading in connection with an expert witness' testimony. . . . This limitation seeks to avoid the danger of misunderstanding or misapplication by the jury and ensures that the jurors will not be unduly impressed

by the text or use it as a starting point for reaching conclusions untested by expert testimony. . . . The Connecticut rule, on the other hand, has the advantage of allowing the jurors to examine more fully the text of what frequently is a technical and complicated discussion that may be unfathomable to a nonexpert juror who merely heard a single oral recitation. Although the concerns which underlie the federal rule cannot be completely obviated when the materials are allowed in the jury room, the dangers can be minimized by the judicious exercise of discretion by the trial court in deciding which items ought to be admitted as full exhibits." (Citation omitted; internal quotation marks omitted.) Id., 135–36.

Relying on this language, the plaintiff argues that § 8-3 (8) of the Connecticut Code of Evidence creates a presumption of admissibility in favor of learned treatises, provided that the treatise is (1) recognized as a standard authority in the field by expert testimony or judicial notice, and (2) relied on by an expert during direct examination or brought to the attention of the expert on cross-examination. Accordingly, the plaintiff argues that the court lacked a legal basis on which to exclude the ATLS excerpts. We find this reading to be misguided.

Although, Connecticut *permits* the admission of learned treatises, our Supreme Court in *Filippelli* explicitly held that § 8-3 (8) of the Connecticut Code of Evidence neither mandates admission nor limits the trial court's discretion to exclude evidence that "carries the danger of misunderstanding or misapplication by the jury . . . ." (Internal quotation marks omitted.) *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 140. Rather, in upholding the trial court's decision to restrict the plaintiff's use of a learned treatise on cross-examination, the court in *Filippelli* clarified that "the mere fact that [a] trial court found that the article met the

requirements for admissibility under the learned treatise exception does not mean that the court was *required* to allow the plaintiff unfettered use of the article. *Section 8-3 (8) merely provides that materials which meet the foundational requirements of the learned treatise exception are not excluded by the hearsay rule, and does not mandate the admission of such materials or otherwise purport to circumscribe the discretion generally afforded to a trial court to determine the admissibility of evidence in light of the facts of record.* . . . [W]e have long recognized that this state's approach to the learned treatise exception, which allows materials admitted under the rule to be treated as full exhibits and taken into the jury room during deliberations, carries the danger of misunderstanding or misapplication by the jury that other jurisdictions seek to avoid by precluding the admission of such materials as full exhibits. . . . We therefore have explained that trial courts may minimize the risks posed by the rule by use of the judicious exercise of discretion . . . in deciding which items ought to be admitted as full exhibits." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 139–40.

Applying the foregoing legal principles to the present case, we conclude that it was well within the court's discretion to preclude admission of the ATLS excerpts. Even assuming that the excerpts met the requirements for admissibility under the learned treatise exception, we cannot conclude that the court abused its discretion in excluding them on the ground that they may have confused the jury. Throughout trial and in his posttrial motion, the plaintiff repeatedly and erroneously contended that the ATLS guidelines actually set forth the relevant standard of care in the present action. These assertions required the court to continuously clarify that the proper standard of care is "that level of care,

skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." General Statutes § 52-184c (a). Accordingly, the court correctly determined that, had the excerpts been admitted, the jury may mistakenly have assessed the defendant's conduct only in light of the ATLS guidelines, rather than determining whether the defendant deviated from the standard of care.

The judgment is affirmed.

In this opinion the other judges concurred.

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## C. B. *v.* S. B.*
## (AC 44800)

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

*Syllabus*

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff, claiming that the court abused its discretion by finding his net weekly income, declining to accept his proposed parenting schedule, and refusing to deviate from the relevant child support guidelines in fashioning its support orders. *Held* that this court declined to review the defendant's claims as the claims were inadequately briefed, the defendant having provided no statement of the facts, minimal relevant citation to the record, almost no citation to applicable legal authorities and no meaningful analysis for his claims, and his briefing was conclusory, confusing and disorganized.

Argued March 3—officially released April 5, 2022

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Coleman, J.*;

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

*S. B.*, self-represented, the appellant (defendant).

*Opinion*

PER CURIAM. The self-represented defendant, S. B., appeals from the judgment of the trial court dissolving his marriage to the plaintiff, C. B. On appeal, the defendant claims that the court abused its discretion by (1) finding that his net weekly income was $489, (2) declining to accept his proposed parenting schedule, and (3) refusing to deviate from the relevant child support guidelines to accommodate his existing financial obligations. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. On June 9, 2021, the court, by way of memorandum of decision, rendered judgment dissolving the parties' marriage. The court found that the defendant's net weekly income was $489 and, accordingly, ordered him to pay the plaintiff $191 per week in child support. The dissolution judgment also ordered joint legal custody of the parties' three minor children, with the defendant having custody "every Tuesday after school (or 11:00 a.m. when the children are not in school) through Thursday morning drop off at school (or 11:00 a.m. when the children are not in school)" and every other weekend. This appeal followed.[1]

[1] On June 16, 2021, before the appeal in the present case was filed, the defendant filed a motion to reargue in the trial court, seeking to modify the court's finding that his net weekly income was $489. A review of the court's docket indicates that the court granted reargument and held a hearing on the motion to reargue on October 4, 2021. On January 29, 2022, the court issued its decision on the motion to reargue and denied the relief requested. Neither the defendant's motion to reargue nor the court's decision on that motion are before us on appeal.

Having thoroughly reviewed the record and the defendant's brief,[2] we conclude that we cannot properly review the defendant's claims on appeal because they are inadequately briefed, and thus we decline to address them. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . .

"In addition, briefing is inadequate when it is not only short, but confusing, repetitive, and disorganized. . . . We are mindful that [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Nonetheless, [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Citations omitted; internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803–804, 256 A.3d 655 (2021).

For his claims on appeal, the defendant in his brief provides no statement of the facts, minimal relevant citation to the record, and almost no citation to applicable legal authorities. See id., 804 (brief containing only

[2] The plaintiff did not file a brief.

minimal citation to record was inadequate); see also *Mattie & O'Brien Contracting Co.* v. *Rizzo Construction Pool Co.*, 128 Conn. App. 537, 544, 17 A.3d 1083 (brief containing minimal citation to legal authority was inadequate), cert. denied, 302 Conn. 906, 23 A.3d 1247 (2011).

Further, the defendant's single page "summary of argument" provides no meaningful analysis for his claims. See *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018) (actual analysis, not mere assertions, is required for briefing to be adequate). Last, the defendant's briefing is conclusory, confusing, and disorganized. See *State* v. *Buhl*, 321 Conn. 688, 722–23, 138 A.3d 868 (2016) (declining to review defendant's claims when briefing was short, confusing, and disorganized); see also id., 726 ("[a]lthough the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed"). The defendant's brief simply is inadequate for us to conduct any meaningful review of his claims, and we thus decline to review them.

The judgment is affirmed.

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## STATE OF CONNECTICUT *v.* GERALD J.*
## (AC 44324)

Prescott, Suarez and Palmer, Js.

Argued January 4—officially released April 5, 2022

*Procedural History*

Substitute information charging the defendant with the crimes of sexual assault in the first degree and risk

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

of injury to a child, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; thereafter, the court, *Dewey*, *J.*, denied the defendant's motion to suppress certain evidence; verdict and judgment of guilty, from which the defendant appealed to this court. *Appeal dismissed.*

*Matthew D. Dyer*, with whom were *Kristen Mostowy*, and *Sydney Mazur*, certified legal intern, for the appellant (defendant).

*James M. Ralls*, assistant state's attorney, with whom, on the brief, were *Sharmese Walcott*, state's attorney, and *Edward Naurus*, former assistant state's attorney, for the appellee (state).

*Opinion*

PER CURIAM. The defendant, Gerald J., appeals from his conviction of sexual assault in the first degree and risk of injury to a child involving a relative. After this case was argued, however, defense counsel notified this court that the defendant died on or about March 3, 2022. Because defense counsel did not request any specific disposition of this appeal as a result of the defendant's death, we dismiss the appeal as moot, consistent with the past precedent of our Supreme Court. See *State* v. *Graham*, 337 Conn. 857, 858, 256 A.3d 151 (2021), and cases cited therein.

The appeal is dismissed.

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## PEDRO GONZALEZ *v.* COMMISSIONER OF CORRECTION
## (AC 44229)

Prescott, Elgo and Suarez, Js.

*Syllabus*

The petitioner, who had been convicted of various criminal offenses, sought a writ of habeas corpus, alleging that his trial counsel had rendered

ineffective assistance. During the pendency of his habeas action, the petitioner filed a motion seeking his immediate release from the custody of the respondent Commissioner of Correction. The petitioner claimed that his continued confinement during the COVID-19 pandemic constituted an unnecessary risk to his life and that he had a 9 percent chance of survival if he contracted the COVID-19 virus while incarcerated. The habeas court conducted a remote hearing during which it heard testimony from the petitioner and F, the acting regional medical director for the Department of Correction. The court denied the petitioner's motion, concluding that he failed to show that, during the early months of the pandemic, the respondent acted with deliberate indifference to his medical needs in violation of the eighth amendment to the United States constitution. The court reasoned that the respondent had provided the petitioner with adequate medical care and taken appropriate measures to minimize his exposure to and risk of contracting COVID-19. The habeas court granted the petitioner certification to appeal. On appeal, he claimed that the habeas court improperly concluded that he had not established the deliberate indifference necessary to constitute an eighth amendment violation or that the respondent violated his rights under article first, §§ 8 and 9, of the Connecticut constitution. During the pendency of his appeal, the petitioner declined the department's offer to provide him with doses of a COVID-19 vaccine that had been approved by the federal Food and Drug Administration. *Held*:

1. The respondent's claim that the petitioner's appeal was moot because he declined the department's offer to vaccinate him was unavailing; the petitioner's appeal concerned the adequacy of the measures taken by the respondent to prevent transmission of the COVID-19 virus, and, as it was undisputed that the petitioner could contract the virus even if he had accepted the vaccination offer, an actual controversy existed regarding the adequacy of the measures taken by the respondent; accordingly, the appeal was not moot, as this court could provide the petitioner with practical relief if it were to conclude that the respondent's conduct during the early months of the pandemic constituted deliberate indifference to the petitioner's health and safety.
2. The habeas court properly concluded as a matter of law that the petitioner had not met his burden of demonstrating the deliberate indifference necessary to establish an eighth amendment violation: the record substantiated the court's determination that the respondent's response to the COVID-19 outbreak in the state's correctional facilities was reasonable, and that the respondent had provided adequate medical care and took appropriate measures to minimize the petitioner's exposure to and risk of contracting the virus, as the court, being the sole arbiter of witness credibility, credited F's testimony regarding the petitioner's medical issues and the department's measures to safeguard his health; moreover, the court had before it declarations made under penalty of perjury by department officials who outlined the screening, testing and

isolation protocols that were implemented, as well as measures that were implemented regarding social distancing, personal protective equipment and cleaning, and, in light of those measures, this court could not conclude that the respondent's conduct was an unreasonable reaction to the risk posed to the petitioner that amounted to the recklessness required under law.

3. The petitioner's state constitutional claim that his continued confinement constituted cruel and unusual punishment under article first, §§ 8 and 9, of the state constitution was unavailing under the circumstances of his case:

a. The petitioner's claim was unpreserved, as he did not indicate in his motion for immediate release that he was pursuing such a claim, he presented no evidence or argument that contemporary standards of decency compelled the conclusion that the respondent violated his state constitutional rights and he did not seek an articulation of the habeas court's decision with respect to any state constitutional claim.

b. Although review under *State* v. *Golding* (213 Conn. 233) is available in habeas appeals for unpreserved constitutional claims that could have been raised in the habeas petition or which challenge the actions of the habeas court, such review was unavailable in the petitioner's circumstances, as he did not distinctly raise a state constitutional claim in his habeas petition or invoke the protections of the state constitution during the hearing on his motion for immediate release; moreover, despite the petitioner's assertion that the habeas court should have construed his motion to include a state constitutional claim, under the applicable rule of practice (§ 5-2), that court was under no obligation to decide a question of law that was not distinctly stated to it.

Argued January 6—officially released April 5, 2022

*Procedural History*

Motion for release from incarceration, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the motion, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Jennifer B. Smith*, assistant public defender, for the appellant (petitioner).

*James W. Donohue*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (respondent).

ELGO, J. The petitioner, Pedro Gonzalez, appeals from the judgment of the habeas court denying his motion for immediate release from the custody of the respondent, the Commissioner of Correction, filed in connection with his pending habeas corpus proceeding. On appeal, the petitioner claims that (1) the court improperly concluded that he had not proven the requisite deliberate indifference to establish a violation under the eighth amendment to the United States constitution and (2) the respondent violated his rights under article first, §§ 8 and 9, of the state constitution. Both claims are predicated on the petitioner's allegation that his continued confinement during the COVID-19 pandemic constitutes an unnecessary risk to his life. We affirm the judgment of the habeas court.

In May, 2016, the petitioner pleaded guilty to various criminal offenses and was sentenced to a term of twelve years of incarceration, execution suspended after nine years, and three years of probation. In March, 2017, the petitioner filed a petition for a writ of habeas corpus, alleging, inter alia, that his guilty plea was involuntary and that his trial counsel had rendered ineffective assistance.

While that habeas corpus action was pending, the COVID-19 pandemic swept the globe. On January 31, 2020, the secretary of the United States Department of Health and Human Services declared a public health emergency in the United States. On March 10, 2020, Governor Ned Lamont declared a public health emergency and a civil preparedness emergency throughout the state of Connecticut. On March 13, 2020, President Donald J. Trump issued a proclamation that the COVID-19 outbreak in the United States constituted a national emergency. In response, numerous emergency measures were enacted at both the state and federal level.

On May 19, 2020, the petitioner, acting in a self-represented capacity, filed a "motion for immediate release" with the habeas court.[1] In that motion, the petitioner alleged that, due to multiple medical conditions, his risk of contracting the COVID-19 virus while incarcerated constituted an unnecessary risk to his life. More specifically, the petitioner alleged that, "[i]f [he] is not release[d], and does get infected with COVID-19, [his] chances of surviving the virus is 9 [percent]. Simply put, [the petitioner] will die." Because less than four years remained on his sentence, the petitioner alleged that his health was "unnecessarily compr[om]ised by continued incarceration . . . ."[2] By order dated May 20, 2020, the court ordered the respondent to furnish a copy of the petitioner's medical records to the petitioner and the clerk of the court; the respondent complied with that request.[3]

The respondent filed an objection to the petitioner's motion on May 28, 2020. Appended to that pleading were the sworn declarations of Warden Antonio Santiago; Warden Kristine Barone; Byron Kennedy, Chief Medical Officer for the Department of Correction (department); and Melinda Jarjura, a registered nurse employed by the department.[4] A copy of the interim COVID-19 guidelines issued by the United States Centers for Disease Control and Prevention (CDC) also accompanied the respondent's objection.

[1] Although the petitioner pursued his motion for immediate release in a self-represented capacity before the habeas court, he is represented by counsel in this appeal.

[2] The record contains the declaration of Warden Antonio Santiago, in which he averred that the petitioner's "current release date is May 4, 2024 and [his] parole eligibility date is April 22, 2023 . . . ."

[3] A copy of the petitioner's medical records was admitted into evidence at a hearing on the petitioner's motion that took place on May 29, 2020.

[4] Those declarations were made under penalty of perjury pursuant to 28 U.S.C. § 1746.

On May 29, 2020, the court conducted a remote hearing on the petitioner's motion.[5] At the outset, the petitioner confirmed that he had received the four sworn declarations submitted by the respondent; the petitioner, the respondent, and the court all discussed those declarations during that hearing.[6] The only evidence presented by the petitioner was his own testimony.[7] In addition, the respondent offered the testimony of Carey Freston, a licensed physician who served as the department's acting regional medical director.

In its June 16, 2020 memorandum of decision, the court found the following relevant facts. "The petitioner is currently housed at [MacDougall-Walker] Correctional Institution in Suffield . . . . He has a current diagnosis of central pulmonary sarcoidosis, a disease which causes complications within lung tissue. He also has a diagnosis of asthma. Further, the petitioner has been diagnosed with allergic rhinitis (described by Freston as a 'drippy nose'), melanonychia (described by Freston as a noncancer related darkness of the finger nails), self-described claustrophobia, ectopic dermatitis (a 'skin rash'), back pain, neuropathic pain, seasonal allergies . . . gastro-esophageal reflux disease, vitamin D deficiency, migraines, epigastric discomfort, and pleuritic chest pain. He has no symptoms commonly associated with having contracted COVID-19. . . .

[5] Due to the COVID-19 pandemic, the Judicial Branch began holding remote hearings using the Microsoft Teams platform. For more information, see State of Connecticut, Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 23, 2021), p. 5, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited March 31, 2022) ("Microsoft Teams is a collaborative meeting app with video, audio, and screen sharing features").

[6] During the hearing, the petitioner challenged the substance of those sworn declarations. In particular, the petitioner disputed averments regarding his disciplinary history while incarcerated, the medical care provided by the department, and the sanitary measures implemented by the department.

[7] During his testimony, the petitioner amended his prayer for relief to include, as an alternative to his immediate release, a request "to be placed on single cell status" while incarcerated.

"Freston is board certified in family medicine and is a certified correctional health professional. He testified credibly to the evaluation, diagnosis and treatment of the petitioner's several medical issues. Freston testified that the petitioner's pulmonary sarcoidosis results in trouble breathing and inflammation of the lungs. Although this diagnosis places the petitioner at increased risk of contracting COVID-19 and, if contracted, at increased risk for adverse health consequences, [Freston] testified credibly that the sarcoidosis is being monitored by [the department's] medical staff and is presently stable, requiring no prescription medications.

"Freston testified to [department's] measures designed to safeguard the petitioner's health. The petitioner's asthma, another preexisting condition that increases the petitioner's risk of contracting COVID-19 and, if contracted, an increased risk for adverse health consequences, has been evaluated and monitored through pulmonary functioning tests. Although the asthma has worsened over time to the point where it has been classified as 'moderate-persistent,' it is being treated with an inhaled steroid. The court finds that there is a lack of evidence to support the petitioner's contention of the existence of a large mass present in the front lobe of the petitioner's brain, as opposed to a small area of a single abnormality as revealed by a brain scan MRI.

"Freston testified credibly that inmates' health, including the petitioner's, is monitored, and they are screened in an effort to identify symptoms commonly associated with having contracted COVID-19. Those inmates testing positive, showing symptoms or refusing a COVID-19 test are isolated from inmates testing negative.

"A review of the testimony and exhibits leads the court to the conclusion that the petitioner has failed to show 'deliberate indifference' to his medical needs.

. . . The evidence presented supports the conclusion that the respondent has provided adequate medical care, has taken appropriate measures to minimize the petitioner's exposure and risk to COVID-19 and has not been deliberately indifferent to any of the risks to the petitioner's health. . . . The court finds that the several, recent protective and mitigating measures testified to by [Freston] demonstrate a thoughtful, sincere, and organized effort by [the department] to prevent and reduce the spread of this virus through the petitioner's [correctional] facility." (Citations omitted.) The court thus concluded that the petitioner had not established an eighth amendment violation and, accordingly, denied the petitioner's motion. The court subsequently granted certification to appeal from that judgment, and this appeal followed.[8]

I

Before considering the claims raised by the petitioner in this appeal, we first address a threshold question of whether this court has subject matter jurisdiction over the appeal. "A claim that a court lacks subject matter jurisdiction . . . may be raised at any time during the proceedings, including for the first time on appeal." (Internal quotation marks omitted.) *Mangiafico* v. *Farmington*, 331 Conn. 404, 430, 204 A.3d 1138 (2019). "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is

[8] Although the present appeal could be viewed as interlocutory in nature, as the petitioner's habeas corpus action remains pending, the habeas court treated the emergency motion for immediate release as an independent habeas petition and, thus, as conceded by the respondent, the court's ruling on the motion effectively terminated a separate and distinct proceeding. Accordingly, the court's ruling on the petitioner's motion constitutes an appealable final judgment. See, e.g., *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983).

without jurisdiction . . . .'' (Internal quotation marks omitted.) *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005). Whether a court possesses subject matter jurisdiction is a question of law over which our review is plenary. See *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 470, 239 A.3d 272 (2020). In addition, ''[i]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged.'' (Internal quotation marks omitted.) *Novak* v. *Levin*, 287 Conn. 71, 79, 951 A.2d 514 (2008).

At issue is whether the petitioner's appeal is moot. ''Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot.'' (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 506, 970 A.2d 578 (2009).

The petitioner commenced the present appeal in the summer of 2020. It is undisputed that, on February 13, 2021, the department offered to provide the petitioner with two doses of a COVID-19 vaccine approved by the United States Food and Drug Administration pursuant to the federal emergency use authorization act. See 21 U.S.C. § 360bbb-3 (2018); *Dixon* v. *De Blasio*, F. Supp. 3d , United States District Court, Docket No.

21-cv-5090 (BMC) (E.D.N.Y. October 12, 2021) (noting that, "[i]n mid-December 2020, the [Food and Drug Administration] issued an emergency use authorization for two COVID-19 vaccines developed by Pfizer and Moderna"), appeal filed (2d Cir. October 22, 2021) (No. 21-2666). The petitioner declined that offer and noted "without prejudice" on the signature line of the consent form furnished to him by the department.

In light of that development, the respondent submits that this court can grant no practical relief to the petitioner, stating: "As the vaccine would offer [the petitioner] the protection from the virus he demands, his refusal to accept that protection should render this appeal moot." By contrast, the petitioner argues that an actual controversy continues to exist regarding the adequacy of the measures taken by the respondent to prevent transmission of the COVID-19 virus. The petitioner argues that, because he is "susceptible to contracting" COVID-19 "[r]egardless of whether or not [he] is vaccinated," this court can provide him practical relief by ordering his immediate release "if it finds that the [department] was acting with deliberate indifference . . . ." We agree with the petitioner that this appeal is not moot because, if we were to agree with his deliberate indifference claim, there is practical relief we could afford him.

The gravamen of the petitioner's appeal concerns the transmission of the COVID-19 virus and the adequacy of the preventative measures instituted by the respondent. In his principal appellate brief, the petitioner, citing *Helling* v. *McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993), submits that the respondent has a duty to protect him "from the *risk of contracting* a 'serious, communicable disease' . . . ." (Emphasis added.) Because COVID-19 indisputably is a serious, communicable disease, the petitioner claims that "[t]he risk of contracting [COVID-19] constitutes an unsafe,

life-threatening condition that imperils prisoners' reasonable safety . . . ." (Internal quotation marks omitted.) The petitioner further argues that the measures implemented by the respondent to prevent transmission of that virus were inadequate and evince deliberate indifference to his health and safety.

In our view, the fact that the department offered the petitioner a COVID-19 vaccine in early 2021 certainly bears on the question of whether it acted with deliberate indifference to his health and safety, the substantive issue to be decided in this appeal. Once available, vaccination was yet another measure that the respondent implemented to combat COVID-19 in the correctional facilities of this state.

While the implementation of a vaccination program relates to the merits of a deliberate indifference claim, it does not foreclose meaningful review of such a claim. The present matter concerns the adequacy of the measures taken by the respondent to prevent transmission of the COVID-19 virus. It is undisputed that the petitioner could contract that virus even if he had accepted the vaccination offer. In his appellate brief, the respondent relies in part on the guidance issued by the CDC. That guidance indicates that "vaccines are not 100 [percent] effective at preventing infection [and] some people who are fully vaccinated will still get COVID-19." See Centers for Disease Control and Prevention, Possibility of COVID-19 after Vaccination: Breakthrough Infections (last updated December 17, 2021), available at https://www.cdc.gov/coronavirus/ 2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html (last visited March 31, 2022). The CDC further advises that "[v]accine breakthrough infections are expected" and that, "as the number of people who are fully vaccinated goes up, the number of vaccine breakthrough infections will also increase." Id.

As the Centers for Medicare and Medicaid Services at the United States Department of Health and Human Services noted in its November 5, 2021 interim final rule with comment period, Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,615, "the effectiveness of the vaccine[s] to prevent disease transmission by those vaccinated [is] not currently known." Moreover, in considering an eighth amendment deliberate indifference claim, the United States District Court for the Northern District of California emphasized that prison officials "fail to consider that it is not only the unvaccinated population that is at substantial risk of serious harm from COVID-19, and that such risk would be present even if the entire incarcerated population were vaccinated." *Plata* v. *Newsom*, F. Supp. 3d , United States District Court, Docket No. 01-CV-01351 (JST) (N.D. Cal. September 27, 2021), appeal filed (9th Cir. October 14, 2021) (No. 21-16696); see also *Commonwealth* v. *McDermott*, 488 Mass. 169, 173, 171 N.E.3d 1136 (2021) ("[a]lthough vaccinations have proved to be highly effective at protecting vaccinated people against symptomatic and severe COVID-19, breakthrough infections can occur and have occurred").

That authority supports the petitioner's contention that an actual controversy continues to exist regarding the adequacy of the measures taken by the respondent to prevent transmission of the COVID-19 virus in this state's correctional facilities, even after vaccination was offered to inmates. If this court were to conclude that the respondent's conduct constituted deliberate indifference to the petitioner's health and safety, we could provide the petitioner with practical relief. Given "the sweeping, constantly evolving nature of the COVID-19 pandemic"; *People* v. *Hernandez*, 488 P.3d 1055, 1060 (Colo. 2021); and mindful of our obligation to indulge every presumption in favor of jurisdiction; *Novak* v. *Levin*, supra, 287 Conn.

79; we therefore conclude that the petitioner's appeal is not moot.

II

On appeal, the petitioner claims that the court improperly concluded that he had not proven the deliberate indifference necessary to establish an eighth amendment violation. We disagree.

As a preliminary matter, we note that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Faraday* v. *Commissioner of Correction*, 288 Conn. 326, 338, 952 A.2d 764 (2008); see also *Wilson* v. *Williams*, 961 F.3d 829, 840 (6th Cir. 2020) (issue of "whether [a prison official's] conduct could constitute deliberate indifference is a mixed question of law and fact").

The eighth amendment proscribes the infliction of cruel and unusual punishments; see U.S. Const., amend. VIII; which "encompasses more than barbarous physical punishment." *Arey* v. *Warden*, 187 Conn. 324, 328, 445 A.2d 916 (1982). As the United States Supreme Court has explained, the eighth amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates . . . ." (Citation omitted; internal quotation marks omitted.) *Farmer* v. *Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). At the same time, the court emphasized that "[t]he [c]onstitution does not mandate comfortable prisons . . . . [N]ot . . . every injury suffered by [a] prisoner . . . translates into

constitutional liability for prison officials responsible for the victim's safety. . . . [A] prison official violates the [e]ighth [a]mendment only when two requirements are met. First, the deprivation alleged must be, objectively, sufficiently serious . . . . [Second] a prison official must have a sufficiently culpable state of mind. . . . In prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 832–34.

"An official acts with the requisite deliberate indifference when that official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . . Thus, an official's failure to alleviate a significant risk that he should have perceived but did not [does not violate the eighth amendment]. . . . Accordingly, to establish a claim of deliberate indifference in violation of the eighth amendment, *a prisoner must prove* that the officials' actions constituted more than ordinary lack of due care for the prisoner's interests or safety. . . . [D]eliberate indifference is a stringent standard of fault . . . requiring proof of a state of mind that is the equivalent of criminal recklessness. . . . In other words, negligence, even if it constitutes medical malpractice, does not, without more, engender a constitutional claim." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Faraday* v. *Commissioner of Correction*, supra, 288 Conn. 338–40. To succeed on a deliberate indifference claim, a litigant must establish that a prison official recklessly disregarded a substantial risk of harm to a prisoner. See *Farmer* v. *Brennan*, supra, 511 U.S. 836–37; *Valentine* v. *Collier*, 993 F.3d 270, 281–82 (5th Cir. 2021).

In the present case, the petitioner claims that the respondent acted with deliberate indifference by disre-

garding risks to his health and safety following the outbreak of the COVID-19 pandemic. For his part, the respondent does not dispute that the COVID-19 virus presented a substantial risk of harm to the petitioner.[9] The respondent nevertheless submits that the petitioner failed to demonstrate that the respondent recklessly disregarded that risk during the early months of the pandemic. We agree with the respondent.

As the United States Court of Appeals for the Third Circuit has observed, "[t]he context of the [respondent's] conduct is essential to determine whether it shows the requisite deliberate indifference . . . . COVID-19 presents highly unusual and unique circumstances . . . that have radically transformed our everyday lives in ways previously inconceivable . . . and have altered [our world] with lightning speed . . . . So we must evaluate the [respondent's] response to the virus in that context." (Citations omitted; internal quotation marks omitted.) *Hope* v. *Warden*, 972 F.3d 310, 330 (3d Cir. 2020); accord *Swain* v. *Junior*, 961 F.3d 1276, 1280 (11th Cir. 2020) ("[t]he [COVID-19] virus . . . poses particularly acute challenges for the administration of the country's jails and prisons"). COVID-19 is a "rapidly evolving" pandemic. *Casey* v. *Lamont*, 338 Conn. 479, 484, 258 A.3d 647 (2021); see also *United States* v. *Kauwe*, 467 F. Supp. 3d 940, 947 (D. Nev. 2020) (noting "the scientific and medical community's rapidly-evolving understanding of COVID-19"), appeal dismissed, United States Court of Appeals, Docket No. 20-10230 (9th Cir. October 20, 2020). Although two years have passed since the initial COVID-19 outbreak in the

[9] See, e.g., *Swain* v. *Junior*, 961 F.3d 1276, 1280 (11th Cir. 2020) ("[b]ecause incarcerated inmates are necessarily confined in close quarters, a contagious virus represents a grave health risk to them—and graver still to those who have underlying conditions that render them medically vulnerable"); *Wilson* v. *Williams*, supra, 961 F.3d 833 ("The COVID-19 virus is highly infectious and can be transmitted easily from person to person. . . . If contracted, COVID-19 can cause severe complications or death.").

United States, the question presented in this appeal concerns the respondent's conduct in the months immediately prior to the court's May 19, 2020 denial of the petitioner's motion for release.. See, e.g., *Fraihat* v. *United States Immigration & Customs Enforcement*, 16 F.4th 613, 620 (9th Cir. 2021) (review of deliberate indifference claim regarding defendant's response to COVID-19 pandemic confined to period between outbreak and rendering of judgment by trial court).

In its memorandum of decision, the court, as sole arbiter of witness credibility; see *Lebron* v. *Commissioner of Correction*, 204 Conn. App. 44, 51, 250 A.3d 44, cert. denied, 336 Conn. 948, 250 A.3d 695 (2021); credited Freston's testimony regarding "the evaluation, diagnosis and treatment" of the petitioner's medical issues. At the hearing, the court asked Freston if any of the petitioner's ailments increased the risk of contracting COVID-19. Freston testified that "two chronic diseases that may contribute increase risks for contracting COVID [or] mortality from COVID infection include the [petitioner's] pulmonary sarcoidosis and [his] asthma." Freston explained that "the status of the [pulmonary] sarcoidosis is stable. He's not on any medication for it." In addition, Freston testified that the petitioner was provided an inhaled steroid treatment for his asthma, which was classified as "moderate persistent . . . ." Freston noted that, "on [a] recent pulmonary function test, [the petitioner] had reversibility of the asthma, and the general overall function of the lung capacity was described as improved . . . ." Freston also testified that the petitioner was being "followed by a specialist" for both of those conditions. The petitioner's medical records confirm that the department provided ongoing treatment to him for those conditions.

The court also credited Freston's testimony regarding the department's "measures designed to safeguard the petitioner's health" and its "protective and mitigating

measures . . . to prevent and reduce the spread of this virus through the petitioner's facility." Freston testified that the department had "extensive programs and policies in place that are changed frequently throughout each week as we gain more information and knowledge of this disease." Freston explained that the department's measures included protocols "to monitor, screen and identify people that show symptoms and isolate them appropriately according to CDC recommendations" and emphasized that the department was "adhering to the CDC recognized interventions for correctional facilities. . . . [P]eople are being screened, they're being asked [about their health], they're being looked at. If somebody says that they [have] symptoms, they're quickly evaluated, they have a mask to put on so it doesn't transmit to other people. If they have a fever, if they have other known symptom[s] . . . they are tested for COVID. Then they are isolated and quarantined until results are known. Those people are not mixed with the other population." Freston also noted that "anybody that tested positive for COVID would move to Northern Correctional Institution where we set up the COVID infirmary [with a] higher level of care" and "use [of] a special medicine [that] wasn't available . . . in the other [correctional] facilities." In addition, Freston confirmed that "the governor and the health department have been jointly working with [the department] as well as the National Guard" to implement mass COVID-19 testing at correctional facilities throughout the state.

The court also had before it the declarations of Barone and Kennedy, which were made under penalty of perjury pursuant to 28 U.S.C. § 1746. In their declarations, Barone and Kennedy outlined the screening, testing, and isolation protocols that had been implemented to combat the spread of the COVID-19 virus. They also detailed additional measures taken by the department,

including "steps to increase social distancing and reduce the number of people with whom each inmate has contact"; providing personal protective equipment and masks to all inmates and staff; providing cleaning supplies and soap for hand-washing; conducting more frequent cleaning of "[a]ll areas" of the correctional facilities; educating inmates and staff on the virus and "social distancing and cleaning procedures"; suspending social visits, gym recreation, religious services, and volunteer services at the facilities; "quarantining all new admits from the general population for fourteen days"; requiring inmates to eat all meals inside their cells; and requiring inmates to wear "protective masks when . . . exiting cells, exiting cubicles, and in a common area."[10]

[10] In his appellate reply brief, the petitioner claims that our consideration of those declarations is improper, as they were not formally admitted as full exhibits at the remote hearing conducted on the Microsoft Teams platform; see footnote 5 of this opinion; and, thus, are not part of the record for our review. On the particular facts of this case, we do not agree. This case involves an emergency motion for immediate release, in which the petitioner alleged that his life was at risk due to the department's initial response to the COVID-19 outbreak. In light of the gravity of the petitioner's claim, that motion was treated with the utmost urgency and, despite the myriad challenges presented in the early days of the pandemic, the respondent filed his objection, an expedited remote hearing was held, and the court issued its decision two weeks from the filing of the petitioner's motion.

In accordance with Practice Book § 23-68 (d) ("prior to any proceeding in which a person appears by means of an interactive audiovisual device, copies of all documents which may be offered at the proceeding shall be provided to all counsel and self-represented parties in advance of the proceeding"), the respondent provided copies of the sworn declarations to the petitioner prior to the remote hearing. Moreover, at the outset of that hearing, the petitioner confirmed that he had received copies of those documents. The petitioner then proceeded to dispute the substance of those declarations during his testimony. See footnote 6 of this opinion. When the petitioner first expressed his disagreement with the substance of one of those declarations early in the hearing, the court asked the respondent if that declaration "was part of your recent filing," and counsel replied, "[y]es, it is, Your Honor. Just that—to make the—to verify for the court, it should be exhibit A . . . ." In so doing, the respondent indicated that those declarations were evidence for the court to consider. The petitioner did not object to consideration of them by the court.

The court likewise referenced those declarations during the hearing. For example, during Freston's testimony, the court stated: "I know we have the

As the United States Supreme Court has explained, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the [e]ighth [a]mendment is to ensure reasonable safety . . . . Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the [c]ruel and [u]nusual [p]unishments [c]lause." (Citations omitted; internal quotation marks omitted.) *Farmer* v. *Brennan*, supra, 511 U.S. 844–45.

In light of the measures the department instituted in response to the COVID-19 outbreak during the spring of 2020, we cannot conclude that the respondent's conduct was an unreasonable reaction to the risk posed to the petitioner that amounted to the recklessness required under established law. See id., 836–37. The record substantiates the court's determination that the respondent "has provided adequate medical care, has taken appropriate measures to minimize the petitioner's exposure and risk to COVID-19 and has not been deliberately indifferent to any of the risks to the petitioner's health."

. . . affidavit of [Barone, but] what, if you know, is being done to separate . . . positive from negative inmates?" The respondent's counsel similarly noted, without any objection from the petitioner, that the petitioner had not established deliberate indifference in light of Freston's testimony and "the declaration from [Barone] as to exactly the measures that . . . have been taken and are being taken in regards to COVID-19."

In its memorandum of decision, the court expressly stated that its decision was predicated on its "review of the testimony and exhibits . . . ." Its use of the plural "exhibits" indicates that the court considered the sworn declarations to be materials that properly were before the court, as the only other exhibit introduced at the hearing was the petitioner's medical file. Those sworn declarations were part of the pleadings in this emergency motion for immediate release, were provided to the petitioner prior to the remote hearing, were the subject of discussion by all parties during that hearing, and were represented to be exhibits by the respondent's counsel. In light of the foregoing, we conclude that the sworn statements properly are before us as a part of the habeas court record.

Several federal courts of appeals have reached a similar result when faced with deliberate indifference claims involving COVID-19. *Swain* v. *Junior*, supra, 961 F.3d 1280, involved "a group of medically vulnerable inmates" who, like the petitioner here, raised an eighth amendment challenge to the response of prison officials in the early months of the pandemic. In its decision, which was issued one day prior to the habeas court's June 16, 2020 memorandum of decision in the present case, the United States Court of Appeals for the Eleventh Circuit found that, "[b]y taking other measures, besides release—including, among many other things, implementing some social-distancing measures, distributing face masks, screening inmates and staff, and providing cleaning and personal hygiene supplies—[the director of corrections] has responded reasonably to the risk of the virus." Id., 1291. The court further stated: "We simply cannot conclude that, when faced with a perfect storm of a contagious virus and the space constraints inherent in a correctional facility, the defendants here acted unreasonably by doing their best. Because the defendants act[ed] reasonably, they cannot be found liable under the [e]ighth [a]mendment." (Internal quotation marks omitted.) Id., 1289. That logic also applies here.

Like the present case, *Wilson* v. *Williams*, supra, 961 F.3d 832–33, involved an action by inmate petitioners who sought "to obtain release from custody to limit their exposure to the COVID-19 virus" in the early months of the COVID outbreak.[11] In rejecting their eighth amendment claim, the United States Court of Appeals for the Sixth Circuit first noted that "[t]here is no question that the [respondent Bureau of Prisons]

[11] *Wilson* v. *Williams*, supra, 961 F.3d 829, was decided one week prior to the habeas court's issuance of its memorandum of decision in the present case.

was aware of and understood the potential risk of serious harm to inmates . . . through exposure to the COVID-19 virus. . . . The [respondent] acknowledged the risk from COVID-19 and implemented a six-phase plan to mitigate the risk of COVID-19 spreading . . . ." (Citation omitted.) Id., 840. With respect to deliberate indifference, the court emphasized that "[t]he key inquiry is whether the [respondent] responded reasonably to th[is] risk." (Internal quotation marks omitted.) Id. The court then stated that the respondent "took preventative measures, including screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant supplies, and providing masks.[12] The [respondent] initially struggled to scale up its testing capacity . . . but . . . represented that it was on the cusp of expanding testing. The [respondent's] efforts to expand testing demonstrate the opposite of a disregard of a serious health risk. This court has found similar responses by prison officials and medical personnel to be reasonable responses to serious risks of harm." (Footnote added.) Id., 841. Because that response was a reasonable one, the court held that petitioners could not prevail on their deliberate indifference claim.[13] See id.; see also *Valentine* v. *Collier*, supra, 993 F.3d 283 (rejecting eighth amendment deliberate indifference claim by inmate plaintiffs because defendant's response to COVID-

[12] The respondent in the present case implemented similar measures as part of its response to the COVID-19 outbreak in Connecticut.

[13] Several state courts have reached the same conclusion. See, e.g., *Matter of Writ of Habeas Corpus*, 168 Idaho 411, 422–25, 483 P.3d 954 (2020) (rejecting eighth amendment deliberate indifference claim predicated on response of prison officials to COVID-19 outbreak); *Committee for Public Counsel Services* v. *Barnstable County Sheriff's Office*, 488 Mass. 460, 474–77, 173 N.E.3d 1102 (2021) (same); *People ex rel. Figueroa* v. *Keyser*, 193 App. Div. 3d 1148, 145 N.Y.S.3d 663 (same), leave to appeal denied, 37 N.Y.3d 905, 173 N.E.3d 428, 151 N.Y.S.3d 380 (2021); *Colvin* v. *Inslee*, 195 Wn. 2d 879, 899–901, 467 P.3d 953 (2020) (same).

19 pandemic was "not unreasonable"); *Hope* v. *Warden*, supra, 972 F.3d 329 (same, and noting that "mere disagreement as to the response to the risk to [p]etitioners in light of their medical condition will not support constitutional infringement" (internal quotation marks omitted)); cf. *Fraihat* v. *United States Immigration & Customs Enforcement*, supra, 16 F.4th 647 (concluding that immigration detainee plaintiffs "have not established a likelihood of success or serious questions on the merits of their claim that [United States Immigration and Customs Enforcement's] nationwide approach to COVID-19 in spring 2020 reflected deliberate indifference or reckless disregard of health risks").

In the present case, the facts found by the court—and particularly its determination that the respondent's response to the COVID-19 outbreak in the early months of the pandemic was reasonable and not reckless—find support in the record before us.[14] The precedent of the United States Supreme Court instructs that, with respect to claims of deliberate indifference, "prison officials who act reasonably [in response to a substantial risk to inmate health or safety] cannot be found liable under the [c]ruel and [u]nusual [p]unishments [c]lause." *Farmer* v. *Brennan*, supra, 511 U.S. 845. The habeas court, therefore, properly concluded as a matter of law that the petitioner had not met his burden of demonstrating the deliberate indifference necessary to establish an eighth amendment violation.

## III

The petitioner also claims that the respondent's response to the COVID-19 outbreak in the early months

[14] Our Supreme Court "consistently [has] held that reasonableness is a question of fact for the trier to determine based on all of the circumstances." *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 580, 657 A.2d 212 (1995). Recklessness likewise presents a question of fact. See *Williams* v. *Housing Authority*, 327 Conn. 338, 360–61, 174 A.3d 137 (2017); *Frillici* v. *Westport*, 264 Conn. 266, 277, 823 A.2d 1172 (2003).

of the pandemic violated his rights under article first, §§ 8 and 9, of the Connecticut constitution.[15] More specifically, he contends that, under the "contemporary standards of decency" framework set forth in *State* v. *Santiago*, 318 Conn. 1, 21, 122 A.3d 1 (2015), this court should conclude that his continued confinement constitutes cruel and unusual punishment under our state constitution. The respondent counters that this state constitutional claim is unpreserved, as it was neither presented to nor decided by the habeas court, and is not entitled to *Golding* review. See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We agree with the respondent.

A

"Habeas corpus is a civil proceeding." *Collins* v. *York*, 159 Conn. 150, 153, 267 A.2d 668 (1970); see also *Blumenthal* v. *Barnes*, 261 Conn. 434, 449, 804 A.2d 152 (2002); *Lorthe* v. *Commissioner of Correction*, 103 Conn. App. 662, 687 n.21, 931 A.2d 348, cert. denied, 284 Conn. 939, 937 A.2d 696 (2007). Our rules of practice require a party, as a prerequisite to appellate review, to distinctly raise its claim before the trial court. See Practice Book § 5-2 ("[a]ny party intending to raise any question of law which may be the subject of an appeal

[15] Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

Article first, § 9, of the Connecticut constitution provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

"It is . . . well established that the constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9. . . . Although neither provision of the state constitution expressly references cruel or unusual punishments, it is settled constitutional doctrine that both of our due process clauses prohibit governmental infliction of cruel and unusual punishments." (Internal quotation marks omitted.) *State* v. *Rivera*, 177 Conn. App. 242, 253, 172 A.3d 260 (2017), cert. denied, 333 Conn. 937, 218 A.3d 1046 (2019).

must . . . state the question distinctly to the judicial authority"); Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). When a party fails to do so, the judicial authority is "under no obligation to decide the question." Practice Book § 5-2. Accordingly, Connecticut's appellate courts "will not review a claim unless it was distinctly raised at trial." (Internal quotation marks omitted.) *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 597, 188 A.3d 702 (2018); see also *Mitchell* v. *Commissioner of Correction*, 156 Conn. App. 402, 408, 114 A.3d 168 ("this court is not bound to consider any claimed error 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" (internal quotation marks omitted)), cert. denied, 317 Conn. 904, 114 A.3d 1220 (2015); *State* v. *Faison*, 112 Conn. App. 373, 379, 962 A.2d 860 ("[i]t is fundamental that claims of error must be distinctly raised and decided in the trial court"), cert. denied, 291 Conn. 903, 967 A.2d 507 (2009).

As our Supreme Court has explained, "principles of fairness dictate that both the opposing party and the trial court are entitled to have proper notice of a claim. . . . Our review of a claim not distinctly raised at the trial court violates that right to notice. . . . [A]ppellate review of newly articulated claim[s] not raised before the habeas court would amount to an ambuscade of the [habeas] judge . . . . Accordingly, the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Citations omitted; internal quotation marks omitted.) *Eubanks* v. *Commissioner of Correction*, supra, 329 Conn. 597–98; see also *Swerdloff* v. *AEG*

*Design/Build, Inc.*, 209 Conn. 185, 188, 550 A.2d 306 (1988) ("[a] claim 'briefly suggested' is not 'distinctly raised' ").

The petitioner did not indicate, in his motion for immediate release or at the May 29, 2020 hearing, that he was pursuing a claim under the Connecticut constitution. He also presented no evidence or argument that contemporary standards of decency compel the conclusion that the respondent had violated his state constitutional rights. See *Eubanks* v. *Commissioner of Correction*, supra, 329 Conn. 587 (concluding that Appellate Court "improperly reached the merits of the petitioner's claim" when "the petitioner presented no evidence and made no argument to the habeas court that would have alerted either that court or opposing counsel" of that claim). For that reason, it is not surprising that there is no discussion of our state constitution in the court's memorandum of decision.

In *Eubanks*, the Supreme Court emphasized that "the habeas court's . . . decision makes clear that . . . the court had not been placed on notice that the petitioner was making that argument. . . . [N]othing in the court's decision suggests that it understood the petitioner to be making [the] argument" that he advanced on appeal. Id., 600–601. That also is the case here. Because the petitioner alleged in his motion for immediate release that his continued incarceration threatened his health and safety,[16] the court stated in its memorandum of decision that it "will address [that motion] as

[16] In his motion for immediate release, the petitioner alleged in relevant part: "If [the petitioner] is not release[d], and does get infected with COVID-19, [his] chances of surviving the virus is 9 [percent]. Simply put, [the petitioner] will die. . . . There is no practical difference in releasing [the petitioner] now and/or a year or two from now. Further, not only is [the petitioner's] health unnecessarily compromised by continued incarceration, but lowering the inmate population in general keeps other inmates and [department] staff safer."

a petition for a writ of habeas corpus based on unsafe conditions of custody" in violation of the petitioner's well established eighth amendment rights, as recognized by the United States Supreme Court in *Farmer* v. *Brennan*, supra, 511 U.S. 832. The court then proceeded to analyze his claim under the federal constitution and concluded that the petitioner had not met his burden of establishing an eighth amendment violation.

Furthermore, to the extent that the petitioner believed he had, in fact, properly raised a state constitutional claim that the habeas court failed to address, the petitioner did not seek an articulation of the court's decision with respect to any state constitutional claim. See *Eubanks* v. *Commissioner of Correction*, supra, 329 Conn. 594–95 (petitioner filed motion for articulation with habeas court); *Manifold* v. *Ragaglia*, 94 Conn. App. 103, 124, 891 A.2d 106 (2006) (articulation is proper vehicle to address matter overlooked in decision). In short, the petitioner did nothing to alert the habeas court or the opposing party that he was pursuing a claim under the Connecticut constitution. We, therefore, conclude that the petitioner failed to preserve his state constitutional claim for appellate review.

B

The petitioner alternatively claims that he is entitled to review of that unpreserved claim pursuant to *Golding*.[17] The precedent of our Supreme Court compels a different conclusion.

[17] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, supra, 317 Conn. 781.

Three decades ago, the Supreme Court suggested that the extraordinary review afforded under *State* v. *Evans*, 165 Conn. 61, 327 A.2d 576 (1973), the precursor to *Golding*, did not apply to habeas appeals. See *Safford* v. *Warden*, 223 Conn. 180, 190 n.12, 612 A.2d 1161 (1992). In light of that guidance, this court subsequently held that "*Golding* review is not available for unpreserved claims of [constitutional] error raised for the first time in a habeas appeal." *Hunnicutt* v. *Commissioner of Correction*, 83 Conn. App. 199, 202, 848 A.2d 1229, cert. denied, 270 Conn. 914, 853 A.2d 527 (2004); see also *Cupe* v. *Commissioner of Correction*, 68 Conn. App. 262, 271 n.12, 791 A.2d 614 ("*Golding* does not grant . . . authority for collateral review and is . . . inapplicable to habeas proceedings"), cert. denied, 260 Conn. 908, 795 A.2d 544 (2002).

In *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 67, 967 A.2d 41 (2009), the petitioner sought review of an unpreserved claim that the habeas court had violated his state and federal due process rights by declaring a mistrial. Because that claim was inadequately briefed, the Supreme Court declined to reach its merits. See id., 69. At the same time, the court clarified in a footnote that *Golding* review is not categorically unavailable in habeas appeals but, rather, is "applicable" when "the petitioner challenges the actions of the habeas court itself . . . ." Id., 67 n.2.

The Supreme Court expounded on that precept six years later. In *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 780, 114 A.3d 925 (2015), the court framed the issue before it as "the extent to which unpreserved constitutional claims may be reviewed on appeal in habeas actions." On appeal, the petitioner had argued that "*Golding* review is available in a habeas appeal for *any* claim that would have been cognizable in the habeas court." (Emphasis added.) Id., 783. In rejecting that contention, the court first discussed *Mozell*, in

which it previously had recognized that *Golding* review could be applied to habeas appeals in limited circumstances. See id., 786–87. The court then explained that "*Golding* review [was] not available for the petitioner's unpreserved . . . claim because that claim does not arise out of the actions or omissions of the habeas court itself. . . . *Golding* review is available in a habeas appeal only for claims that challenge the actions of the habeas court." Id., 787.

The court further held that resort to *Golding* is unavailing when a petitioner has neither distinctly alleged the constitutional claim in the petition for a writ of habeas corpus nor pursued such a claim at the habeas trial. As the court stated: "The petitioner asks this court to sanction *Golding* review under different circumstances. Specifically, the petitioner seeks *Golding* review of a claim that he raised for the first time in his habeas appeal but *could have raised in his habeas petition*. If we were to allow *Golding* review under such circumstances, a habeas petitioner would be free to raise virtually any constitutional claim on appeal, regardless of what claims he raised in his habeas petition or what occurred at his habeas trial." (Emphasis in original.) Id., 789; see also *Eubanks* v. *Commissioner of Correction*, supra, 329 Conn. 604 n.8 (*Golding* review of unpreserved constitutional claim foreclosed in light of *Moye*).

As we already have noted, the petitioner did not distinctly raise a state constitutional claim before the habeas court. There was no mention of the Connecticut constitution in his motion for immediate release or the May 29, 2020 hearing. The petitioner nonetheless contends that, because he alleged that his motion for immediate release was "made in accordance with his constitutional rights," the court should have (1) construed his motion to include a claim that the Connecticut constitution provides greater protection than the federal

constitution with respect to the confinement of inmates during a global pandemic in light of contemporary standards of decency and (2) decided the merits of that novel constitutional claim.[18] We disagree. Under our rules of practice and established precedent, the judicial authority is under no obligation to decide any question of law that has not been distinctly stated to the judicial authority. See Practice Book § 5-2; *Eubanks* v. *Commissioner of Correction*, supra, 329 Conn. 587, 600 (Appellate Court improperly reached merits of unpreserved claim that was not addressed by habeas court because petitioner "presented no evidence and made no argument to the habeas court that would have alerted either that court or opposing counsel" of distinct question of law and habeas court's "decision makes clear that . . . the court had not been placed on notice that the petitioner was making that argument"); *Swerdloff* v. *AEG Design/Build, Inc.*, supra, 209 Conn. 188 (claim briefly suggested was not distinctly raised); *Harris* v. *Commissioner of Correction*, 205 Conn. App. 837, 855 n.14, 257 A.3d 343 (court not obligated to decide question of law that petitioner failed to distinctly raise), cert. denied, 339 Conn. 905, 260 A.3d 484 (2021); *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 480, 946 A.2d 239 (it is not responsibility of habeas judge, without some specific request from petitioner, to search record in order to find some basis for relief for petitioner), cert. denied, 289 Conn. 902, 957 A.2d 873 (2008); *Alexander* v. *Commissioner of Correction*, 103 Conn. App. 629, 639–40 n.4, 930 A.2d 58 (because petitioner failed to raise issue before habeas court, judicial authority was under no obligation to decide question), cert. denied, 284 Conn. 939, 937 A.2d 695 (2007).

In rejecting the petitioner's claim that *Golding* review is "available in a habeas appeal for any claim that would

[18] In his appellate reply brief, the petitioner characterizes his state constitutional claim as an issue of first impression in Connecticut.

have been cognizable in the habeas court"; *Moye* v. *Commissioner of Correction*, supra, 316 Conn. 783; the Supreme Court expressly disavowed the approach proposed by the petitioner here. As it stated: "[T]he petitioner seeks *Golding* review of a claim that he raised for the first time in his habeas appeal but *could have raised in his habeas petition.* If we were to allow *Golding* review under such circumstances, a habeas petitioner would be free to raise virtually any constitutional claim on appeal, regardless of what claims he raised in his habeas petition or what occurred at his habeas trial. Such a rule would . . . undermine the principle that a habeas petitioner is limited to the allegations in his petition, which are intended to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Emphasis in original; internal quotation marks omitted.) Id., 789.

Bound by that precedent, we conclude that *Golding* review is unwarranted in the present case. Our Supreme Court "repeatedly has underscored that *Golding* is a *narrow exception* to the general rule that an appellate court will not entertain a claim that has not been raised in the trial court." (Emphasis in original; internal quotation marks omitted.) *In re Azareon Y.*, 309 Conn. 626, 635, 72 A.3d 1074 (2013); see also *State* v. *Elson*, 311 Conn. 726, 764, 91 A.3d 862 (2014) (describing *Golding* as doctrine "of extraordinary review"). In *Moye*, our Supreme Court carefully circumscribed the limited "extent to which unpreserved constitutional claims may be reviewed on appeal in habeas actions." *Moye* v. *Commissioner of Correction*, supra, 316 Conn. 780. The court rejected the petitioner's claim that "*Golding* review is more widely available in habeas appeals than just for claims that challenge the actions of the habeas court itself"; id., 788; and declined to permit a petitioner "to raise virtually any constitutional claim on appeal,

regardless of what claims he raised in his habeas petition or what occurred at his habeas trial." Id., 789. The Supreme Court made clear that, in the habeas context, *Golding* review is unavailable for claims that "could have [been] raised in [the] habeas petition." (Emphasis omitted.) Id. It further instructed that "*Golding* review is available in a habeas appeal only for claims that challenge the actions of the habeas court." Id., 787; see also id., 788 (*Golding* review is "plainly limited . . . to claims regarding the actions of the habeas court itself . . . a far narrower category of claims than all claims that would have been cognizable in the habeas court" (citation omitted; internal quotation marks omitted)).[19] Applying those precepts to the facts of that case, the court emphasized that "the habeas court did not, and *could not*, take any action with respect to that claim because the petitioner never presented it to the habeas court. The habeas court is not responsible for the petitioner's own failure to present his [constitutional claim]." (Emphasis in original.) Id.

In this case, the petitioner could have raised a state constitutional claim in his motion for immediate release, but did not. The petitioner also could have invoked the protections of our state constitution at the May 29, 2020 hearing, but did not. As a result, the habeas court was under no obligation to act on such a claim. See Practice Book § 5-2. Moreover, because the habeas

[19] Although the precedent of our Supreme Court limits the applicability of *Golding* review in the habeas context, we note that a reviewing court retains the authority, pursuant to its supervisory powers over the administration of justice; see *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 150, 84 A.3d 840 (2014); to review unpreserved claims in a habeas appeal. See, e.g., *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 701 n.11, 6 A.3d 52 (2010) (recognizing supervisory authority to review unpreserved claim but declining to exercise that "extraordinary power"); *Saunders* v. *Commissioner of Correction*, 157 Conn. App. 257, 264 n.7, 116 A.3d 338 (2015) (exercising supervisory power to review unpreserved claim).

court never was presented with a state constitutional claim, it necessarily could not take any action with respect thereto.[20] The precedent of our Supreme Court instructs that *Golding* review is unavailable in such circumstances.[21]

The judgment is affirmed.

In this opinion the other judges concurred.

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[20] If the petitioner had invoked the protections of our state constitution in either his motion or at the May 29, 2020 hearing and the court thereafter refused to consider them in its decision, the petitioner would be entitled to appellate review of that inaction by the court. See *Moye* v. *Commissioner of Correction*, supra, 316 Conn. 787–89. Moreover, as a hypothetical example, if the court had violated the petitioner's right to due process during that hearing, the petitioner would be entitled to *Golding* review irrespective of whether he memorialized his concern at the hearing, as such a claim pertains to the *actions* of the habeas court. See *Mozell* v. *Commissioner of Correction*, supra, 291 Conn. 67 n.2 (concluding that *Golding* review is applicable to petitioner's claim that habeas court's action in declaring mistrial violated due process rights).

[21] Even if the petitioner's claim was properly before us, the arguments set forth in his brief suggest that his claim lacks merit. Nothing in the petitioner's appellate briefs and oral argument supports the proposition that the Connecticut constitution provides greater protection from cruel and unusual punishments than its federal counterpart with respect to the confinement of inmates during the COVID-19 pandemic.