JACQUELINE EPRIGHT *v.* LIBERTY MUTUAL INSURANCE COMPANY (AC 43969)

Alvord, Moll and Sheldon, Js.

Syllabus

The plaintiff in error, B Co., a law firm that represented the plaintiff, E, in the underlying action to recover underinsured motorist benefits from the defendant in error, L Co., filed a writ of error claiming that the trial court improperly ordered sanctions, requiring B Co. to pay all costs related to L Co.'s retention of D, an expert disclosed by L Co. as a potential trial witness in the underlying case. L Co.'s disclosure indicated that, on the basis of his review of E's medical records, D would opine that E's shoulder injury was not related to the underlying motor vehicle accident. During his deposition, however, D indicated that his opinion might change if he learned that E had been complaining about her shoulder injury since the date of the accident. Thereafter, without informing or obtaining the consent of L Co., B Co. sent E's deposition transcripts, in which she indicated that she had been complaining about her shoulder pain since the date of the accident, to D and set up an appointment for D to perform a medical examination of E. Prior to the examination, B Co. filed a disclosure indicating that it intended to call D as an expert witness at trial to testify that, contrary to his earlier opinion, D believed that E's shoulder injury was a direct result of the motor vehicle accident. Following the medical examination, D prepared a report to that effect. Thereafter, the trial court granted L Co.'s motion for expenses, requiring B Co. to reimburse L Co. for all expenses it had paid to D for his expert services. *Held* that the trial court's order of sanctions must be reversed because our rules of practice do not clearly prohibit ex parte communications between an attorney and an expert who previously had been disclosed by the opposing party as a potential trial witness: pursuant to our Supreme Court's decision in *Millbrook Owners Assn., Inc.* v. *Hamilton Standard* (257 Conn. 1), for a trial court's order of sanctions for a violation of a discovery order or rule to withstand scrutiny, the order or rule to be complied with must be reasonably clear, and the applicable rule of practice (§ 13-4) in the present case does not include language that explicitly prohibits ex parte communications with experts who have been disclosed by an opposing party; moreover, the trial court's holding that B Co.'s ex parte communications with D were implicitly forbidden because they were not explicitly permitted by Practice Book § 13-4 was predicated on outdated authorities that analyzed a pre-1993 version of rule 26 (b) (4) of the Federal Rules of Civil Procedure, which the trial court claimed mirrored Practice Book § 13-4 and provided the exclusive means for conducting discovery

of expert witnesses, however, the exclusivity language of the pre-1993 version of rule 26 (b) (4) is not included in the current version of the rule or in the current version of Practice Book § 13-4; furthermore, Practice Book § 13-4 (e), which establishes a procedure by which a party can adopt and make use of an expert already disclosed by another party, implicitly suggests that some sort of communication may be required between opposing counsel and a disclosed expert to satisfy the disclosure requirements of that subsection; accordingly, the trial court's justification for the order of sanctions, which was based on its finding that B Co.'s conduct with respect to D was wrongful, was clearly erroneous.

Argued February 8—officially released May 31, 2022

Procedural History

Writ of error from an order of the Superior Court in the judicial district of Middlesex, *Frechette, J.*, granting a motion for sanctions filed by the defendant in error, brought to the Supreme Court, which transferred the matter to this court. *Reversed*; *judgment directed.*

Mario Cerame, with whom, on the brief, was *Timothy Brignole*, for the appellant (plaintiff in error Brignole, Bush & Lewis, LLC).

Thomas P. Mullaney III, for the appellee (defendant in error Liberty Mutual Insurance Company).

Opinion

SHELDON, J. This case comes before the court on a writ of error brought by the plaintiff in error[1] Brignole, Bush & Lewis, LLC, the law firm representing the plaintiff, Jacqueline Epright, in the underlying action to recover underinsured motorist benefits from the defendant in error, Liberty Mutual Insurance Company, in connection with a motor vehicle accident. The plaintiff in error seeks review of the trial court's order granting a motion for sanctions, which the defendant in error filed against it in the underlying action as a motion for

[1] We note that the writ of error also named Timothy Brignole, an attorney with Brignole, Bush & Lewis, LLC, as a plaintiff in error.

expenses, pursuant to which the plaintiff in error has been ordered to pay the defendant in error all costs related to the defendant in error's retention of James W. Depuy, an expert first disclosed by the defendant in error as a potential trial witness in the underlying case to dispute the causal connection between the motor vehicle accident and one of Epright's principal claims of injury. The court based its challenged sanctions order upon a finding that the plaintiff in error had had impermissible ex parte communications with Depuy after the defendant in error disclosed him as a testifying expert, in what the court found to have been a clear violation of the rules of expert discovery set forth in Practice Book § 13-4.

In its writ of error, the plaintiff in error claims that the sanctions order issued by the trial court was improper because, among other things, (1) the plaintiff in error complied with the rules of practice governing the disclosure of expert witnesses, (2) no rule of practice prohibited the ex parte communications here at issue, and (3) the prerequisites necessary to justify imposition of a discovery sanction were not satisfied in this instance. The plaintiff in error also argues that, to the extent the rules of practice are interpreted to prohibit the ex parte communications in question, the rules are unconstitutionally vague because they fail to provide adequate notice that such communications are prohibited.[2] Because we conclude that our rules of practice do not clearly prohibit ex parte communications between an attorney for a party and a testifying expert witness previously disclosed by an opposing party, the order of sanctions

[2] We note that the plaintiff in error, on behalf of Epright, filed an interlocutory appeal simultaneously with its writ of error. The appeal challenged the trial court's order disqualifying Depuy from testifying at trial. See *Epright* v. *Liberty Mutual Ins. Co.*, 211 Conn. App. 26, 26, 271 A.3d 731 (2022). This court dismissed Epright's appeal for lack of subject matter jurisdiction because the challenged interlocutory order is not a final judgment for purposes of appeal. Id.

in this case cannot stand.[3] Accordingly, we reverse the judgment of the trial court.

We begin by setting forth the relevant facts, as found by the trial court, in addition to the procedural history of the present dispute. The plaintiff in the underlying action, Epright, filed suit to recover underinsured motorist benefits under her insurance policy with the defendant in error in connection with a rear-end motor vehicle collision that occurred on December 14, 2012. Epright allegedly sustained various injuries as a result of this accident, including an injury to her left shoulder, which she claims to have resulted in multiple surgeries. On August 30, 2017, the defendant in error filed a disclosure pursuant to Practice Book § 13-4, which identified Depuy as an expert witness who would opine, on the basis of his review of Epright's medical records, that the treatment Epright received for her left shoulder was not causally related to the motor vehicle accident.

On January 7, 2019, Attorney Kevin F. Brignole, an attorney with the plaintiff in error who represents Epright in the underlying action, deposed Depuy at the defendant in error's expense. Depuy was emphatic that he had reviewed all of Epright's medical records and that there was no indication in them that Epright had complained of any shoulder pain until well after the accident. He thus opined that Epright's shoulder injury was unrelated to the accident. Depuy was then asked by Kevin Brignole whether it would change his opinion on

[3] In its briefing before this court, the plaintiff in error also argues that it was inappropriate for the court to disqualify Depuy as an expert witness. We note that the only issue that we address on this writ of error is the appropriateness of the sanction of expenses in the amount of $12,895. This is the only claim that the plaintiff in error has standing to raise at this juncture. To the extent that the plaintiff in error would like to challenge the disqualification of Depuy in the underlying matter, that would be the prerogative of its client, Epright, who may file an appeal after there is a final judgment in the underlying action. See *Epright* v. *Liberty Mutual Ins. Co.*, 211 Conn. App. 26, 26, 271 A.3d 731 (2022).

the issue of causation if he learned that Epright had been complaining about shoulder pain since the date of the accident. Depuy testified that if that were the case, then his opinion might, indeed, be different. Depuy was then asked if he had been provided with copies of Epright's deposition transcripts prior to rendering his opinion, and he replied that he had not. Epright had testified at her deposition that she had been complaining about shoulder pain ever since the date of the accident.

On January 22, 2019, without informing or obtaining consent from counsel for the defendant in error, Attorney Timothy Brignole, another attorney with the plaintiff in error, instructed his paralegal, Sandra Bryant, to contact Depuy's office to set up an appointment for Depuy to perform a medical examination of Epright for a fee. Timothy Brignole was within earshot of Bryant when she spoke with Depuy's secretary, who scheduled the medical examination for February 12, 2019. "Immediately following this discussion, [Kevin] Brignole filed a lengthy and detailed disclosure," indicating that Epright intended to call Depuy as an expert witness at trial (January 22 disclosure). Timothy Brignole then sent this disclosure to the general e-filing address of the law firm representing the defendant in error. The January 22 disclosure stated, among other things, that, upon information and belief, Depuy would testify that, contrary to his earlier opinion, he believed that Epright's shoulder injury was a direct result of the motor vehicle accident. In a letter to Depuy dated January 22, 2019, Timothy Brignole memorialized the scheduling of the examination and reiterated his intention to pay Depuy a fee for the examination.[4] Along with the letter, he

[4] The trial court noted that "[t]his correspondence directly contradicts the following statement in Attorney [Timothy] Brignole's affidavit, dated March 15, 2019: 'I have never ever spoken to Dr. Depuy in person, via e-mail, via letter, via fax or any other type of communication.' "

enclosed Epright's deposition transcripts.[5] Prior to the January 22 disclosure, the plaintiff in error made no attempt to reach an agreement with or to inform counsel for the defendant in error about having Depuy consider Epright's deposition transcripts or having him examine her as possible bases for reconsidering his previously disclosed expert opinion concerning the causation of Epright's shoulder injury.

Depuy conducted the medical examination of Epright on March 5, 2019. The plaintiff in error never informed the defendant in error that the examination, which was originally scheduled for February 12, 2019, had been rescheduled for March 5, 2019. On March 6, 2019, Kevin Brignole sent the defendant in error a medical examination report prepared by Depuy. The report stated that, on the basis of his discussion with and examination of Epright, Depuy had come to believe that the shoulder injury of which she was complaining of in the underlying action was causally related to her December 14, 2012 accident.

On March 8, 2019, the defendant in error filed a motion for order to show cause, requesting that the court issue a summons and order to Depuy and his employer, Ortho-Connecticut/Danbury Orthopedics, requiring them to appear at a hearing before the court to demonstrate why its attached prayer for injunction and disgorgement should not be granted. In its prayer for injunction and disgorgement, the defendant in error sought to enjoin Depuy from giving any testimony in the underlying action, to enjoin and prohibit any use of his March 5, 2019

[5] The record discloses that Epright's deposition was taken on June 21, 2017, which was approximately two months prior to the defendant in error's disclosure of Depuy as an expert witness and the issuance of Depuy's independent medical record review. Depuy issued two subsequent addenda to his medical record review report, one on October 8, 2017, and another on November 18, 2018. Neither of these submissions took into consideration Epright's deposition testimony concerning her shoulder injury.

medical examination report at trial, and to require Depuy to disgorge all sums it had paid to him for his expert services in the underlying action.

On March 14, 2019, construing the motion for order to show cause as "a motion to preclude/motion to disqualify" Depuy, the court ordered that a hearing on the motion be held on April 4, 2019, and permitted counsel for the defendant in error to subpoena Depuy to appear at the hearing and produce his file in this matter. On March 21, 2019, the plaintiff in error, on behalf of Epright, filed an objection to the defendant in error's request that Depuy be precluded from testifying in the action, arguing, inter alia, that neither Connecticut case law nor Connecticut's rules of practice limit or prohibit a plaintiff from disclosing, as the plaintiff's own expert, an individual who previously was named by a defendant as a testifying expert. Furthermore, it argued that there is no authority in Connecticut requiring counsel for the plaintiff to seek any waiver, stipulation or permission from counsel for the defendant before having direct contact with a testifying expert whom the defendant has disclosed, especially when the plaintiff has disclosed that she too may call the expert to testify as her own expert witness at trial. On April 18, 2019, both the plaintiff in error, on behalf of Epright, and the defendant in error, on its own behalf, filed posthearing briefs.

In a memorandum of decision dated June 18, 2019, the trial court, *Frechette*, *J.*, granted the defendant in error's motion to disqualify Depuy. As its basis for so doing, the court stated that the conduct of the plaintiff in error constituted "a clear violation of Practice Book § 13-4." The primary basis for the court's conclusion to that effect was that the plaintiff in error had contacted Depuy "ex parte, imparted information to him, set up an appointment for him to conduct an examination of [Epright], and offered him remuneration . . . ." The court further found that the January 22 disclosure was

noncompliant with § 13-4 (e), a provision that explicitly authorizes parties in civil cases, inter alia, to adopt "all or a specified part of the expert disclosure already on file," because "the disclosure already filed by the defendant [in error with respect to Depuy] contained an opinion that was unambiguously unfavorable to [Epright], and the . . . January 22 disclosure references a future examination and an opinion favorable to [Epright]. Thus, it is clear that the January 22 disclosure is not an adoption of the [defendant in error's] disclosure of Dr. Depuy's expert opinion under . . . § 13-4 (e)."[6] (Emphasis omitted.)

The court then stated that our rules of practice "do not authorize, and thus implicitly forbid, counsel from making ex parte contact with the opposing party's disclosed expert." The court indicated that the plaintiff in error's contact with Depuy was "especially egregious" because "he was a currently disclosed expert for the opposing party, and the contact resulted in him 'switching sides' of the litigation close in time to the commencement of trial." The court stated: "To reiterate the obvious: parties and their attorneys are allowed to, and routinely do, hire and disclose expert witnesses in order to present their side of the case. As part of this, counsel need to be able to have candid discussions with their experts, and be allowed to cogently present their side of the case through the disclosed expert. Our Practice Book rules provide the means for obtaining information about the other side's expert, via interrogatories and depositions. These rules do not permit ex parte contact

[6] The full text of Practice Book § 13-4 (e) provides: "If any party expects to call as an expert witness at trial any person previously disclosed by any other party under subsection (b) hereof, the newly disclosing party shall file a notice of disclosure: (1) stating that the party adopts all or a specified part of the expert disclosure already on file; and (2) disclosing any other expert opinions to which the witness is expected to testify and the substance of the grounds for any such expert opinion. Such notice shall be filed within the time parameters set forth in subsection (g)."

with the other side's experts. In the case at bar, [Epright] had, indeed, already disclosed two of her own experts. Severing the contact between the defendant [in error] and its only expert is prejudicial to the defendant [in error] because it was relying upon Dr. Depuy's testimony in the impending trial. If this court were to condone the [plaintiff in error's] behavior, it would encourage circumvention of Connecticut's mandatory discovery rules. . . . In addition, the defendant [in error] would be prevented from presenting the evidence at trial in a way that fits its story of the case, which it has a right to do." (Citation omitted; emphasis omitted; footnote omitted.) In sum, the court concluded that "there were plenty of alternative, appropriate courses of action available to [the plaintiff in error]"; however, none was taken.[7] On that basis, it granted the defendant in error's motion to disqualify Depuy.[8] In addition, it indicated in its ruling that the defendant in error could file a motion to recover any fees or costs related to this motion to preclude or any other expenses it had incurred as a result of the actions of the plaintiff in error.[9]

On July 24, 2019, the defendant in error filed a motion for expenses requesting that the court order the plaintiff

[7] For example, the court stated that the plaintiff in error "could have cross-examined Dr. Depuy at his deposition using [Epright's] deposition, which Dr. Depuy said he had not read. [The plaintiff in error] could have also suspended Dr. Depuy's deposition until he read [Epright's] deposition. In addition, they could have waited for trial and cross-examined Dr. Depuy, on the stand, to elicit the desired information. Or, finally, they could have had another expert (they had two disclosed) opine on the same subject matter."

[8] The court explicitly found, however, that the plaintiff in error did not violate the Rules of Professional Conduct, to wit, rule 3.4 (3), because the court took counsel at their word that they thought their conduct was permissible.

[9] On July 8, 2019, the plaintiff in error, on behalf of Epright, filed a motion to reargue and reconsider the defendant in error's motion to disqualify Depuy. The court denied the motion on September 9, 2019, concluding that Epright had not presented any additional facts or law that were not raised or could have been raised in her original filings.

in error to reimburse it for all fees, costs, and expenses related to Depuy. Attached to the motion was an affidavit that set forth the value of the legal services that the defendant in error's counsel had rendered in connection with this dispute as to Depuy ($16,732.50), in addition to the amount the defendant in error had paid for Depuy's expert services up until that point ($12,895).

On January 2, 2020, the court issued its ruling on the defendant in error's motion for expenses, drawing upon much of its discussion in its earlier memorandum of decision that ordered Depuy's preclusion.[10] The court stated that, although there was "no Connecticut authority directly dealing with this issue," this was likely so "because so few attorneys would engage in direct ex parte contact with an opponent's expert." The court further stated: "[The plaintiff in error] still maintains, without citing any legal authority, that he is allowed to engage in ex parte contact with his opponent's expert. This is a disturbing position for counsel to take, and in the case at bar, has resulted in the wrongful disruption of the court's docket and significant costs to the defendant [in error]. [The plaintiff in error] seems to suggest that [it] is somehow defending the rights of the plaintiff's bar in taking this position. This is also a curious position: do plaintiffs not hire experts to help present their cases? Do counsel for plaintiffs want counsel for defense to engage in ex parte contact with experts retained (and paid) by them? To state the obvious, neither party—plaintiff or defendant—[is] permitted to directly engage in ex parte discussions with their opponent's expert. We have, like every other jurisdiction,

[10] In support of its ruling on the motion for expenses, the court incorporated by reference the analysis it employed in its previous opinion regarding Depuy's disqualification. The court stated in relevant part: "While this court made no explicit order against hiring opposing counsel's expert, that action goes against common sense and numerous prescribed procedural rules as explained in this court's previous opinion on disqualification."

clear and explicit rules regarding the obtaining of information from the other side's expert: they are known as rules of discovery. Every lawyer knows (or should know) what the rules are regarding the obtaining of information from an opponent's expert."

The court then concluded that the requirements for sanctions under our case law were satisfied. Citing to *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001),[11] the court concluded that Practice Book "§ 13-4 is clear," it "was violated," and the "preclusion of expert testimony and related attorney's fees are proportional to the noncompliance at issue." The court found that the plaintiff in error's improper ex parte communication had caused the defendant in error "to lose the [defendant in error's] disclosed expert." The court further stated: "This action by [the plaintiff in error] (1) caused a delay in the imminently scheduled trial (which irretrievably disrupted the court's docket); (2) caused the defendant [in error] to incur costs in the fees already paid to its expert; and (3) caused the defendant [in error] to now have to hire a new expert so that the defendant [in error] could properly defend this case." The court then ordered the plaintiff in error to pay the defendant in error the sum of $12,895, which represented and was intended to compensate the defendant in error for all expenses it had paid to Depuy for his expert services. The court, however, did not order the plaintiff in error to pay the defendant in error's attorney's fees associated with this dispute. This writ of error followed. Additional facts will be set forth as necessary.

We begin by setting forth the legal principles regarding a trial court's power to sanction a party or attorney.

[11] As discussed in greater detail subsequently in this opinion, *Millbrook Owners Assn., Inc.*, sets forth the three part test to determine whether sanctions for a violation of a discovery order withstand scrutiny. See *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18.

A trial court's authority to impose sanctions comes from various sources. One such source is "our rules of practice, adopted by the judges of the Superior Court in the exercise of their inherent rule-making authority . . . ." *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 234, 963 A.2d 943 (2009). With respect to disclosures and discovery of expert witnesses in civil matters, Practice Book § 13-4 (h) provides in relevant part that "[a] judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. . . ."[12]

In addition to the foregoing rule, our Supreme Court has "long recognized that, apart from a specific rule of practice authorizing a sanction, 'the trial court has the inherent power to provide for the imposition of reasonable sanctions, to compel the observance of its rules.' " *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 9. Subject to certain limitations, our trial courts may impose sanctions against attorneys and their clients "for a course of claimed dilatory, bad faith and harassing litigation conduct, even in the absence of a specific rule or order of the court that is claimed to have been violated." (Internal quotation marks omitted.) *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 393, 685 A.2d 1108 (1996), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999). "[B]efore imposing any such sanctions, the court must afford the sanctioned party or attorney a proper hearing on the . . . motion for sanctions. . . . There must be fair notice and an opportunity for a hearing on the record." (Citation omitted; internal

[12] Practice Book § 13-4 (h) further provides in relevant part: "An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions."

quotation marks omitted.) *Maris* v. *McGrath*, 269 Conn. 834, 844, 850 A.2d 133 (2004).

In order for a trial court's order of sanctions for a violation of a discovery order or rule to withstand scrutiny, three requirements must be met. "First, the order to be complied with must be reasonably clear. In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo. Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review. Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." (Internal quotation marks omitted.) *Menna* v. *Jaiman*, 80 Conn. App. 131, 135, 832 A.2d 1219 (2003); see also *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18.

Under these authorities, the question we must first address in reviewing the appropriateness of the sanction here at issue is whether Practice Book § 13-4 is "reasonably clear" in alerting attorneys that they may not have ex parte communications with experts who have been disclosed by their opponents as potential witnesses at trial. The trial court did not identify a particular portion of the rule that was violated; rather, it concluded that our "rules require the attorney seeking information from, or contact with, an opponent's expert, to follow the Practice Book rules of discovery, and obtain the information sought through those rules, not outside them." It reasoned that our "rules do not autho-

rize, and thus implicitly forbid, counsel from making ex parte contact with the opposing party's disclosed expert."

We must therefore turn our attention to Practice Book § 13-4. In our review of that rule, we have found no explicit prohibition regarding ex parte communications with experts who have been disclosed by an opposing party as potential witnesses at trial. To that end, we note that in other provisions of our rules of practice where the judges of the Superior Court intended to limit a lawyer's ex parte communications, they have explicitly said so. See Rules of Professional Conduct 3.5 ("[a] lawyer shall not: (1) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (2) *Communicate ex parte* with such a person during the proceeding unless authorized to do so by law or court order" (emphasis added)); Rules of Professional Conduct 4.2 ("[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so"). No such language, however, appears in Practice Book § 13-4.

In the absence of explicit language in Practice Book § 13-4 prohibiting ex parte communications by counsel with experts who have been disclosed by their opponents as possible trial witnesses, we must look more broadly at § 13-4 to determine whether it, as the trial court concluded, otherwise implicitly prohibits such ex parte communications, and, if so, whether it is "reasonably clear" in alerting attorneys to that prohibition. On the basis of our review of the rule, we cannot so conclude.

The trial court appears to have held that the plaintiff in error clearly violated Practice Book § 13-4 because

the ex parte communications in this case fell outside of the prescribed formal discovery procedures set forth therein and were, therefore, forbidden by our rules. In arriving at this conclusion, the court cited to a 1993 formal opinion of the American Bar Association's Committee on Ethics and Professional Responsibility (ABA Committee), Formal Opinion 93-378, titled "Ex Parte Contacts with Expert Witnesses." See A.B.A. Committee on Ethics and Professional Responsibility, Formal and Informal Ethics Opinions 1983–1998 (2000) p. 213. In that formal opinion, the ABA Committee opined that, "[a]lthough the [American Bar Association's] Model Rules [of Professional Conduct] do not explicitly prohibit ex parte contacts with an opposing party's expert witness, a lawyer who engages in such contacts *may* violate Model Rule 3.4 (c)[13] if the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule of Civil Procedure 26 (b) (4) (A)." (Emphasis added; footnote added). Id. In reaching that conclusion, the ABA Committee cited to two decisions on the issue from the U.S. Court of Appeals for the Ninth Circuit, which had held that ex parte communications with the opposing party's expert witness constituted violations of the federal discovery rules then in effect. Id., p. 215; see *American Protection Ins. Co.* v. *MGM Grand Hotel-Las Vegas, Inc.*, 748 F.2d 1293 (9th Cir. 1984), withdrawn by *American Protection Ins. Co.* v. *MGM Grand Hotel-Las Vegas, Inc.*, 765 F.2d 925, 926 (9th Cir. 1985); *Campbell Industries* v. *M/V Gemini*, 619 F.2d 24 (9th Cir. 1980). Relying

[13] At that time, rule 3.4 of the American Bar Association's Model Rules of Professional Conduct provided in relevant part: " 'A lawyer shall not . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . .' " (Footnote omitted.) A.B.A. Committee on Ethics and Professional Responsibility, supra, p. 213. Rule 3.4 of the Rules of Professional Conduct similarly provides in relevant part: "A lawyer shall not . . . (3) [k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . ."

on these authorities, the trial court in the present case stated that, because Practice Book § 13-4 is a " 'mirror image' " of rule 26 (b) (4) of the Federal Rules of Civil Procedure, which, in the court's view, provides "specific, mandatory and exclusive procedures" for the conduct of expert discovery, it is clear that our "rules do not authorize, and thus implicitly forbid, counsel from making ex parte contact with the opposing party's disclosed expert."

Our reading of Practice Book § 13-4 mandates a different conclusion. As an initial matter, it appears that the trial court's ruling is predicated on outdated authorities. To be sure, the court relies almost exclusively on the ABA Committee's 1993 formal opinion (and the cases cited therein), which in turn was based on a pre-1993 version of rule 26 (b) (4) of the Federal Rules of Civil Procedure. The pre-1993 version of the federal rule contained language expressly providing that the rule set forth therein described the *exclusive* means by which a party could obtain discovery from expert witnesses. See Fed. R. Civ. P. 26 (b) (4) (1992) ("[d]iscovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, *may be obtained only as follows*" (emphasis added)); see also *Campbell Industries* v. *M/V Gemini*, supra, 619 F.2d 26 n.1 (citing pre-1993 federal expert discovery rule). Because the rules at that time provided the *exclusive* means for conducting discovery of expert witnesses, some courts reasoned that ex parte communications were prohibited because they fell outside the prescribed methods for discovery. See *Erickson* v. *Newmar Corp.*, 87 F.3d 298, 301 (9th Cir. 1996) ("[a]t the time of the present litigation, Federal Rule of Civil Procedure 26 (b) (4) provided that a lawyer's permissible contact with an opposing party's expert was limited to interrogatories

and, upon leave of the court, depositions"). In 1993, however, rule 26 (b) (4) was amended, inter alia, by removing therefrom the phrase "[d]iscovery . . . may be obtained only as follows . . . ." Accordingly, the current form of rule 26 (b) (4) contains none of the limiting language that was previously set forth in the rule upon which the ABA Committee relied in its 1993 formal opinion.

Furthermore, and of particular importance here, although previous versions of Practice Book § 13-4, like previous versions of rule 26 (b) (4) of the Federal Rules of Civil Procedure, contained limiting language regarding expert discovery, that limiting language was eliminated from Practice Book § 13-4 in 2009 when major revisions to the rule took effect. Practice Book (2009) § 13-4, history. Before that time, the expert witness provision of our rules of practice provided in relevant part: "Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Section 13-2 and acquired or developed in anticipation of litigation or for trial, *may be obtained only as follows* . . . ." (Emphasis added.) Practice Book (2008) § 13-4. Beginning in 2009, however, such language was eliminated from § 13-4 and additional changes were made. See Practice Book (2009) § 13-4. Although courts interpreting expert discovery rules premised on the pre-1993 federal rules and the pre-2009 Connecticut rules might have had some textual support for their conclusion that ex parte communications with experts disclosed by their opponents as potential witnesses at trial were prohibited because the rules prescribed the exclusive means for obtaining expert discovery, we have not found any language in our current rules that would allow us to interpret them in this manner.

We thus find unsupportable the court's holding, predicated on the ABA Committee's 1993 formal opinion,

that, because ex parte communications with a disclosed expert are not expressly permitted by Practice Book § 13-4, such communications must implicitly be forbidden. Although, to reiterate, the trial court's analysis may have been reasonable under earlier versions of our rules, we have found no support for such a limited reading in our current rules.

Another way in which Practice Book § 13-4 differs from the federal rules of expert discovery is its inclusion of § 13-4 (e),[14] which explicitly establishes a procedure by which a party can adopt and make use of an expert already disclosed by another party. It provides that in a party's notice of disclosure for an expert who was previously disclosed as a testifying expert by another party, a party shall adopt all or a specified part of the other party's disclosure and shall disclose "other expert opinions to which the witness is expected to testify and the substance of the grounds for any such expert opinion." Practice Book § 13-4 (e). This provision does not expressly or implicitly prohibit ex parte communications between the lawyer making the disclosure pursuant to § 13-4 and the expert so disclosed. See Practice Book § 13-4 (e). To the contrary, it implicitly suggests that some sort of communication may be required between the opposing counsel and the previously disclosed expert in order to facilitate the disclosure required by § 13-4 (e), particularly because that provision requires an attorney to disclose any other opinions to which the expert is expected to testify and the grounds therefor, which may be quite different, both in their nature and in the expert's reasons for holding them, from all other opinions and the grounds supporting them that the opposing party previously disclosed. Counsel cannot ethically make an expert disclosure under Practice Book § 13-4 based upon mere guesswork, and so he or she must somehow ascertain the

[14] See footnote 6 of this opinion for the full text.

nature and substance of an expert's opinions before filing the disclosure.[15] See Rules of Professional Conduct 3.1 ("[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"); Rules of Professional Conduct 3.3 ("[a] lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer").

At bottom, we cannot conclude that Practice Book § 13-4 is "reasonably clear" in alerting attorneys that they are prohibited from having ex parte communications with experts who have been disclosed by their opponents as possible trial witnesses. We also have found no case law in this state that makes it reasonably clear that such conduct is prohibited. Indeed, the trial court itself recognized that there was "no Connecticut authority directly dealing with this issue . . . ." Attorneys practicing in Connecticut courts must be able to consult our rules and be able to rely upon them to clearly define appropriate and inappropriate conduct.

[15] Although the precise issue before this court is whether the ex parte communication at issue is sanctionable under Practice Book § 13-4, we take a moment to address the January 22 disclosure of Depuy. In this disclosure, Epright stated, inter alia, that "[t]he expert ascertained through his review of [Epright's] medical records, review of [Epright's] deposition testimony and independent medical evaluation performed on [Epright] that on December 14, 2012, she was involved in a motor vehicle accident wherein she sustained injuries to her neck and shoulders, as a result of the accident." Although the plaintiff in error, on the basis of Depuy's deposition testimony, had a good faith basis to believe that Depuy would testify that Epright's injuries were caused by the motor vehicle accident, the plaintiff in error should have stated the actual basis for its disclosure and expressed its intention of having Depuy review the deposition transcripts and perform a medical evaluation, rather than suggesting that a deposition review and medical examination had already been conducted.

We have no occasion to take a position on whether ex parte communications with an opposing party's disclosed expert should or should not be permissible; we simply hold today that Practice Book § 13-4 does not clearly prohibit such conduct.[16] Because we cannot conclude that the ex parte communications at issue in this case were proscribed by our rules or, thus, that it was wrongful to engage in them, the sanction of requiring counsel, on the basis of such communications, to pay all expenses incurred by his opponent for the services of the expert so communicated with cannot stand. Put differently, because the ex parte communications at issue were not impermissible under § 13-4, the trial

[16] That is not to say that there are no ethical restrictions that apply to ex parte communications with expert witnesses. For example, the ethical restrictions that have been developed for ex parte communications with fact witnesses similarly apply to expert witnesses. See, e.g., General Statutes § 53a-151 ("[a] person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding"); Rules of Professional Conduct 3.4 ("[a] lawyer shall not . . . [f]alsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law"); Rules of Professional Conduct 4.1 ("[i]n the course of representing a client a lawyer shall not knowingly: (1) Make a false statement of material fact or law to a third person"); Rules of Professional Conduct 4.2 (generally, attorneys must abstain from contact with represented person); Rules of Professional Conduct 4.3 (attorney who is "dealing on behalf of a client with a person who is not represented by counsel . . . shall not state or imply that the lawyer is disinterested"); Rules of Professional Conduct 4.4 ("[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person").

To the extent the legislature or the judges of the Superior Court in the exercise of their inherent rule-making authority do not believe the ethical restrictions already in place are sufficient, it is, of course, their prerogative to enact a law or rule that clearly prohibits ex parte communications with a testifying expert disclosed by another party. At least one state has done so. See Idaho R. Civ. P. 26 (b) (4) (v) ("Limitation on Contact With Expert. A party must not contact a retained expert disclosed by another party pursuant to this Rule without first obtaining the permission of the party who retained the expert or by the court.").

court's justification for the sanction in this case based on its findings that the plaintiff in error's conduct was "wrongful" and "caused the defendant [in error] to lose" its disclosed expert is clearly erroneous. (Emphasis omitted.) The "loss" of Depuy cannot be said to have been caused by wrongful conduct of the plaintiff in error. Rather, any "loss" of Depuy must be attributed to the plaintiff in error's questioning of Depuy at a deposition, when Depuy testified favorably to the plaintiff in error by stating that if he were presented with evidence that Epright had been complaining of shoulder pain since the time of the accident (which she had testified to at her own deposition prior to the defendant in error's disclosure of Depuy), his opinion as to causality might, indeed, be different. The plaintiff in error's subsequent conduct in having its paralegal contact Depuy to provide him a more complete body of relevant evidence (i.e., Epright's deposition transcripts demonstrating her persistent complaints of shoulder pain since the date of the accident) and providing Depuy with an opportunity to do a physical examination of Epright (instead of solely reviewing a sampling of medical records selected by counsel for the defendant in error) is devoid of any indication that the plaintiff in error was thereby attempting impermissibly to influence Depuy not to testify or to testify falsely.

In concluding that the ex parte communications in this case were improper, the court stated that "counsel need to be able to have candid discussions with their experts, and be allowed to cogently present *their side* of the case through the disclosed expert." (Emphasis in original.) The court reasoned that if it were to condone the ex parte communications at issue, "the defendant [in error] would be prevented from presenting the evidence at trial in a way that fits its story of the case, which it has a right to do."

The court's rationale, however, fails to recognize two important points. First, "no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege, no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance."[17] *Doe* v. *Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983); see id. ("[e]ven an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone"). As this court has stated, "[t]here is no justification for a 'rule that would wholly exempt experts from placing before a tribunal factual knowledge relating to the case in hand [or] opinions already formulated . . . .' " *Lane* v. *Stewart*, 46 Conn. App. 172, 176, 698 A.2d 929, cert. denied, 243 Conn. 940, 702 A.2d 645 (1997); see also *Thomaston* v. *Ives*, 156 Conn. 166, 167, 173–74, 239 A.2d 515 (1968) (landowner in eminent domain proceeding may require appraiser hired by state, whom state did not call, to testify concerning valuation of land); *Loiseau* v. *Board of Tax Revenue*, 46 Conn. App. 338, 345, 699 A.2d 265 (1997) ("[t]hat the plaintiffs might have the opportunity to cross-examine a defense expert does not provide fair access if the defendant chooses not to call the expert as a witness").

Second, once an expert is disclosed, the status of that expert changes. Prior to the disclosure, the expert likely served as a consultant to the attorney who, thus,

[17] As another court aptly put it: "It would, though, appear that the underlying factor which causes the courts to treat expert testimony somewhat differently from testimony of other witnesses is that the party has an investment in the witness. Somehow it is believed that he has bought and paid for the witness and that the other party should not share in his property. We cannot accept this 'oath helper' approach to discovery. It is inconsistent with our basic assumption that the trial is a search for truth and not a tactical contest which goes to either the richest or to the most resourceful litigant." *Seven-Up Bottling Co.* v. *United States*, 39 F.R.D. 1, 2 (D. Colo. 1966).

in the absence of exceptional circumstances, was a person about whom the other party had no right to demand information through discovery. See Practice Book § 13-4 (f).[18] In the absence of exceptional circumstances, the attorney can prevent his or her opponent from acquiring information about a consulting expert simply by refraining from disclosing him or her as a person who might testify at trial. See Practice Book § 13-4 (f). The rule is intended to allow litigants to consult experts in order to evaluate a claim "without fear that every consultation with an expert may yield grist for the adversary's mill." *Rubel* v. *Eli Lilly & Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1995); see also *Petterson* v. *Superior Court of Merced County*, 39 Cal. App. 3d 267, 273, 114 Cal. Rptr. 20 (1974) (explaining that rule precluding discovery of consultative experts is "a shield to prevent a litigant from taking undue advantage of his adversary's industry and effort, not a sword to be used to thwart justice").

Following an expert disclosure, however, a transformation occurs. By making the disclosure, the attorney essentially certifies to the court and the opposing party that the expert is no longer a consultant but someone who has relevant "scientific, technical or other specialized knowledge" that can "assist the trier of fact in understanding the evidence or in determining a fact in issue." Conn. Code Evidence § 7-2; see *Lane* v. *Stewart*, supra, 46 Conn. App. 177 ("[b]y disclosing the witness, the defendant made it possible for the plaintiffs to discover evidence that the plaintiffs decided was beneficial to their case and should be brought before the trier of

[18] Practice Book § 13-4 (f) provides: "A party may discover facts known or opinions held by an expert who had been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Section 13-11 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

fact"). Because a disclosed expert has been identified as someone who can help the fact finder ascertain the truth in the matter, the opposing party is permitted to acquire information about the expert in connection with his or her opinions, even if some of that information may be helpful to the opposing party's case. This, in fact, is why our rules allow depositions of expert witnesses; see Practice Book § 13-4 (c); and require that the disclosing party, in the absence of certain exceptions, "produce to all other parties all materials obtained, created and/or relied upon by the expert in connection with his or her opinions in the case . . . ." Practice Book § 13-4 (b) (3). Such materials logically and necessarily include all communications between the expert and the attorney who hired him concerning the case, including communications from the attorney to the expert as to his theory of the case and his hopes or expectations as to the nature and substance of the expert's opinions about the case. See, e.g., *In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (The federal expert witness discovery rule "proceeds on the assumption that fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony. Indeed, we are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party.").

It inevitably follows that once a party has had a chance to acquire information about an opposing party's disclosed expert, such party may wish to present that expert's testimony at trial, especially if that expert agrees with that party on one or more issues in dispute. Our rules of practice contemplate this. As previously explained, Practice Book § 13-4 (e) establishes a procedure by which a party can adopt and make use of an expert already disclosed by another party. The party

must file a disclosure that states that it is adopting the prior disclosure in whole or in part, and, to the extent the expert is making a new opinion, the party must disclose the "other expert opinions to which the witness is expected to testify and the substance of the grounds for any such expert opinion. . . ." Practice Book § 13-4 (e).

Our decision in *Lane* v. *Stewart*, supra, 46 Conn. App. 177, further highlights the significance of an expert disclosure. In *Lane*, a personal injury action, the defendant retained and disclosed an expert witness who was deposed by the plaintiffs. Id., 174–75. Soon thereafter, the defendant, for tactical reasons, decided not to call its expert at trial and sought to quash the subpoena duces tecum served on its expert by the plaintiffs. Id., 175–76. The trial court in that case granted the motion to quash, but this court held that the granting of the motion to quash was an abuse of discretion. Id., 175, 177. This court reasoned that, "[b]y disclosing the witness, the defendant made it possible for the plaintiffs to discover evidence that the plaintiffs decided was beneficial to their case and should be brought before the trier of fact. To allow the defendant to prevent this witness from testifying may have deprived the trier of fact of material and relevant information that would have assisted it in reaching a decision in the case." Id., 177. We thus held that, "where one party has disclosed an expert witness pursuant to Practice Book § 220 (D) [now Practice Book § 13-4], and that expert witness has either been subsequently deposed by the opposing party, or the expert's report has been disclosed pursuant to discovery, then either party may call that expert witness to testify at trial." Id.

Lane, of course, was decided before the addition of Practice Book § 13-4 (e) to our rules of practice, which provides an avenue for an opposing party to disclose an opponent's previously disclosed expert witness as

an expert she also wishes to call at trial. Nevertheless, a logical interpretation of § 13-4 (e), in light of *Lane*, is that a party who has complied with the disclosure requirements of § 13-4 (e) should generally be permitted to call that previously disclosed expert to testify at trial. See id. To hold otherwise would deprive "the trier of fact of material and relevant information that would have assisted it in reaching a decision in the case." Id.

The judgment is reversed and the case is remanded with direction to render judgment denying the defendant in error's motion for sanctions.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOVAN MARQUIS GHANT
(AC 44146)

Prescott, Clark and DiPentima, Js.

Syllabus

Convicted, after a jury trial, of the crimes of unlawful restraint in the first degree, assault in the third degree and threatening in the second degree, and, after pleas of guilty, of being a persistent offender, the defendant appealed to this court. He claimed, inter alia, that the trial court violated his sixth amendment right to self-representation when it denied his request to proceed as a self-represented party. At a pretrial hearing, at which his counsel was not present, the defendant stated to the court that he wanted to fire his counsel. When the court began to explain that it was not allowed to talk directly with him without his attorney present, the defendant interjected and asserted that he wanted to defend himself. The court then said, "I can't," twice in an attempt to finish its sentence and thereafter reiterated, "I can't talk to you about" self-representation. When the defendant asked for a transcript of the proceedings, the court stated, "[n]o, no. You're not getting canvassed" as to self-representation and told him to file an appearance with the clerk's office, after which he would be canvassed at the next court proceeding. *Held*:

1. The trial court did not violate the defendant's sixth amendment right to self-representation, as his statements to the court did not constitute a clear and unequivocal request to proceed as a self-represented party: the court neither clearly nor conclusively denied the defendant's request

to represent himself but, rather, emphasized that it did not want to, and could not, speak with him without his attorney present, as the court's statements, "I can't," and, "I can't talk to you about this," reasonably could have referred to its view that it could not properly talk to the defendant about his request without his attorney present, and the court's statement, "[n]o, no. You're not getting canvassed," could not be read as a clear denial of the defendant's request to represent himself, as it was not clear from the transcript of the proceeding to what the court was saying no; moreover, although the court inadvisably instructed the defendant, who was incarcerated throughout the proceedings, to file a pro se appearance with the clerk's office and stated that he would be canvassed at the next court hearing, the court did not condition its willingness to consider his request on the fulfillment of that instruction, and its acknowledgment of his right to self-representation and suggestion that the required canvass would occur at a later date refuted the defendant's assertion that the court clearly and conclusively denied his request; furthermore, the defendant waived his right to self-representation when he acquiesced in representation by counsel at subsequent hearings and at trial, and failed to reassert that right.

2. The trial court did not abuse its discretion in limiting the scope of defense counsel's cross-examination of the victim regarding her motivation for not wanting to go to jail; the court did not unduly restrict counsel's cross-examination, as it permitted counsel to question the victim about her statement to the police that she did not want to go to jail so as to expose her motive, interest, bias or prejudice in cooperating with the police, and, as the victim admitted that she did not want to go to jail, her motive to avoid prison was undisputed.

Argued February 2—officially released May 31, 2022

Procedural History

Substitute information charging the defendant with the crimes of unlawful restraint in the first degree, assault in the third degree, strangulation in the second degree and threatening in the second degree, and two part B informations charging the defendant in each with being a persistent offender, brought to the Superior Court in the judicial district of New Haven, where the substitute information was tried to the jury before *B. Fischer*, *J.*; verdict of guilty of unlawful restraint in the first degree, assault in the third degree and threatening in the second degree; thereafter, the defendant was presented to the court on pleas of guilty to the part B informations; judgment in accordance with the verdict

and the pleas, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, with whom was *Emily M. Shouse*, former certified legal intern, for the appellant (defendant).

Nathan J. Buchok, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Jason Germain*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Jovan Marquis Ghant, appeals from the judgment of conviction, rendered following a jury trial, of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), assault in the third degree in violation of General Statutes § 53a-61 (a) (1), and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). On appeal, the defendant claims that the trial court (1) violated his right to self-representation under the sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution[1] by denying his request to represent himself and (2) violated his right to confront the witnesses against him under the sixth amendment by improperly limiting cross-examination of the state's key witness. We affirm the judgment of the trial court.

On the basis of the evidence admitted at trial, the jury reasonably could have found the following facts. In early July, 2018, the victim, B,[2] met the defendant in

[1] Although the defendant refers in his brief to the right to self-representation afforded under article first, § 8, of the Connecticut constitution, he has not provided an independent analysis of his state constitutional claim in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). Therefore, we limit our review of the defendant's claim to his right to self-representation under the federal constitution. See, e.g., *State* v. *Flanagan*, 293 Conn. 406, 409 n.3, 978 A.2d 64 (2009).

[2] 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,

New Haven, and, thereafter, the two entered into a relationship. B and the defendant were homeless and were living together in a car that was owned by the defendant's friend. On July 21, 2018, at about 8:30 p.m., B and the defendant were inside the car, which was parked along a sidewalk in the Wooster Street neighborhood of New Haven. B and the defendant began arguing because the defendant thought that B had been flirting with the defendant's friends earlier in the day.

Francesca Djerejian and her boyfriend, Craig Vargas, who were visiting New Haven for the weekend, witnessed the argument. Djerejian and Vargas were walking from the Omni Hotel, where they were staying, to the Wooster Street neighborhood to have pizza at a restaurant. En route to the restaurant, the couple saw the car parked along the sidewalk. As they passed the car, they heard B and the defendant arguing inside. B was sitting in the passenger seat while the defendant was sitting in the driver's seat. B then got out of the car and walked to the sidewalk. The defendant also exited the car and followed B onto the sidewalk. As B was walking away from the car, the defendant said, "don't think I won't hurt you . . . ."

The defendant then punched B, and she fell to the ground. The defendant continued to punch B as she was on the ground.[3] While the defendant was punching B, Djerejian and Vargas decided to keep walking away

Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

[3] Djerejian testified at trial that B "was on the ground in an instant, kind of curled up, and [the defendant] was punching her" and was "punching her and, like, pounding her into the sidewalk." Djerejian explained, "the blows were kind of putting her body into the pavement" because B was on the ground. Djerejian described the defendant's actions as "very violent . . . ."

Vargas testified at trial that the defendant was "punching very aggressively, like pulling his hand back as far as he could and swinging as hard as he could."

from the car and toward the end of the block out of concern for their own safety. Upon reaching the end of the block, Djerejian called 911. The assault was still taking place when Djerejian called 911 and when she and Vargas left the area.

While B was on the ground, she tried to fight back but could not get up off the sidewalk because the defendant continued to punch her and, at one point, choked her. The defendant then dragged her from the sidewalk back to the car where he choked her again. While the defendant was choking B he said, "[d]o you want to die . . . ?"

New Haven Police Officers John Brangi and Vincent M. Destefanis responded to the 911 call. When the officers arrived, they placed the defendant in handcuffs, and Destefanis completed a patdown of the defendant The defendant was bleeding from a cut above his right eye.

Meanwhile, Brangi spoke with B, and she recounted the details of the assault to him. At one point during the conversation, B stated that she did not want to go to jail. B was upset, frightened, and scared as she spoke with him. Her face was extremely swollen, she was spitting out blood, had marks around her neck, and scrapes on her feet.

B was transferred to Yale New Haven Hospital for further treatment of her injuries.[4] Mary Ellen Lyon, an emergency room physician, treated B at the hospital. B's cheek and jaw were very swollen, her chest was tender, and she had cuts and scrapes on one of her legs.[5] B remained in the hospital for three days.

[4] Brangi rode in the ambulance with B to the hospital. Once at the hospital, B gave another statement to Brangi.

[5] Lyon testified at trial that these injuries appeared fresh and could be consistent with someone who had recently been punched, choked, and dragged across pavement or a sidewalk.

The defendant was transported to Yale New Haven Hospital, Saint Raphael Campus, to be evaluated. Destefanis followed the ambulance to the hospital. The defendant subsequently was released from the hospital and arrested.

Following a jury trial, the defendant was found guilty of unlawful restraint in the first degree in violation of § 53a-95 (a), assault in the third degree in violation of § 53a-61 (a) (1), and threatening in the second degree in violation of § 53a-62 (a) (1). The defendant was found not guilty of strangulation in the second degree in violation of General Statutes § 53a-64bb (a). The defendant pleaded guilty to two part B informations, each charging him with being a persistent offender under General Statutes § 53a-40d. The defendant was sentenced to a total effective term of seven years of incarceration, execution suspended after four years, followed by three years of probation. This appeal followed. Additional procedural history will be set forth as necessary.

I

The defendant first claims that the trial court violated his right to self-representation under the sixth amendment to the United States constitution.[6] The defendant specifically argues that the court improperly denied his clear and unequivocal request to represent himself. We disagree.

The following procedural history is relevant to our resolution of this claim. On January 18, 2019, a hearing

[6] The sixth amendment to the United States constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the [s]tate and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

was held before the court, *Markle*, *J*. At the time, Attorney Maureen Murphy, a public defender, represented the defendant. At the commencement of the hearing, Murphy stated, "Your Honor, the state conveyed a new offer to [the defendant]. I conveyed—conveyed that to him today. I did see him speaking with [another attorney], so perhaps he is considering [retaining that attorney]. Perhaps we can have a continuance." The following colloquy then occurred:

"The Court: All right. Mr. Ghant, your—you'd like to seek private counsel?

"The Defendant: I'm not quite sure yet. I have to speak with my—my family.

"The Court: All right.

"The Defendant: But I want Mrs. Murphy dismissed as counsel, if possible.

"The Court: All—

"The Defendant: Also—

"The Court: All right. Well, you'll—can you make those discussions within two weeks?

"The Defendant: Yes.

"The Court: All right. We'll bring you back then on February 1st.

"[Attorney Murphy]: Thank you.

"The Defendant: And, also—I'm putting in a verbal—

"[Attorney Murphy]: I'm advising you not to speak anymore, Mr. Ghant.

"The Defendant: I don't want to take her counsel. I'd also like to put in a verbal motion for discovery for my case. Is that possible, Your Honor?

"The Court: So—

"[The Prosecutor]: Attorney—

"The Court: —Mr. Ghant, at this point you are represented by counsel.

"The Defendant: Yeah.

"The Court: New counsel can file in lieu of. And new counsel can request the discovery.

"The Defendant: Well, if I asked her several time[s] to file a motion, she—she refused to do so.

"[Attorney Murphy]: I—

"The Defendant: She doesn't—she doesn't really do what I ask her to do. And as far as I'm concerned, the last time I came to court, she made up an offer, which the state didn't even know about.

"[The Prosecutor]: But, Your Honor, if I could clarify that just so that—for [the defendant's] knowledge? The state did make an offer back in September of five years, suspended after two years to serve, with three years probation. After speaking with the complainant and after speaking with Your Honor today, both the complainant and Your Honor felt that offer was too low, considering the allegation. And the state did make the new offer. Furthermore, Attorney Murphy does have all of the discovery that the state has.

"The Defendant: Why don't I have it? 'Cause I asked you for it several times?

"[The Prosecutor]: That's not a question I can answer.

"The Defendant: Okay. I—I asked her that.

"The Court: All right. Mr. Ghant, we're gonna continue it to February 1st.

"The Defendant: No problem.

"The Court: All right.

"The Defendant: One last thing—

"The Court: You'll come back on that date with a new counsel, if you wish. If you don't, at this point, until somebody files an appearance in lieu of Attorney Murphy's, she's still in on the case until that point.

"The Defendant: Would it be possibly transferred to high court? How—how would that work? How would I go about that?

"The Court: No, sir.

"The Defendant: I mean, these are severe charges. I would assume that high court—

"The Court: They are very severe charges.

"The Defendant: Yeah. I don't understand why I'm here, then.

"The Court: Mr. Ghant, I'm gonna tell you what the procedure is.

"The Defendant: Okay.

"The Court: All right.

"The Defendant: I understand.

"The Court: You have to follow the procedure.

"[Attorney Murphy]: Your—

"The Court: I'll continue the case for you to get new counsel.

"The Defendant: All right.

"The Court: That's what you wish to do. I'll give you ample opportunity to do it. You told me two weeks is sufficient time. If you'd like more, I can give you more time. But at this juncture, for—we've had a judicial pretrial. The attorney needs to discuss it. The new attorney needs to discuss the case with you and then advise you what to do.

"The Defendant: But if I feel that she's insufficiently representing me, I wouldn't be privileged to fire counsel?

"The Court: You know, you get appointed counsel, you get appointed counsel. Otherwise, you get your own counsel, or you can represent yourself. Those are your options.

"The Defendant: I'd like to represent myself at the time being and dismiss counsel, then.

"The Court: All right. So, we'll continue the case.

"The Defendant: Mm-hmm.

"The Court: You have the right to represent yourself, if you'd like. You have to file an appearance at the clerk's office.

"The Defendant: Not a problem.

"The Court: All right.

"The Defendant: Thank you.

"The Court: So, you'll do that.

"[Attorney Murphy]: Your Honor, is the court withdrawing—

"The Court: No.

"[Attorney Murphy]: —me?

"The Court: No.

"[Attorney Murphy]: And, also, I did file a motion to modify [the defendant's] bond, as per his request for today, but considering the fact that he may be retaining private counsel, I'd ask that be marked off to the next court date.

"The Court: All right. So ordered."

At the next hearing, which took place on February 1, 2019, Murphy informed the court, *Markle*, *J.*, that the attorney-client relationship had broken down, was beyond repair, and, therefore, she was requesting that new counsel be appointed to represent the defendant. In response, the court stated that it would appoint a special public defender to represent the defendant and continued the case for two weeks. The defendant stated, "[a]ll right."

Subsequent pretrial hearings took place on February 15, April 5, May 10, and June 7 and 28, 2019, at which the defendant was represented by Attorney Glenn M. Conway. Conway was not present at either the May 10 or June 28, 2019 hearings due to other court matters and therefore made requests for a continuance on both dates. At both hearings, the defendant expressed frustration with the continuances and with Conway's representation but never expressed or reasserted any interest in self-representation.[7]

[7] At the May 10, 2019 hearing, after the defendant was informed by the court, *Markle*, *J.*, that the case would be continued, the defendant stated: "Am I able to speak or, like—'cause they—I had this dude Conway for, like, three months. He ain't did shit. I mean, like, everything that they said was supposed to happen, he's too busy. Why are you giving me attorneys that can't even show to court? I don't understand that."

The court replied, stating: "That's the way it works. If he's on trial on a criminal matter, he can't be in two courts on the same day." The defendant then said: "But didn't you guys know a month ago when you gave me this court that he was gonna be in—" The court then continued the matter until May 24, 2019.

At the June 28, 2019 hearing, the court, *Cradle*, *J.*, informed the defendant that Conway was busy with another matter and had requested that the defendant's case be continued until July 5, 2019. The following colloquy then occurred between the defendant and the court:

"The Defendant: So, do I—like, you're just telling me that. I don't got a choice here in the matter? I don't—I don't—

"The Court: Say that again?

"The Defendant: I said, is—is that a choice here or—

"The Court: No. He's on trial.

"The Defendant: He's been on trial since I had him. He has—he's on trial with everybody. I didn't see him for three months—

"The Court: Let me see.

Another hearing was scheduled for July 5, 2019, before the court, *Markle, J.* Conway, however, was held up again by another matter and, therefore, was not present at the hearing but did request a continuance. The following colloquy ensued:

"The Court: All right. Mr. Ghant, your attorney—a judge called from Waterbury. Your attorney—

"The Defendant: Yeah. I already know.

"The Court: You already know.

"The Defendant: Is there anything I can ask? Because he's supposed to get back—he's not—I want him fired. I—I've been going through this with him for almost six months. I was told that he was supposed to give my counteroffer to the prosecutor. He hasn't told me anything. He doesn't return my phone calls.

"The Court: All right. I don't want to get in the middle of your communications with your attorney.

"The Defendant: I've been down a year, Your Honor. If this isn't a case, then I want to go to trial. I—I—I don't even know—

"The Court: Well, you can hire an attorney. You can hire whatever—you can—

"The Defendant: I don't even know—I don't even know if they got my counteroffer. If they—

"The Defendant: —then he came back, now he's on trial with this other guy. Like, this is crazy.

"The Court: All right. Hold on a minute. Let me just see.

"The Defendant: We're supposed to be making a resolution to all of this, and he was supposed to be discussing something with the prosecutor. I guess seeing what my rebuttal to their offer. And he never said anything about that.

"The Court: Okay. I have—

"The Defendant: I want him to file motions in which he ain't filed, and that's the reason I filed the last—fired the last attorney."

The court continued the matter until July 5, 2019, but told the defendant that, "[i]f I can get [Conway] here earlier, that's what I'll do."

"The Court: Sir, the rules provide, I can't talk to you directly about your case without the attorney of record—

"The Defendant: But how do I get in—I would like to [defend] myself.

"The Court: I can't.

"The Defendant: How do I get in contact with the prosecutor to—

"The Court: I can't.

"The Defendant: —at least let them know my counteroffer?

"The Court: You can—

"The Defendant: I've been on a year. This is bullshit.

"The Court: The matter is continued, August—what was the date we gave for Mr. Conway?

"The Defendant: August? Are you fucking kidding me? I don't give a fuck, bro. I've been down a goddamn year. This is bullshit.

"The Court: All right. Sir, if you keep doing it, I'm gonna have to hold you in contempt and give you even more.

"The Defendant: I got a year in. What is that, six months? That's nothing.

"The Court: I'm gonna have to do it. You're forcing me to do it.

"The Defendant: Your Honor, you—

"The Court: I don't want to.

"The Defendant: Nobody will talk to me about anything.

"The Court: I can't talk to you about this.

"The Defendant: Okay. So, who do I talk to? You're not giving me any options.

"The Court: Your attorney or hire an attorney. You have the right to hire whoever you want.

"The Defendant: I've already fired my attorney and got Conway, and Conway's not doing his job. So, I'd like to fire him and represent myself. I do have the right to do that, don't I?

"The Court: All right. The matter is set down—what was the date we gave for Mr. Conway?

"The Defendant: Can I get a copy of the transcript where I'm being denied my—my legal rights? This is my—my amendment rights to represent myself. Right?

"[The Prosecutor]: We gave you attorney—

"The Court: No, no. You're not getting canvassed on that today.

"[The Prosecutor]: August 16th is the other date.

"The Court: Because the problem is, we have—nothing's gonna happen today, anyway.

"The Defendant: Nothing's ever happened. Your Honor, I've been down a year. They told me, right, that they have no victim. Why am I still sitting in jail when I can't go to trial? No one's telling what they want to do with my counteroffer.

"The Court: So, you do—you do have a right, but you've got to do it the way that it's got to be done.

"The Defendant: I've been doing it for a year, Your Honor. I've already fired the public defender who would not do anything I asked her to do.

"The Court: So, file a pro se appearance, and you'll be canvassed on it on self-representation on the next case.

"The Defendant: How—how do I do that? Is there a paperwork or something like that I can get?

"The Court: Yeah. At the clerk's office you can get it. All right. So ordered.

"The Defendant: If I hire a what? Could you write that down for me please?

"The Court: No. I can't give you legal advice. I—

"The Defendant: You just told me—

"The Court: You're just gonna have to figure this out.

"The Defendant: So, when is my continuance?

"The Court: What date?

"The Defendant: August? You're fucking kidding me. Right?

"The Court: The sixteenth. Sixteenth."

The defendant subsequently appeared before the court on August 19, and September 6 and 10, 2019, before jury selection began on September 23, 2019. The defendant was represented by Conway at these subsequent pretrial hearings. The defendant did not raise his right to self-representation at any of the hearings and proceeded to trial represented by Conway.

The following legal principles guide our analysis of the defendant's claim that the court violated his right to self-representation. "The sixth amendment to the United States constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense. The sixth amendment right to counsel is made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . . In *Faretta* v. *California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the United States Supreme Court

concluded that the sixth amendment [also] embodies a right to self-representation and that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. . . . In short, forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. . . .

"It is well established that [t]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them. When the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel. . . .

"State and federal courts consistently have discussed the right to self-representation in terms of invoking or asserting it . . . and have concluded that there can be no infringement of the right to self-representation in the absence of a defendant's proper assertion of that right. . . . The threshold requirement that the defendant clearly and unequivocally invoke his right to proceed [as a self-represented party] is one of many safeguards of the fundamental right to counsel. . . . Accordingly, [t]he constitutional right of self-representation depends . . . upon its invocation by the defendant in a clear and unequivocal manner. . . . In the absence of a clear and unequivocal assertion of the right to self-representation, a trial court has no independent obligation to inquire into the defendant's interest in representing himself . . . . Conversely, once there has been an unequivocal request for self-representation, a court must undertake an inquiry [pursuant to Practice

Book § 44-3],[8] on the record, to inform the defendant of the risks of self-representation and to permit him to make a knowing and intelligent waiver of his right to counsel." (Footnote added; internal quotation marks omitted.) *State* v. *Paschal*, 207 Conn. App. 328, 332–34, 262 A.3d 893, cert. denied, 340 Conn. 902, 263 A.3d 387 (2021), cert. denied, U.S. , 142 S. Ct. 1395, L. Ed. 2d (2022). "The inquiry mandated by Practice Book § 44-3 is designed to ensure the knowing and intelligent waiver of counsel that constitutionally is required." (Internal quotation marks omitted.) Id., 333.

"Although a clear and unequivocal request is required, there is no standard form it must take. [A] defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to [that] request. Insofar as the desire to proceed [as a self-represented party] is concerned, [a defendant] must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made. . . . Moreover, it is generally incumbent upon the courts to elicit that elevated degree of clarity through a detailed inquiry. That is, the triggering statement in a defendant's attempt to waive his right to counsel need not be punctilious;

[8] Practice Book § 44-3 provides: "A defendant shall be permitted to waive the right to counsel and shall be permitted to represent himself or herself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

"(1) Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled;

"(2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself;

"(3) Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and

"(4) Has been made aware of the dangers and disadvantages of self-representation."

rather, the dialogue between the court and the defendant must result in a clear and unequivocal statement. . . .

"[I]n conducting our review, we are cognizant that the context of [a] reference to self-representation is important in determining whether the reference itself was a clear invocation of the right to self-representation. . . . The inquiry is fact intensive and should be based on the totality of the circumstances surrounding the request . . . which may include, inter alia, whether the request was for hybrid representation . . . or merely for the appointment of standby or advisory counsel . . . the trial court's response to a request . . . whether a defendant has consistently vacillated in his request . . . and whether a request is the result of an emotional outburst . . . .

"When a defendant's assertion of the right to self-representation is not clear and unequivocal, recognition of the right becomes a matter entrusted to the exercise of discretion by the trial court. . . . In the exercise of that discretion, the trial court must weigh into the balance its obligation to indulge in every reasonable presumption against waiver of the right to counsel." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 334–35.

Although a court is required to conduct a canvass pursuant to Practice Book § 44-3, once a defendant has clearly and unequivocally invoked his right to self-representation; see *State* v. *Paschal*, supra, 207 Conn. App. 334; our Supreme Court explained in *State* v. *Braswell*, 318 Conn. 815, 842 n.8, 123 A.3d 835 (2015), that there may be some circumstances in which a defendant asserts his right to self-representation but subsequently waives that right before a court clearly and conclusively denies his request. The court in *Braswell* explained: "[If] a trial court has not clearly and conclusively denied

a defendant's request to represent himself, the defendant may subsequently waive such a request. But, [if] a court has clearly and conclusively denied the request, the defendant does not waive his right to self-representation by subsequently acquiescing in being represented by counsel or by failing to reassert that right." Id., 843–44.

The court in *Braswell* made clear that "[t]his does not mean, however, that, after a defendant's clear and unequivocal request to represent himself, a trial court may simply ignore such a request and proceed to a critical stage of the proceedings, and thereby avoid any error simply because it did not make a clear and conclusive ruling on the defendant's request. . . . [O]nce a defendant has clearly and unequivocally invoked his right to self-representation, the trial court is obligated to conduct a canvass in accordance with Practice Book § 44-3 to determine if his waiver of counsel is knowingly and intelligently made. Our decision in this case does not alter that obligation. Instead, it suggests there may be some instances in which a defendant asserts and subsequently waives his right to self-representation before a court clearly and conclusively rules on the defendant's request. In such instances, it is possible that there are circumstances in which the trial court's delay in ruling on the request would not constitute error." Id., 842 n.8.

Our Supreme Court explained its reasoning behind this rule: "Although a defendant does not have to reassert his right to self-representation once it has been clearly denied by the court . . . we have never held that there is no obligation to renew such claim [if] the court does not address it. It seems to us that there is a significant difference between a defendant who waives or forfeits his right to self-representation after a clear ruling and one who waives or forfeits the right when there has been no such ruling. In the former situation, it is likely that the waiver or forfeiture is

precipitated by the denial. . . . In the latter situation, contrarily, there has been no court action that would suggest that the reassertion of one's right would be futile." (Citations omitted.) Id., 841 n.8.

Having set forth the applicable legal principles, we next set forth the standard of review that governs our analysis of the defendant's claim. "We ordinarily review for abuse of discretion a trial court's determination, made after a canvass pursuant to [Practice Book] § 44-3, that a defendant has knowingly and voluntarily waived his right to counsel. . . . In cases . . . however, where the defendant claims that the trial court improperly failed to exercise that discretion by canvassing him after he clearly and unequivocally invoked his right to represent himself . . . whether the defendant's request was clear and unequivocal presents a mixed question of law and fact, over which . . . our review is plenary." (Internal quotation marks omitted.) *State* v. *Paschal*, supra, 207 Conn. App. 333.

On appeal, the defendant claims that he clearly and unequivocally invoked his right to proceed as a self-represented party at the July 5, 2019 hearing,[9] and that, despite this clear and unequivocal invocation, the court clearly and conclusively denied him this right, thereby violating his sixth amendment right to self-representation. The state argues that the defendant did not make a clear and unequivocal request to represent himself, and, in the alternative, even if he did make a clear and unequivocal request to represent himself, the court did not clearly and conclusively deny his request, and the defendant subsequently waived his right to self-representation. Even if we assume, without deciding, that the defendant's statements during his dialogue with the

[9] Although the defendant also argued, in his principal appellate brief, that he had clearly and unequivocally invoked his right to self-representation during the January 18, 2019 hearing, during oral argument before this court, the defendant's counsel conceded that he was no longer asserting this claim.

court on July 5, 2019, constituted a clear and unequivocal request to represent himself, we conclude that the court did not clearly and conclusively deny that request and that the defendant subsequently waived his right to self-representation.

At the commencement of the July 5, 2019 hearing, the court informed the defendant that Conway was not present. The defendant then stated that he wanted Conway fired. The court immediately stated that it did not want to get in the middle of the defendant's communications with his attorney. The court began explaining to the defendant that "the rules provide, [that the court] can't talk to you directly about your case without the attorney of record," but before the court had finished its sentence, the defendant interjected, asserting that he would like to defend himself. The court then said, "I can't."

The defendant contends that the court clearly and conclusively denied his request to represent himself when the court stated, "I can't." We disagree. We conclude that the trial court's statement, "I can't," when read in context, was not a clear and conclusive denial of the defendant's request. The court repeated, "I can't," twice in an apparent attempt to finish its previous statement, explaining how it could not talk to the defendant about the case without the attorney of record present. The defendant's interjection muddled the record. Presumably, the court was about to advise the defendant regarding how he could represent himself when it stated, "[y]ou can," before it was again cut off by the defendant, who began cursing. The court informed the defendant that the matter would be continued.

The defendant then became even more emotional, utilizing numerous expletives to express his frustration with the ordered continuance. After warning the defendant that it would hold him in contempt if he continued

his behavior, the court reiterated, "I can't talk to you about this." Read in context, this statement by the court is also not a clear and conclusive denial of the defendant's request because it reasonably could refer to the court's view that it could not properly talk to the defendant about his request without his attorney present.

Shortly thereafter, the defendant stated that he would like to fire Conway and represent himself. The court responded, "[a]ll right. The matter is set down—what was the date we gave Mr. Conway?" The defendant then asked, "[c]an I get a copy of the transcript where I'm being denied my—my legal rights? This is my—my amendment rights to represent myself. Right?" The prosecutor began to say, "[w]e gave you attorney," when the court said, "[n]o, no. You're not getting canvassed on that today." The court went on to explain that nothing was going to happen during the hearing and informed the defendant that he did have a right to represent himself but that he had to "do it the way that it's got to be done." The court told the defendant to file a pro se appearance and that he would be canvassed on self-representation "on the next case." When the defendant asked how to file an appearance, the court said it could not give him legal advice and that he was "just gonna have to figure [it] out." The court then continued the matter until August 16, 2019.

The defendant contends that the court clearly and conclusively denied his request to represent himself when it stated, "[n]o, no." The court's statement, "[n]o, no," also cannot properly be read, in context, as a clear denial of the defendant's request to represent himself. Because the prosecutor began talking, and because the defendant's request to defend himself was intermixed with a request for a copy of the transcript of the hearing, it is not clear from the transcript to what the court was saying no. Thus, the court's statement, "[n]o, no,"

cannot properly be read as a clear denial of the defendant's request.

The defendant also argues that it was improper for the court to tell him to file a pro se appearance. According to the defendant, by telling him that he would have to figure out how to represent himself on his own, the court clearly and conclusively denied his request to represent himself because it indicated to him that further inquiries and invocations of his right to self-representation would be futile. Although we question the propriety of the court's statement that he should file a pro se appearance,[10] we do not agree with the defendant that this statement amounted to a clear and conclusive denial of his right to self-representation. As previously explained, despite the court's improper instruction, the court told the defendant that he did have a right to self-representation and that he would be canvassed on that right during the next hearing. Thus, the court did not clearly and conclusively deny the defendant's request.

The defendant next contends that our Supreme Court's decisions in *State* v. *Braswell*, supra, 318 Conn. 815, and *State* v. *Jordan*, 305 Conn. 1, 44 A.3d 794 (2012), control this case. We disagree.

In *State* v. *Braswell*, supra, 318 Conn. 845–47, our Supreme Court determined that the trial court's denial of the defendant's request to represent himself was both clear and conclusive when the court said, "I'm going

[10] We share the defendant's concern regarding the propriety of the court's instruction to him that he should file a pro se appearance with the clerk's office. The defendant was incarcerated throughout these proceedings, and his lawyer was not present at the July 5, 2019 hearing, making it unrealistic for the court to expect him to file a pro se appearance with the clerk's office. Furthermore, the defendant should not have been required to file a pro se appearance with the clerk's office until after the court canvassed him on his right to self-representation, concluded that his waiver of his right to counsel was knowing and intelligent, and ordered defense counsel to withdraw from the case.

to deny the motion to discharge counsel or allow you to proceed pro se. If, in the next four weeks, I see some additional support for those, I'm happy to reconsider them, okay?" (Emphasis omitted; internal quotation marks omitted.) Id., 845. In *Braswell*, the trial court's denial was clear: "I'm going to deny the motion to . . . allow you to proceed pro se." (Emphasis omitted; internal quotation marks omitted.) Id. Here, unlike in *Braswell*, none of the court's statements amounted to a clear denial of the defendant's request. As previously explained, read in the context of the entire transcript, we cannot conclude that the court's statements, "I can't," and, "no," clearly denied the defendant's request to represent himself.

The court in *Braswell* also concluded that the trial court's denial of the defendant's request was conclusive because "[t]he court conditioned its willingness to reconsider its ruling on seeing some additional support for the motion"; (internal quotation marks omitted) *State* v. *Braswell*, supra, 318 Conn. 845; and because "the additional support the court wanted was largely outside the control of the defendant." Id., 846. Therefore, the court concluded that the "defendant, faced with these circumstances, could reasonably believe that it would be futile to again request to proceed pro se." Id. Here, unlike in *Braswell*, although the court inadvisably instructed the defendant to file a pro se appearance; see footnote 10 of this opinion; the court did not condition its willingness to consider, at a later date, the defendant's request to proceed as a self-represented party on the fulfillment of that instruction. We thus find the defendant's reliance on *Braswell* unavailing.

In *State* v. *Jordan*, supra, 305 Conn. 16, our Supreme Court concluded that the trial court had denied the defendant's request to invoke his right to self-representation because, in response to the defendant's oral assertion of the right, the trial court cut the defendant

off, directed him to stop talking, ordered him to leave the courtroom to discuss the matter with counsel and, at the conclusion of the hearing, summarily denied the defendant's motion to dismiss counsel without acknowledging the defendant's written and oral assertions of the right to represent himself. Here, unlike in *Jordan*, the court acknowledged the defendant's request to represent himself and did not make a ruling on it. Instead, the court continued the matter and suggested that the defendant would be canvassed on his request at a future hearing because the court expressed concern about talking to the defendant about his request without his attorney present. We thus disagree with the defendant's assertion that this case is similar to *Jordan*, in which the court's statements suggested that the defendant's reassertion, at future proceedings, of his right to self-representation would be futile; id., 20 ("the denial likely convinced [the] defendant [that] the self-representation option was simply unavailable, and [that] making the request again would be futile" (internal quotation marks omitted)); and conclude that the defendant's reliance on *Jordan* is misplaced.[11]

Unlike in *Braswell* and *Jordan*, the court in the present case neither *clearly* nor *conclusively* denied the defendant's request to represent himself. Rather, the court emphasized that it did not want to speak with the defendant without his attorney present and noted that rules provide that it could not talk to the defendant

[11] We likewise disagree with the defendant's assertion that the court here, as in *State* v. *Flanagan*, 293 Conn. 406, 978 A.2d 64 (2009), repeatedly denied him his right to self-representation and thereby convinced him that self-representation was not an option. See id., 425 (court found to have clearly denied defendant's request to represent himself by confirming on record during next day of trial that it had denied defendant's earlier request to represent himself). As previously explained, the court in the present case did not clearly deny the defendant's request to represent himself but, instead, informed him only that he would not be canvassed on the matter without his attorney present.

about his case without the attorney present. The court's acknowledgment of the defendant's right to self-representation and its statement suggesting that the required canvass would occur at a later date refute the defendant's assertion that the court clearly and conclusively denied his request. To the contrary, the question of self-representation was left open for possible further discussion at subsequent pretrial hearings. See *Wilson* v. *Walker*, 204 F.3d 33, 38 (2d Cir.), (concluding that defendant's motion to represent himself was "still open for discussion" where court based its denial, in part, on defendant's refusal to answer certain questions that would have allowed court to determine whether waiver of counsel was knowing and intelligent and where court gave defendant one week to confer with counsel regarding his motion to represent himself), cert. denied, 531 U.S. 892, 121 S. Ct. 218, 148 L. Ed. 2d 155 (2000); see also *State* v. *Paschal*, supra, 207 Conn. App. 338 (right to self-representation still open for discussion when court denied defendant's request to represent himself without prejudice and granted one week continuance).

The court in *Braswell* provided that "there may be some instances in which a defendant asserts and subsequently waives his right to self-representation before a court clearly and conclusively rules on the defendant's request. In such instances, it is possible that there are circumstances in which the trial court's delay in ruling on the request would not constitute error." *State* v. *Braswell*, supra, 318 Conn. 842 n.8. We conclude that the facts of this case present such a circumstance. The transcript makes clear that the court's delay in ruling on the defendant's request to represent himself was due to its concern about violating the Code of Judicial Conduct—specifically, rule 2.9 (a), which provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties

or their lawyers, concerning a pending or impending matter," subject to certain exceptions. As a result of this concern, the court communicated to the defendant that, although he had a right to self-representation, he would not be canvassed on that right during the July 5, 2019 hearing but, instead, at a future hearing when defense counsel was present. Based upon our thorough review of the July 5, 2019 transcript, we conclude that the court did not clearly and conclusively deny the defendant's request to represent himself.

We further conclude that the defendant waived his right to represent himself by "subsequently acquiescing in being represented by counsel [and] by failing to reassert [his] right." *State* v. *Braswell*, supra, 318 Conn. 844. As previously discussed, after the July 5, 2019 hearing, the defendant appeared before the court on August 19 and September 6 and 10, 2019, before jury selection began on September 23, 2019. The defendant was represented by Conway throughout these subsequent pretrial hearings and did not raise his right to self-representation at any of the hearings. The defendant then proceeded to trial represented by Conway. Because the defendant acquiesced to being represented by counsel and did not reassert his right to self-representation after the July 5, 2019 hearing, he waived that right. Accordingly, we conclude that the court did not violate the defendant's sixth amendment right to self-representation.

II

The defendant also claims that the court improperly limited his cross-examination of B and thereby violated his sixth amendment right to confront the witnesses against him.[12] The defendant claims that the court foreclosed cross-examination into an entire area of inquiry,

[12] The defendant also claims that the court violated his right to present a defense and his right to a fair trial. Because we conclude that these claims are not adequately briefed, we decline to review them. See, e.g., *State* v. *Cusson*, 210 Conn. App. 130, 137 n.8, 269 A.3d 828 (2022) ("It is well estab-

namely, B's bias and motive for exaggerating the extent of her injuries and the details of the affray, when it prevented him from cross-examining her regarding her motivations for not wanting to go to jail. We disagree.

The following facts and additional procedural history are relevant to our resolution of this claim. As previously noted, Brangi spoke with B at the scene of the crime after responding to the 911 call. During this conversation, B told the officer what had happened. B also told the officer that she did not want to go to jail.

At trial, during cross-examination, the following colloquy occurred between defense counsel and B:

"Q. When you were first speaking to the police officer at the scene, the one who interviewed you, I think it was Officer Brangi, do you remember saying to him that you had hit [the defendant]?

"A. Yes.

"Q. Do you remember saying to him that you didn't want to go to jail?

"A. Yes.

"Q. Now, at that point you were on methadone?

"A. I was on methadone, yep.

"Q. Okay. And was your concern that, if you were in jail, that you had to go through withdrawal?

"A. No, because they do methadone in jail.

"Q. How do you know that?"

The prosecutor objected. The court then heard argument on the objection outside the presence of the jury.

lished that the appellate courts of this state are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived." (Internal quotation marks omitted.)).

Defense counsel argued that the question went "to the overall credibility assessment. . . . I basically, implicitly said, you're lying because you didn't want to go through withdrawal. . . . And so it goes to—again, it's—it's her state of mind, and somehow, I want to get to her state of mind as to why she's saying she doesn't want to go to jail. Why would she think she had to go to jail if she didn't do anything?"

The prosecutor argued that the question was not relevant: "That's just clearly—that's not relevant to the situation. She indicated she was taking methadone, and now [defense counsel's] asking her to try to [impugn] her credibility by saying that she might have some credibility issues because she's in jail. I just don't see how this is relevant, how her knowledge of methadone in prison would be going to her ability to tell the truth, what happens, and I—I don't believe it's relevant."

Defense counsel then conducted an offer through his questioning of B:

"Q. So, what I had just asked you was, you responded to the question and indicat—you indicated that you can get methadone and [the Department of Correction (department)] administers methadone, and I asked you, how do you know. And so for this proceeding only and not in front of the jury, how do you know?

"A. From friends. I've had friends who have gone to jail on methadone.

"Q. Okay. So, you do not have personal knowledge of that?

"A. No.

* * *

"Q. So, assuming that the objection is sustained with regard to that question, my question would be, you don't

have firsthand knowledge that the [the department] administers methadone?

"A. No."

The prosecutor maintained that the line of questioning was irrelevant. The court agreed, stating: "I agree with the state on this, Attorney Conway. I don't think it's relevant to what this jury has to decide, whether—the witness' status on whether there is administration of methadone at [the department], and there's no issue, as I understand it, that she was presented to [the department] for the events of that evening. So, I do make a ruling that it's not relevant to what this jury has to decide."

The jury was brought back into the courtroom, and the cross-examination of B continued:

"[Defense Counsel]: Going back to—so, again, you would agree that you had asked the officer or told the officer at the scene that you did not want to go to jail; right?

"[B]: Yes.

"[Defense Counsel]: And had you gone to jail and there had been a bond, you would not have been able to make it; right?

"[B]: Yes.

"[The Prosecutor]: What was that, Judge?

"[Defense Counsel]: If you had—do you want me to repeat?

"The Court: Sure. Why don't you repeat it.

"[Defense Counsel]: If you had—if you had gone—what I said was, if you had gone to jail, been arrested, and there had been a bond you would not have been able to make it?

"[The Prosecutor]: I don't see how that's relevant, and I would ask that it be stricken, Judge.

"The Court: Yeah. No. I'm going to sustain the objection, it's not relevant to what this jury has to decide.

"[The Prosecutor]: May it be stricken, Judge?

"The Court: Yeah. And I'll strike it.

"[The Prosecutor]: Thank you."

We begin by setting forth our standard of review and the applicable principles of law that govern our analysis of the plaintiff's claim. "Our standard of review of a claim that the court improperly limited the cross-examination of a witness is one of abuse of discretion. . . . [I]n . . . matters pertaining to control over cross-examination, a considerable latitude of discretion is allowed. . . . The determination of whether a matter is relevant or collateral, and the scope and extent of cross-examination of a witness, generally rests within the sound discretion of the trial court. . . . Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . .

"The court's discretion, however, comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment [to the United States constitution]. . . . The sixth amendment . . . guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . . As an appropriate and potentially vital function of cross-examination, exposure of a witness' motive, interest, bias or prejudice may not be unduly restricted. . . . Compliance with the constitutionally guaranteed right to cross-examination requires that the defendant be allowed to present the jury with facts from which it

could appropriately draw inferences relating to the witness' reliability. . . . [P]reclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements of the sixth amendment. . . . In determining whether such a violation occurred, [w]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) *State* v. *Holbrook*, 97 Conn. App. 490, 497–98, 906 A.2d 4, cert. denied, 280 Conn. 935, 909 A.2d 962 (2006).

The defendant argues that the purpose of cross-examining B as to (1) how she knew that methadone was available in jail, and (2) her ability to pay a bond had she been arrested, was to show that she was fearful of going to jail. According to the defendant, the precluded questions were relevant to show B's bias, lack of credibility, and motive to fabricate or exaggerate her injuries and the details of the assault.

Examining the nature of the inquiry, we conclude that the court did not abuse its discretion in limiting the defendant's cross-examination of B. The court permitted the defendant to question B regarding her statement to Brangi that she did not want to go to jail. In doing so, the court permitted the defendant to expose B's motive, interest, bias, or prejudice in cooperating with the police. Said another way, the court allowed the defendant to question B about her motive to avoid going to jail. The only question precluded by the court was whether B (1) had personal knowledge that methadone was available in jail, and (2) believed that she did not have the financial means to pay bail if arrested. Because B admitted that she did not want to go to jail, and, thus, her motive to avoid prison was undisputed,

the court did not unduly restrict the defendant's attempt to expose B's motive, interest, bias, or prejudice. See id., 498 ("[a]s an appropriate and potentially vital function of cross-examination, exposure of a witness' motive, interest, bias or prejudice may not be unduly restricted" (internal quotation marks omitted)). We therefore conclude that the court did not abuse its discretion in restricting the scope of defense counsel's cross-examination of B.

The judgment is affirmed.

In this opinion the other judges concurred.

D2E HOLDINGS, LLC *v.* CORPORATION FOR URBAN HOME OWNERSHIP OF NEW HAVEN

(AC 44218)
(AC 44656)

Alvord, Suarez and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for breach of contract in connection with a real estate contract in which the plaintiff agreed to purchase from the defendant certain residential units. The real estate contract required the plaintiff to obtain mortgage financing by a certain date and mandated that the defendant provide to the plaintiff various documents, to the extent such documents were existing and available. The defendant did not supply all of the documents requested by the plaintiff because certain documents did not yet exist. The closing date expired and the plaintiff never obtained mortgage financing. The plaintiff commenced this action alleging that the defendant breached the implied covenant of good faith and fair dealing by failing to provide it with the necessary documents for it to obtain mortgage financing and by retaining the plaintiff's deposit without intent to transfer title to the units. The defendant impleaded B Co. into the action by way of a third-party complaint. B Co. and the defendant had attempted to enter into a property management agreement. B Co., however, did not exist as a corporate entity on the date that the agreement was executed. P, a manager of B Co., signed the agreement, despite the fact that P was not a party to the agreement. B Co. filed a third-party counterclaim against the defendant alleging that the defendant breached the management agreement and was unjustly enriched when it failed to pay B Co.

for all of its services. After a trial to the court, the trial court found in favor of the defendant as to the plaintiff's claim alleging breach of the implied covenant of good faith and fair dealing, concluding that the defendant had no obligation to provide the plaintiff with documents that did not exist. The court rendered judgment in favor of the defendant as to B Co.'s breach of contract claim on the ground that the management agreement was a "nullity" because B Co. did not exist when the management agreement was executed. The plaintiff and B Co. appealed from the trial court's judgment, and, while that appeal was pending, the plaintiff filed a motion to open the trial court's judgment on the ground that the defendant engaged in fraud by concealing that it had sold the residential units to another entity for a higher price. The court denied the motion, reasoning that, even if the plaintiff's contentions were true, this would not have affected its determination that the defendant performed its obligations under the contract, and the plaintiff filed a separate appeal to this court, which consolidated the appeals. *Held*:

1. The plaintiff could not prevail on its claim that the trial court improperly rendered judgment in favor of the defendant on the plaintiff's claim alleging that the defendant breached the implied covenant of good faith and fair dealing, which was based on its claim that the court incorrectly determined that the defendant did not act in bad faith by failing to provide to the plaintiff the documents necessary for it to obtain mortgage financing and by accepting the plaintiff's deposit without the intent to transfer title to the residential units: the court determined that the defendant did not act in bad faith by failing to provide the plaintiff with documents to secure financing that did not exist, the agreement does not mandate that the defendant create nonexistent documents, rather, the agreement mandates the opposite, namely, that the defendant must provide the plaintiff with documents that are existing and available; moreover, the defendant did not act in bad faith by retaining the plaintiff's deposit because the agreement permitted the defendant to retain the deposit in the event that the plaintiff defaulted, and it was undisputed that the plaintiff defaulted on its obligations because it did not obtain mortgage financing to comply with the agreement.
2. This court declined to review B Co.'s claim that the trial court improperly rendered judgment in favor of the defendant on B Co.'s breach of contract counterclaim, which was based on its claim that the court incorrectly determined that the management agreement between B Co. and the defendant was a nullity: the trial court did not review any of the fact bound arguments made by B Co. in support of its claim that it was able to enforce the agreement against the defendant, and, therefore, the record was inadequate for this court to consider B Co.'s arguments because the court never made the requisite determination as to the issues of P's capacity, as to P's assignment of the agreement and the defendant's ratification of the agreement, and B Co. failed to seek reargument or an articulation as to any of these grounds; moreover, although

B Co. lacked the capacity to enter into the management agreement because it did not exist as a corporate entity at the time the agreement was executed, B Co.'s lack of capacity did not, by itself, render the agreement a nullity, as the management agreement may have been enforceable between P and the defendant if P had the capacity to execute the agreement on behalf B Co., however, the issue of P's capacity was not determined by the court, which determined only that the agreement was a nullity because B Co. was not yet legally formed.

3. The plaintiff's claim that the trial court incorrectly determined that it failed to make a threshold showing of fraud in order to warrant limited discovery and an evidentiary hearing on its motion to open was unavailing: the trial court did not abuse its discretion in denying the plaintiff's motion to open because the plaintiff failed to make a threshold showing of substance warranting the opening of the judgment, that court having correctly determined that, even if the defendant sold the residential units to another entity, this would have had no impact on its judgment rendered in favor of the defendant, as the court determined that the defendant complied with the real estate agreement, and the defendant's interactions with a separate buyer were immaterial to the plaintiff's claims.

Argued March 8—officially released May 31, 2022

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendant filed a counterclaim and a third-party complaint; thereafter, the third-party defendants filed a third-party counterclaim; subsequently, the matter was tried to the court, *Hon. Jon C. Blue*, judge trial referee; judgment for the defendant on the complaint, for the plaintiff on the counterclaim, for the third-party defendants on the third-party complaint, and for the third-party defendant Dragon Bridge Management, LLC, in part on its third-party counterclaim, from which the plaintiff and the third-party counterclaim plaintiffs appealed to this court; thereafter, the court, *Hon. Jon C. Blue*, judge trial referee, denied the plaintiff's motion to open the judgment, and the plaintiff filed a separate appeal to this court; subsequently, the third-party counterclaim

plaintiff Eduardo Perez withdrew his appeal; thereafter, this court consolidated the appeals. *Affirmed.*

Danielle J. B. Edwards, for the appellant in Docket Nos. 44218 and 44656 (plaintiff).

Peter V. Lathouris, with whom, on the brief, was *Victor Andreou*, for the appellant in Docket No. 44218 (third-party defendant Dragon Bridge Management, LLC).

Scott E. Jackson, for the appellee in Docket Nos. 44218 and 44656 (defendant).

Opinion

BISHOP, J. These consolidated appeals arise from a dispute among the plaintiff, D2E Holdings, LLC (D2E Holdings), the defendant, third-party plaintiff, and third-party counterclaim defendant, Corporation for Urban Home Ownership of New Haven (CUHO), and the third-party defendant and third-party counterclaim plaintiff, Dragon Bridge Management, LLC (Dragon Bridge).[1] In Docket No. AC 44218, D2E Holdings and Dragon Bridge appeal from the judgment of the trial court, rendered after a trial to the court, in favor of CUHO. In Docket No. AC 44656, D2E Holdings appeals from the judgment of the trial court denying its motion to open the judgment in favor of CUHO.[2] The parties advance three claims in their appeals. In AC 44218, D2E Holdings claims that the court improperly rendered judgment in favor of CUHO on D2E Holdings' breach of the implied covenant of good faith and fair dealing claim; in the same docket, Dragon Bridge claims that the court improperly rendered judgment in favor of CUHO on

[1] A manager of Dragon Bridge, Eduardo Perez, was named as a third-party defendant and third-party counterclaim plaintiff, and filed this joint appeal with Dragon Bridge. Eduardo Perez, however, later withdrew from this appeal.

[2] D2E Holdings filed a motion to consolidate the appeals in Docket No. AC 44218 and Docket No. AC 44656, which was granted by this court.

Dragon Bridge's breach of contract counterclaim. In AC 44656, D2E Holdings claims that the court incorrectly determined that it failed to make a threshold showing of fraud in order to warrant limited discovery and an evidentiary hearing on its motion to open. We affirm the judgments of the court.

The following factual findings of the court and procedural history are relevant to the issues raised in this appeal. The present dispute stems from two separate but related contracts: a property management agreement between CUHO and Dragon Bridge, and a real estate contract between CUHO and D2E Holdings.

On March 7, 2017, CUHO and Dragon Bridge attempted to enter into an exclusive property management agreement. In the management agreement, Dragon Bridge, designated in the agreement as the "MANAGER," agreed to be CUHO's "exclusive managing agent to rent, lease, operate, maintain, manage, and supervise and coordinate the rental, leasing, operation, and maintenance" of specified properties owned by CUHO in exchange for a payment of $7000 per month. The management agreement also contained a liquidated damages provision in which CUHO agreed to pay Dragon Bridge twelve months of management fees in the event that CUHO prematurely terminated the management agreement. Dragon Bridge, however, did not exist as a corporate entity on the date that the management agreement was executed, March 7, 2017, because it was not incorporated until March 14, 2017. Eduardo Perez was "employ[ed] . . . as a manager" of Dragon Bridge. Perez signed the management agreement, despite the fact that Perez was not individually named as a party to the management agreement.[3] Nevertheless, between

[3] It is not clear from the face of the management agreement whether Perez signed on behalf of Dragon Bridge as the party to the agreement designated as "MANAGER," or as the manager of Dragon Bridge.

April, 2017, and October, 2017, Dragon Bridge provided services to CUHO pursuant to the management agreement, and CUHO paid Dragon Bridge for a majority of its services. In October, 2017, or November, 2017, CUHO asked Dragon Bridge not to return to its property.

On October 3, 2017, D2E Holdings and CUHO entered into a real estate contract, through which D2E Holdings agreed to purchase from CUHO seventy-three residential units in New Haven in exchange for $2,900,000. The real estate contract contained a financial contingency provision in § 3.3 (a) that required D2E Holdings to obtain "a commitment from a recognized lending institution to provide purchase money mortgage financing" on or before October 31, 2017. Section 3.1 of the real estate contract mandated that CUHO provide to D2E Holdings sixteen types of statements, including those regarding income and expenses, "[t]o the extent such documents are existing and available . . . ." Sections 2.2 (a) and 6.1 of the real estate contract required D2E Holdings to provide CUHO with an initial deposit of $100,000, which could be retained by CUHO if D2E Holdings defaulted on any of its obligations.

In accordance with these provisions in the real estate contract, D2E Holdings provided CUHO's attorney with $100,000 as an initial deposit. D2E Holdings also requested that CUHO provide it with certain documents so that it could obtain financing from Liberty Bank. CUHO supplied D2E Holdings with all of the documents that were required pursuant to the real estate contract, but did not provide all of the documents requested by D2E Holdings because those documents "did not yet exist" and could not be created by the closing date. Consequently, D2E Holdings never submitted a full mortgage loan application, never obtained mortgage financing, and the November 30, 2017 closing date expired without a closing.

The parties thereafter engaged in the underlying litigation stemming from the management agreement and the real estate contract. D2E Holdings instituted an action by way of a complaint against CUHO, alleging that CUHO breached the covenant of good faith and fair dealing implied in the real estate contract by failing to provide D2E Holdings with the necessary documents for it to secure mortgage financing and by retaining D2E Holdings' initial deposit without actual intent to transfer title to the subject units. In that action, D2E Holdings sought specific performance of conveyance of title and "[a]ctual damages . . . ." After being impleaded by way of a third-party complaint filed by CUHO, Dragon Bridge filed a counterclaim against CUHO, alleging that CUHO breached the management agreement and was unjustly enriched when it failed to pay Dragon Bridge all of the fees for its services. In its counterclaim, Dragon Bridge claimed that it suffered damages in the amount of $96,200, on the basis of the liquidated damages provision in the management agreement.

On March 3 and 5, 2020, all of the parties' claims were tried to the court, and the court issued a memorandum of decision on August 6, 2020. Through its memorandum of decision, the court found in favor of CUHO as to D2E Holdings' breach of the implied covenant of good faith and fair dealing claim because it concluded that CUHO had no obligation to provide D2E Holdings with financial documents that did not exist at the time the real estate contract was executed. The court also found in favor of CUHO as to Dragon Bridge's breach of contract claim on the ground that the management agreement was a "nullity" because Dragon Bridge was a nonexistent entity on the date that the management agreement was executed. The court, nevertheless, rendered judgment in the amount of $7000 against CUHO on Dragon Bridge's unjust enrichment claim for the

services provided by Dragon Bridge for one month, which represented the unpaid services that Dragon Bridge provided. D2E Holdings and Dragon Bridge then filed this appeal.

During the pendency of this appeal, D2E Holdings, on March 11, 2021, filed a motion to open seeking to vacate the trial court's judgment in favor of CUHO. In support of its motion, D2E Holdings contended that CUHO engaged in fraud by concealing in discovery that it had sold the subject rental units to another entity for a higher price. On April 6, 2021, the court issued a memorandum of decision denying D2E Holdings' motion to open. The court concluded that CUHO's "allegedly impure motives and the existence or nonexistence of any side deals are legally irrelevant" because the court specifically found in its memorandum of decision that CUHO had complied with the real estate contract. D2E Holdings filed a separate appeal from the trial court's denial of its motion to open, and this court consolidated both appeals. Additional facts will be set forth as necessary.

I

D2E Holdings claims on appeal that the court improperly rendered judgment for CUHO on D2E Holdings' breach of the implied covenant of good faith and fair dealing claim. Specifically, D2E Holdings argues that the court incorrectly determined that CUHO did not act in bad faith by failing to create and provide to D2E Holdings the documents necessary for D2E Holdings to obtain mortgage financing, and by accepting D2E Holdings' initial deposit without the intent to transfer title to the subject units. We are not persuaded.

We begin with the applicable standard of review and relevant legal principles that govern the resolution of this claim. Although D2E Holdings frames its claim as challenging the legal standard used by the court, the

whole of its argument reveals that its claim challenges the court's application of the standard to the evidence presented at trial. See, e.g., *State* v. *Acker*, 160 Conn. App. 734, 741–42, 125 A.3d 1057 (2015) (reframing claim on appeal on basis of content of appellant's brief, despite title of claim, stated standard of review, and characterization of claim used by appellant), cert. denied, 320 Conn. 915, 131 A.3d 750 (2016). We apply plenary review to this claim because the issue of whether undisputed facts meet a particular legal standard is a question of law.[4] *Burns* v. *Adler*, 325 Conn. 14, 33, 155 A.3d 1223 (2017). Likewise, to the extent we are required to interpret the real estate contract, the language of which is plain and unambiguous, our review also is plenary. See *Gallagher* v. *Fairfield*, 339 Conn. 801, 807, 262 A.3d 742 (2021).

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 399, 142 A.3d 227 (2016). "Essentially [the implied covenant of good faith and fair dealing] is a rule of construction designed to fulfill the reasonable expectations of

[4] Although generally "[t]he question of whether certain conduct breached the duty of good faith and fair dealing is a question of fact subject to the clearly erroneous standard of review," D2E Holdings does not contest on appeal the court's factual findings. *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 416, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

the contracting parties as they presumably intended. The principle, therefore, cannot be applied to achieve a result contrary to the clearly expressed terms of a contract, unless, possibly, those terms are contrary to public policy." (Internal quotation marks omitted.) Id., 399 n.11. "[S]tated otherwise, the claim [that the implied covenant has been breached] must be tied to an alleged breach of a specific contract term, often one that allows for discretion on the part of the party alleged to have violated the duty . . . ." (Internal quotation marks omitted.) Id., 399.

"To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." (Internal quotation marks omitted.) *Dorfman* v. *Smith*, 342 Conn. 582, 597, 271 A.3d 53 (2022). "Bad faith in general implies . . . actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose. . . . [B]ad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain . . . ." (Citation omitted; internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 399–400; see also *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 567, 479 A.2d 781 (1984) (party does not act in bad faith by complying with "the clearly expressed terms of a contract").

In *Financial Freedom Acquisition, LLC* v. *Griffin*, 176 Conn. App. 314, 341, 170 A.3d 41, cert. denied, 327 Conn. 931, 171 A.3d 454 (2017), this court held that a

party's implied covenant claim fails when it is contingent on a misinterpretation of a contractual provision. In *Griffin*, the defendants' implied covenant claim was predicated on a provision in a "note prescribing the date on which repayment of the loan was due." Id. The defendants construed the "provision as granting the executrix a right to unilaterally extend the repayment deadline and as imposing upon the named plaintiff an obligation to honor the executrix's unilateral decision to extend the deadline." Id. This court rejected the defendants' construction and held that the plaintiff did not breach the implied covenant of good faith and fair dealing because "the unambiguous language of the provision permits, but does not require, the parties to extend the repayment deadline by entering into a separate written agreement." (Emphasis omitted.) Id. This court reasoned that "[t]he defendants mistakenly construe the provision as granting the executrix a right to unilaterally extend the repayment deadline and as imposing upon the named plaintiff an obligation to honor the executrix's unilateral decision to extend the deadline. The provision guarantees no such right to the executrix and imposes no such obligation on the named plaintiff." Id., 341–42. Accordingly, this court concluded that the defendants' implied covenant claim failed because it was "not predicated on a breach of an express term in the note . . . and the named plaintiff's conduct did not impair any contractual right of the decedent or her estate. . . . That is, the note guaranteed no contractual right to an extension to sell the property, and, consequently, the named plaintiff did not breach the terms of the note by never agreeing to such an extension." (Citations omitted.) Id., 342–43.

The court in the present case determined that CUHO did not breach the implied covenant of good faith and fair dealing on the ground that it did not act in bad faith by failing to provide D2E Holdings with documents

to secure financing that did not exist at the time the parties entered into the real estate contract. The court set forth the standard for implied covenant claims prescribed by *Geysen*, and reasoned that, "[u]nder the express terms of the [real estate] contract, CUHO had no obligation to provide D2E [Holdings] with documents that did not exist. If D2E [Holdings] had wanted to require CUHO to create hitherto nonexistent documents, it could have placed such an obligation in the [real estate] contract. It did not. There is no evidence that CUHO accepted the deposit without actual intent to transfer title to the [subject units]." The court further held that "CUHO's retention of the deposit during the course of this litigation violates neither the express terms of the [real estate] contract nor the implied covenant of good faith and fair dealing. That sum was deposited 'as an initial deposit . . . to be applied to the [p]urchase [p]rice, concurrently with the execution of this [real estate] [c]ontract.' Section 2.2 (a). It is also 'to be credited against [any] liquidated damages sum.' Section 6.1. Under these circumstances, judgment on the second count must enter for [CUHO]."

On the basis of the foregoing, we conclude that the court correctly determined that CUHO did not breach the implied covenant of good faith and fair dealing. As the court aptly held, the plain language of the real estate contract belies D2E Holdings' claim because it does not mandate that CUHO create nonexistent documents. The real estate contract unambiguously provides in § 3.1 that, "[t]o the extent such documents are existing and available to [CUHO] and to the extent such information has not been previously provided, [CUHO] shall provide copies of [certain] documents to [D2E Holdings] within five (5) days after the date that a full and complete executed original of this [real estate] [c]ontract is received by [D2E Holdings] . . . unless such documents have been previously delivered to [D2E Holdings]

. . . .” There is no language in this provision, or otherwise in the real estate contract, mandating that CUHO create nonexistent documents and provide them to D2E Holdings. Rather, § 3.1 mandates the precise opposite: that CUHO must provide D2E Holdings with documents that “are *existing* and *available* . . . .” (Emphasis added.) Just as in *Griffin*, CUHO’s “conduct did not impair any contractual right” because the real estate contract did not obligate CUHO to create nonexistent documents. *Financial Freedom Acquisition, LLC* v. *Griffin*, supra, 342.

Accordingly, D2E Holdings’ implied covenant claim contradicts § 3.1 of the real estate contract because it seeks to mandate that CUHO create and provide documents that are *not existing* and *not available*. Our Supreme Court has made clear that the implied covenant of good faith and fair dealing cannot be applied to achieve a “result contrary to the clearly expressed terms of a contract . . . .” (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 399 n.11.[5] If D2E Holdings wanted to ensure that CUHO create all documents required for it to obtain financing, including those that did not exist, it could have included that language in the real estate contract. In the absence of such a mandate, CUHO did not breach the implied covenant of good faith and fair

[5] D2E Holdings also argues on appeal that the trial court’s application of *Geysen* is in contrast with our Supreme Court’s previous recitations of a more “flexible” and “nuanced” implied covenant standard in *Warner* v. *Konover*, 210 Conn. 150, 156, 553 A.2d 1138 (1989), and *Central New Haven Development Corp.* v. *La Crepe, Inc.*, 177 Conn. 212, 216, 413 A.2d 840 (1979). We disagree because neither *Warner* nor *La Crepe, Inc.*, involved the application of express contract language. See *Warner* v. *Konover*, supra, 153 (implied covenant claim contingent on “absence of a clause in the lease”); *Central New Haven Development Corp.* v. *La Crepe, Inc.*, supra, 216 (implied covenant claim contingent on silence of lease as to time within which lessee may cancel). In the present case, unlike *Warner* and *La Crepe, Inc.*, D2E Holdings’ implied covenant claim is in direct contravention of the express terms of the real estate contract.

dealing, as it could not have engaged in "actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation" because there was no contractual obligation mandating that it create documents for D2E Holdings. (Internal quotation marks omitted.) Id., 399–400; *Financial Freedom Acquisition, LLC* v. *Griffin*, supra, 176 Conn. App. 341–43.

We reach the same conclusion as to CUHO's retention of D2E Holdings' initial deposit. CUHO did not act in bad faith by retaining D2E Holdings' deposit because the express terms of §§ 2.2 (a) and 6.1 of the real estate contract permitted CUHO to retain the initial deposit in the event that D2E Holdings defaulted. In the present case, it is undisputed that D2E Holdings was unable to obtain mortgage financing to comply with § 3.3 (a) of the real estate contract and, thus, D2E Holdings defaulted on its contractual obligations. CUHO's retention of that initial deposit cannot be the basis for D2E Holdings' implied covenant claim because the real estate contract expressly permitted CUHO to do so. See *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 399. Therefore, we conclude that the court correctly determined that D2E Holdings failed to prevail on its implied covenant claim against CUHO.

II

Dragon Bridge claims on appeal that the court improperly rendered judgment for CUHO on Dragon Bridge's breach of contract third-party counterclaim. Particularly, Dragon Bridge argues that the court incorrectly determined that the management agreement between Dragon Bridge and CUHO was a " 'nullity . . . .' " For the reasons set forth below, we are unable to review Dragon Bridge's claim.

The court determined that Dragon Bridge failed to prevail on its breach of contract counterclaim against

CUHO on the ground that the management agreement was a nullity because Dragon Bridge did not yet exist at the time of its execution. The court found: "The first count of the counterclaim in the third-party action alleges breach of contract. It specifically alleges that CUHO breached the [management] agreement in that it: (a) failed to pay Dragon Bridge the management fee for the month of October, 2017, (b) failed to pay Dragon Bridge 'the early termination fee,' and (c) failed to provide 'the required information and documents.' The second special defense alleges that Dragon Bridge did not exist on March 7, 2017, when the [management] agreement was signed. The evidence establishes that Dragon Bridge was incorporated on March 14, 2017, the date its articles of incorporation were filed with the Secretary of the State. . . . A corporation begins 'its corporate existence' on the day that its certificate of incorporation is filed with the Secretary of the State. *DiFrancesco* v. *Kennedy*, 114 Conn. 681, 687, 160 A. 72 (1932). '[I]t then became at least a de facto corporation.' Id. Prior to that time, it had no corporate existence. Under these circumstances, the [management] agreement was a nullity. [Dragon Bridge] may nevertheless be entitled for compensation for work that it actually performed, but that entitlement is addressed with respect to the second count [alleging unjust enrichment]. Under these circumstances, judgment must enter for [CUHO] on the first count." (Citation omitted.)

On appeal, Dragon Bridge does not contest the court's determination that it was not in existence at the time the management agreement was executed. Rather, Dragon Bridge makes three principal arguments[6] to support its

[6] Dragon Bridge makes a fourth argument that warrants little discussion. Dragon Bridge contends that its capacity to enter into the management agreement was not an issue at trial because CUHO made a judicial admission in its answer to Dragon Bridge's counterclaim by stating that CUHO "entered into [the] management agreement with one or both of the third-party defendants," and CUHO never disputed the existence of the management agreement. This argument fails because CUHO explicitly asserted in its second

ability to enforce the management agreement against CUHO. First, Dragon Bridge argues that, pursuant to *BRJM, LLC* v. *Output Systems, Inc.*, 100 Conn. App. 143, 152, 917 A.2d 605, cert. denied, 282 Conn. 917, 925 A.2d 1099 (2007) (*BRJM*), the management agreement was not a "nullity" because Perez had the capacity to enter into the management agreement on behalf of Dragon Bridge. Second, Dragon Bridge argues that it had the authority to enforce the management agreement against CUHO because Perez assigned the agreement to Dragon Bridge after it was legally formed. Third, Dragon Bridge argues that CUHO effectively ratified the management agreement when it accepted the services of Dragon Bridge for seven months. The trial court did not review or assess any of these fact bound arguments. Accordingly, we conclude that the record is inadequate to consider all three of Dragon Bridge's arguments because the trial court never made the requisite determination as to the issues of Perez' capacity, never made the requisite findings and determinations as to Perez' assignment and CUHO's ratification, and because Dragon Bridge failed to seek reargument or an articulation as to any of these grounds.

Turning to the basis on which the court made its findings, we note first that the standard of review applicable to the court's ultimate legal conclusion as to the

special defense to Dragon Bridge's counterclaim that "Dragon Bridge . . . did not exist as an entity on March 7, 2017, and thus was unable to execute a contract or agreement." Furthermore, CUHO's statement that it entered into the management agreement with "*one or both*" of Perez and Dragon Bridge is not so "clear, deliberate and unequivocal" as to constitute a judicial admission that Dragon Bridge was in existence and had the capacity to enter into the management agreement. See *O & G Industries, Inc.* v. *All Phase Enterprises, Inc.*, 112 Conn. App. 511, 523–24, 963 A.2d 676 (2009) (explaining standards for judicial admissions). CUHO additionally raised the issue of Dragon Bridge's capacity in its written closing argument, in its posttrial brief, and its posttrial reply brief. We therefore summarily reject Dragon Bridge's argument as to CUHO's purported judicial admission.

capacity of an individual or entity to enter into a contract is a question of law subject to plenary review. See *BRJM, LLC* v. *Output Systems, Inc.*, supra, 100 Conn. App. 152.

We begin our analysis with a review of this court's decision in *BRJM*. In that case, Nicholas Kepple, purportedly acting on behalf of M & K Realty, LLC, executed a land purchase agreement with the individual seller, Howard Engelsen. Id., 145. Although Kepple intended to form M & K Realty, LLC, at the time of the transaction, that entity was never formed and it never had a legal existence. Id., 146. Kepple accordingly assigned the land purchase agreement to another one of his corporate entities, BRJM, LLC. Id., 146 and n.3. Engelsen later withdrew from the land purchase agreement due to appraisal issues. Id., 146–47. BRJM, LLC, consequently filed an action against Engelsen seeking specific performance of the land purchase agreement and money damages. Id., 147. After trial, the trial court held that M & K Realty, LLC, despite its nonexistence, had the capacity to enter into the land purchase agreement. Id. Engelsen appealed from the trial court's judgment, arguing that M & K Realty, LLC, lacked capacity to enter into the land purchase agreement because it never existed as a legal entity and, thus, the assignment to BRJM, LLC, was void. Id.

This court held on appeal in *BRJM*, as a matter of first impression, that "an entity does not have the legal capacity to contract prior to its legal existence," and that "a contract entered into prior to an entity's formation is not void ab initio due to lack of capacity because the individual entering into the contract on behalf of the unformed entity has the requisite capacity. It follows that, in the situation of an unformed entity, the individual serves as the party to the contract although the contract is entered into in the entity's name." Id., 152. Applying this rule, this court in *BRJM* reasoned that,

"[a]lthough . . . the entity designated as M & K Realty, LLC, did not legally exist and, therefore, lacked the capacity to enter into the agreement, Kepple, acting as an individual on behalf of M & K Realty, LLC, did have capacity to contract with the defendant." Id., 151–52. The court concluded that "Kepple, acting in his individual capacity and as a party to the agreement, made a valid assignment of the agreement to [BRJM, LLC], an existing entity." Id., 154–55.[7]

Applying *BRJM*, we conclude that Dragon Bridge lacked capacity to enter into the management agreement because it is undisputed that it did not exist as a corporate entity at the time the management agreement was executed. Unlike the trial court, however, we conclude that Dragon Bridge's lack of capacity does not, by itself, render the management agreement a "nullity." Instead, the management agreement *may be enforceable* between Perez and CUHO if Perez had the "requisite capacity" to execute the management agreement acting as an individual on behalf of the named but nonexistent entity, Dragon Bridge. See, e.g., id., 153–54 (holding that "prerequisite" to acquisition of preincorporation rights is capacity of individual signee to contract, and that individual had capacity to enter into land purchase agreement as "member" of nonexistent limited liability company). Accordingly, the threshold issue is whether Perez had the requisite capacity to enter into the management agreement on behalf of Dragon Bridge.[8]

[7] See *Bernblum* v. *Grove Collaborative, LLC*, 211 Conn. App. 746 n.4, A.3d (2022) (noting that *BRJM* "is limited to the issue of whether a contract fails due to the lack of capacity of one of the contracting parties if, at the time the contract is executed, one of the parties to the contract is an unformed limited liability company"), petition for cert. filed (Conn. May 6, 2022) (No. 210413).

[8] Although both Dragon Bridge and CUHO discuss *BRJM* on appeal, neither party advances a substantive argument as to Perez' capacity. CUHO does not argue that Perez lacked capacity; instead, it affirmatively contends that the management agreement "was only enforceable between CUHO and Perez . . . ." Dragon Bridge does not make an express capacity argument, but it

However, the issue of Perez' capacity to enter into the management agreement on behalf of Dragon Bridge was not determined by the court. The court's factual findings as to Perez were limited to the following: Perez signed the management agreement, Perez was not named as a party to the management agreement, and Dragon Bridge "employs Perez as a manager." The court did not make a determination as to whether these facts were sufficient to provide Perez with the capacity to enter into the management agreement on behalf of Dragon Bridge. As noted, even assuming that Perez had capacity to enter into the management agreement on behalf of Dragon Bridge, the court did not make any findings or determinations as to Dragon Bridge's second and third arguments with respect to the issues of assignment and ratification.

It is well established that a party cannot obtain appellate review of a claim challenging a finding or determination that the court did not make. "It is the responsibility of the appellant to provide an adequate record for review." (Internal quotation marks omitted.) *State* v. *Walker*, 319 Conn. 668, 678, 126 A.3d 1087 (2015). "It is well established that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal." (Internal quotation marks omitted.) Id., 680; see also Practice Book § 66-5. "Our role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions

does relatedly contend, as part of its separate assignment argument, that "[t]he evidence demonstrates that . . . Perez was the manager of Dragon Bridge."

furnished by the trial court . . . any decision made by us respecting [the appellant's claims] would be entirely speculative." (Internal quotation marks omitted.) *Acadia Ins. Co.* v. *O'Reilly*, 138 Conn. App. 413, 418, 53 A.3d 1026 (2012), cert. denied, 308 Conn. 904, 61 A.3d 1097 (2013); see id., 419 (holding that this court does not "presume error on the part of the trial court; error must be demonstrated by an appellant" (internal quotation marks omitted)). "It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision . . . to clarify the legal basis of a ruling . . . *or to ask the trial judge to rule on an overlooked matter*. . . . In the absence of any such attempts, we decline to review this issue." (Emphasis added; internal quotation marks omitted.) *Brennan* v. *Brennan Associates*, 316 Conn. 677, 705, 113 A.3d 957 (2015).

In *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 231–32, 828 A.2d 64 (2003),[9] the plaintiffs argued on appeal that the trial court incorrectly determined the date on which certain actions accrued for purposes of the statute of limitations. The plaintiffs raised the same arguments before the trial court, however, "the record [was] silent with respect to the trial court's treatment of these specific claims" because "the trial court did not discuss the statute of limitations issues in rendering its . . . decision." Id., 232–33. Our Supreme Court declined to review the plaintiffs' statute of limitations arguments on appeal because "the plaintiffs never remedied this defect in the record by moving for articulation or rectification of the trial court's decision" and, thus, "leaves us with the inappropriate task of speculating about the trial court's reasoning . . . ." Id., 233;

[9] Dragon Bridge relies on *Schoonmaker* in its appellate brief in support of its assignment argument, but it does not discuss the applicability of *Schoonmaker* as to the reviewability of its claims on appeal.

see also, e.g., *Stiffler* v. *Continental Ins. Co.*, 288 Conn. 38, 52–53, 950 A.2d 1270 (2008) (declining to review claim on appeal in absence of articulation when trial court's decision entirely failed to address party's claim); *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 731, 941 A.2d 309 (2008) (declining to review claim on appeal in absence of articulation when trial court's decision failed to address claim).

Here, the court determined *only* that the management agreement was a nullity because Dragon Bridge was not yet legally formed.[10] If the court had considered arguments relating to assignment and/or ratification and rejected them, we cannot locate in the court's memorandum of decision any factual findings that, if found, could be subject to review. This is particularly true in the present case because assignment and ratification

[10] To be clear, the *finding* by the court that Dragon Bridge "employs Perez as a manager," does not constitute a *determination* that such an employment provides him the capacity to contract on behalf of Dragon Bridge. See, e.g., *BRJM, LLC* v. *Output Systems, Inc.*, supra, 100 Conn. App. 145, 154 (determining that individual had capacity to enter into agreement on behalf of limited liability company because he was "member" of that company); see also *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 304 Conn. 820, 835 n.13, 43 A.3d 607 (2012) (generally delineating difference in limited liability companies between "members" and "managers" (internal quotation marks omitted)).

Compounding this deficiency is the unresolved issue of determining in what capacity Perez signed the management agreement. The management agreement entered into evidence states that it was entered into in the name of "MANAGER, DRAGON BRIDGE MANAGEMENT, a Connecticut LLC," and the management agreement is signed by Perez above the phrase "Manager['s] Name." Even if the court's decision was ambiguous as to this point, it is the duty of the appellant to rectify this deficiency. See, e.g., *Brody* v. *Brody*, 315 Conn. 300, 310, 105 A.3d 997 (2015) (declining "invitation to engage in syntactic exercises" in interpreting court's decision and "instead, read [ambiguous language] to support" court's decision); *Szekeres* v. *Miller*, 123 Conn. App. 578, 583, 2 A.3d 953 (2010) (declining to review claim on appeal in absence of articulation when trial court's ruling "at no time fleshed out" standard, rendering its ruling ambiguous); see also *Molaver* v. *Thomas*, 125 Conn. App. 88, 94, 6 A.3d 232 (2010) (declining to review claim on appeal in absence of articulation when it was unclear from memorandum of decision whether trial court made requisite finding).

primarily are factual issues.[11] See *Sunset Gold Realty, LLC* v. *Premier Building & Development, Inc.*, 133 Conn. App. 445, 452, 36 A.3d 243 (validity of assignment of contract generally is question of fact), cert. denied, 304 Conn. 912, 40 A.3d 319 (2012); *Bank of Montreal* v. *Gallo*, 3 Conn. App. 268, 276, 487 A.2d 1101 ("[r]atification is a question of fact"), cert. denied, 195 Conn. 803, 491 A.2d 1103 (1985).

To the extent the court's decision was ambiguous or deficient in any regard, a determination we do not make, Dragon Bridge failed to file a motion to reargue, a motion for clarification, or a motion for articulation seeking to have the trial court make any of the requisite findings or determinations.[12] See *Von Kohorn* v. *Von Kohorn*, 132 Conn. App. 709, 714–15, 33 A.3d 809 (2011) (outlining procedural mechanisms for modifying trial court judgment, including motions for clarification, reargument, and to open); see also, e.g., *Schoonmaker*

[11] For instance, the parties' briefs on appeal as to the assignment of the management agreement disagree as to: (1) the applicable statutory scheme to determine which individual may act on behalf of a limited liability company, as Connecticut Limited Liability Company Act, General Statutes (Rev. to 2017) § 34-100 et seq. was repealed and replaced by the Connecticut Uniform Limited Liability Company Act, General Statutes § 34-243 et seq.; (2) whether the terms of the management agreement permitted assignment; (3) whether Dragon Bridge was member-managed or manager-managed, as its operating agreement was not entered into evidence; (4) whether the purported sole member of Dragon Bridge, Danibel Aviles, was the only individual with the capacity to assign the management agreement; and (5) whether Perez, as an agent for Dragon Bridge, assigned the management agreement to Dragon Bridge through the performance of duties for CUHO. Similar disagreements exist as to CUHO's alleged ratification of the management agreement. The trial court never made any findings or determinations as to any of these issues and, accordingly, we decline to engage in speculation to resolve these arguments for the first time on appeal.

[12] We note that Dragon Bridge properly preserved its arguments before the trial court as to the applicability of *BRJM*, as to assignment, and as to ratification. On appeal, however, Dragon Bridge failed to comply with its duty as the appellant to rectify or to otherwise compel the trial court to address these issues, which were not addressed in the trial court's memorandum of decision.

v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 232–33. Accordingly, we decline to review Dragon Bridge's claim on appeal.

III

D2E Holdings finally claims on appeal that the court incorrectly concluded that it failed to make a threshold showing of fraud in order to warrant limited discovery and an evidentiary hearing on its motion to open. D2E Holdings argues that the court's decision denying D2E Holdings' motion to open improperly applied an "illegal standard . . . ." We disagree.

The following additional facts are relevant to the resolution of this claim. On March 11, 2021, D2E Holdings filed a motion to open and vacate the trial court's judgment, rendered after a trial to the court, in favor of CUHO, on the ground that CUHO engaged in fraud. In support of this motion, D2E Holdings filed a memorandum of law as well as several hundred pages of exhibits purporting to show that CUHO engaged in fraud by concealing in discovery that it had sold the subject rental units to another entity for a higher price. D2E Holdings claimed that it recently discovered, on the basis of land records recorded several years prior to trial, that CUHO and its agents concealed in discovery that it sold the subject units for approximately $100,000 more than it was offered to D2E Holdings. D2E Holdings argued that this "new" evidence warranted the opening of the judgment and that "[t]his cure is appropriate here and now because D2E [Holdings] satisfies the standard for doing so set forth in *Chapman Lumber, Inc.* v. *Tager*, [288 Conn. 69, 106–107, 952 A.2d 1 (2008)]. In opposition, CUHO argued that this evidence was not "new" because it was publically recorded on the land records long before trial, this evidence would not affect the court's judgment, and D2E Holdings failed to make a sufficient threshold showing pursuant to *Tager*. D2E

Holdings replied that CUHO's motive in voiding the real estate contract was directly relevant to its implied covenant claim, and that its evidence satisfies the threshold standard pursuant to *Tager*.

On April 6, 2021, the court, without holding oral argument,[13] issued a memorandum of decision denying D2E Holdings' motion to open, primarily on the ground that the fraud D2E Holdings attempted to establish was "legally irrelevant" to its claims at trial. The court reasoned that, even if D2E Holdings' contentions were true and CUHO concealed an agreement to sell the property to another buyer, this point "would not affect the court's decision" rendering judgment for CUHO. The court held that D2E Holdings "essentially seeks discovery regarding [CUHO's] underlying motives in its dealings with [D2E Holdings]. In a breach of contract claim, however, the issue is whether [CUHO] failed to perform its obligations pursuant to the terms of the contract. The court has specifically found that [CUHO] did not fail to perform its obligations pursuant to the terms of the contract in question. Under these circumstances, [CUHO's] allegedly impure motives and the existence or nonexistence of any side deals are legally irrelevant." This amended appeal followed.

We next set forth the applicable standard of review and relevant legal principles for this claim. Once again, D2E Holdings advocates that it is challenging only the court's use of an improper legal standard in deciding its motion, and, thus, it claims that plenary review applies. We disagree and, instead, apply an abuse of discretion standard because the gist of D2E Holdings' argument is that the court incorrectly determined that D2E Holdings failed to make a threshold showing to warrant opening the judgment. See *Benjamin* v. *Island*

[13] D2E Holdings filed a request for oral argument on its motion to open, to which CUHO objected. The court did not explicitly rule on either of these submissions.

Management, LLC, 341 Conn. 189, 223, 267 A.3d 19 (2021) (disagreeing with appellant's contention that plenary review applied because its arguments "effectively challenge[d]" propriety of court's decision and, thus, "abuse of discretion standard [was] more apt"). "We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 382, 260 A.3d 1187 (2021). "A motion to open and vacate a judgment . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Stanley* v. *Woodard*, 211 Conn. App. 127, 129–30, 271 A.3d 1137 (2022).

"Courts have an inherent power to open, correct and modify judgments. . . . A civil judgment of the Superior Court may be opened if a motion to open or set aside is filed within four months of the issuance of judgment." (Internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 106; see also General Statutes § 52-212a;[14] Practice Book § 17-4 (a).[15] "A motion to open in order to permit a party to

[14] General Statutes § 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ."

[15] Practice Book § 17-4 (a) provides: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior Court may not be

present further evidence need not be granted where the evidence offered is not likely to affect the verdict. . . . Newly-discovered evidence which is merely cumulative, or which impeaches the . . . credibility of a witness, will not suffice ordinarily to grant a new trial, and never unless it appears reasonably certain that injustice has been done in the judgment rendered, and that the result of a new trial will probably be different. . . . When a party seeks to open and vacate a judgment based on new evidence allegedly showing the judgment is tainted by fraud, he must show, inter alia, that he was diligent during trial in trying to discover and expose the fraud, and that there is clear proof of that fraud." (Citations omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, supra, 106–107; see also *Reville* v. *Reville*, 312 Conn. 428, 441, 93 A.3d 1076 (2014) (explaining standards for fraud). "These rules are motivated by the policy that [o]nce a judgment [is] rendered it is to be considered final and it should be left undisturbed by [posttrial] motions except for a good and compelling reason. . . . Otherwise, there might never be an end to litigation. (Citation omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, supra, 107.

To be entitled to a hearing on a motion to open, a party needs "to make some threshold showing that his claims had substance . . . ." Id., 108. This court has stated that this "threshold showing of substance" requires that a party make a showing of "probable cause" to open the judgment.[16] *Veneziano* v. *Veneziano*,

opened or set aside unless amotiontoopenor set aside is filed withinfourmonthssucceeding the date on which notice was sent. The parties may waive the provisions of this subsection or otherwise submit to the jurisdiction of the court."

[16] D2E Holdings invites this court to "clarify" the "proper standard of review of a motion to open judgment based on allegations of fraud" because it perceives some tension between *Tager* and this court's repeated use of the probable cause standard. (Internal quotation marks omitted.) We decline D2E Holdings' invitation because we perceive no ambiguity in the applicable standards, and it would require us to disregard our Supreme Court's prece-

205 Conn. App. 718, 730, 259 A.3d 28 (2021). "Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false." (Internal quotation marks omitted.) *Malave* v. *Ortiz*, 114 Conn. App. 414, 426, 970 A.2d 743 (2009).

We conclude that the court did not abuse its discretion in denying D2E Holdings' motion to open because D2E Holdings failed to make a threshold showing of substance warranting the opening of the judgment. Although the court did not expressly cite to *Tager* to set forth the standard for a threshold showing required to open a judgment,[17] its decision was not a " 'clear abuse of its discretion.' " *Stanley* v. *Woodard*, supra, 211 Conn. App. 129. Stated simply, we find no disagreement with the court's conclusion, specifically, the fact that D2E Holdings discovered that CUHO sold the subject units to another entity would have had no impact on the court's earlier judgment in favor of CUHO. All of D2E Holdings' claims against CUHO were founded on the real estate contract. The court rendered judgment after trial in favor of CUHO, and expressly held that CUHO complied with the real estate contract provisions and the covenant of good faith and fair dealing implied therein. CUHO's interactions with a separate buyer, as to a distinct contract, and a dissimilar financing process are immaterial to D2E Holdings' claims at trial. This "new" submission does not "affect the [judgment]"

dent and to overturn a decision of another panel of this court. See, e.g., *State* v. *Bouvier*, 209 Conn. App. 9, 43 n.21, 267 A.3d 211 (2021), cert. denied, 341 Conn. 903, 269 A.3d 789 (2022).

[17] As fully explained in part II of this opinion, if the legal basis of the court's memorandum of decision is absent or unclear, it is the duty of the appellant to rectify this deficiency. See *Deroy* v. *Estate of Baron*, 136 Conn. App. 123, 129–30, 43 A.3d 759 (2012) ("the failure of an appellant to seek an articulation requires the presumption that the trial court considered all of the facts before it and applied the correct legal standard" (internal quotation marks omitted)). As D2E Holdings did not file a motion for articulation or otherwise attempt to compel the court to identify the legal standard it used, we presume that the court acted properly.

because it has no relation to the claims decided at trial.[18] (Internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 106–107.

D2E Holdings' assertions on appeal as to why the judgment needs to be opened undermine its position. D2E Holdings contends that "[o]ne question of critical relevance that remains unknown is whether CUHO treated the new buyer differently than D2E [Holdings]. Specifically, did CUHO [produce] documents to the new buyer that it refused to produce to D2E [Holdings] during its own financing process?" None of this new information warrants opening the judgment because the manner in which CUHO engaged with a separate buyer, after D2E Holdings failed to obtain financing for the same units, " 'is not likely to affect the [judgment].' " *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 106. Likewise, whether and how CUHO's agents disclosed in discovery that CUHO sold the subject units to another buyer when D2E Holdings failed to obtain financing only goes to impeach the credibility of those witnesses, which does not "suffice . . . to grant a new trial . . . ." (Internal quotation marks omitted.) Id., 107. Therefore, indulging every reasonable presumption in favor of the court's decision, we conclude that the court did not clearly abuse its discretion in denying D2E Holdings' motion to open.

The judgments are affirmed.

In this opinion the other judges concurred.

[18] Although not explicitly stated by the trial court, the exercise of its discretion denying D2E Holdings' motion to open is further supported on the ground that D2E Holdings was not "diligent" in discovering the "new evidence" that formed the basis of its motion to open. *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 107. The foundation for D2E Holdings' claim is CUHO's public recordation on the land records of the right of first refusal on December 21, 2017, which was several years prior to trial and only weeks after the commencement of this action. The discovery of a public land record does not constitute "new evidence" and D2E Holdings does not attempt to explain why it first discovered this filing after the trial held in March, 2020.

WINSTON Y. LI ET AL. *v.* VALERIE M. YAGGI, ADMINISTRATOR (ESTATE OF HENRY K. YAGGI III), ET AL.
(AC 43957)

Cradle, Clark and Norcott, Js.

Syllabus

The plaintiffs, who had entered into an agreement to purchase a parcel of residential property from the defendants, sought, inter alia, the return of certain contractual deposits pursuant to a mortgage contingency clause in the agreement. The mortgage contingency clause provided in relevant part that the plaintiffs' obligation was contingent on the plaintiffs obtaining financing. If the plaintiffs were unable to obtain a written mortgage commitment and notified the defendants in writing by 5 p.m. on the mortgage commitment date, the agreement would be null and void and any deposits would be returned to the plaintiffs, otherwise, the agreement would continue in full force and effect. The agreement also contained a liquidated damages clause, which provided that, if the plaintiffs failed to comply with the terms of the agreement by the time set forth for compliance, the defendants would be entitled to the deposit funds. Two days before the expiration of the relevant contingency date, the plaintiffs sent the defendants an e-mail in which they requested an extension of the mortgage commitment and closing dates. They explained that they would not be able to obtain a mortgage commitment by 5 p.m. that day, namely, the date that the e-mail was sent, but that they expected a mortgage commitment from a bank the following week. Although the defendants responded that they would be willing to agree to an extension if the plaintiffs provided certain additional information, that information was never provided. After the mortgage contingency date passed, the plaintiffs made three additional requests proposing amendments to extend the commitment and closing dates, but the parties did not reach an agreement on those requests. The plaintiffs subsequently requested termination of the agreement and a return of their deposits. After a trial to the court, judgment was rendered in favor of the defendants, from which the plaintiffs appealed to this court. *Held* that the trial court properly determined that the plaintiffs failed to provide adequate notice to the defendants of their inability to obtain a written mortgage commitment on or before the commitment date, as required pursuant to the parties' real estate agreement, and they were not entitled to recover their deposits: the plaintiffs' e-mail requesting an extension, viewed in its entirety, was equivocal with respect to whether the plaintiffs would be able to obtain a written mortgage commitment on or before the commitment date, as their notice of an expectation of receiving the commitment from a bank the following week left

open the possibility that they might receive a written commitment by the commitment date; moreover, when the defendants declined to sign the proposed amendment attached to the plaintiffs' e-mail, the plaintiffs did not provide notice on or before the commitment date that they would not be able to obtain a written mortgage commitment by the commitment date or take any other subsequent actions consistent with a termination of the agreement and the right to a return of their deposits, and, as a result, the parties' agreement remained in effect and the defendants were entitled to retain the deposits when the plaintiffs subsequently failed to close on the property in accordance with the agreement.

Argued December 1, 2021—officially released May 31, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Thomas J. Corradino*, judge trial referee; judgment for the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

Winston Y. Li, self-represented, and *Liping Wang*, self-represented, the appellants (plaintiffs).

Philip G. Kent, for the appellees (defendants).

Opinion

CLARK, J. This action returns to us after this court's decision in *Li* v. *Yaggi*, 185 Conn. App. 691, 198 A.3d 123 (2018), in which we reversed the judgment of the trial court and remanded the case for a new trial. In the instant appeal, the self-represented plaintiffs, Winston Y. Li and Liping Wang, appeal from the judgment of the trial court rendered in favor of the defendant, Valerie M. Yaggi, individually and as administrator of the estate of Henry K. Yaggi III.[1] Following a trial to the court, the court concluded that the plaintiffs were

[1] Henry K. Yaggi III, who was named as a defendant in the original complaint, died during the pendency of the first trial, and Valerie M. Yaggi, as the administrator of his estate, was substituted for Henry K. Yaggi III. Accordingly, in this opinion, we refer to Valerie M. Yaggi in both of her capacities as the defendant.

not entitled to recover the deposits they made for the purchase of the defendant's home pursuant to a residential purchase and sale agreement (agreement).[2] On appeal, the plaintiffs claim that the court improperly concluded that they (1) failed to exercise due diligence in obtaining a written mortgage commitment, (2) did not provide adequate notice to the defendant that they were unable to obtain a mortgage commitment, and (3) waived any right they might have had to the deposits. We conclude that the court properly determined that the plaintiffs did not provide adequate notice to the defendant that they were unable to obtain a mortgage commitment pursuant to the terms of the agreement.[3] Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On October 26, 2012, the parties executed the agreement. The agreement contemplated that the plaintiffs would buy from the defendant a parcel

[2] The plaintiffs also alleged claims sounding in common-law breach of contract, a violation of the Connecticut Unfair Trade Practices Act (CUTPA), unjust enrichment, and fraud. The trial court found in favor of the defendant on all of these claims. With the exception of the unjust enrichment claim, the plaintiffs do not challenge the court's rulings on these separate claims.

The plaintiffs' challenge to the court's ruling with respect to their unjust enrichment claim warrants little discussion. It is well established that unjust enrichment is an "equitable remedy of restitution by which a plaintiff may recover the benefit conferred on a defendant in situations where *no express contract has been entered into by the parties*." (Emphasis added.) *Burns* v. *Koellmer*, 11 Conn. App. 375, 385, 527 A.2d 1210 (1987). It is uncontested that the parties in the present appeal executed a contract, the validity and enforceability of which has not been challenged by the parties. The plaintiffs also appear to assert an estoppel claim for the first time on appeal, which we decline to address. See *Guddo* v. *Guddo*, 185 Conn. App. 283, 286, 196 A.3d 1246 (2018) (our appellate courts generally will not review claims raised for first time on appeal).

[3] The agreement required the plaintiffs to exercise due diligence in pursuit of a commitment *and* to provide timely notice to the defendant of their inability to secure a commitment. Because we conclude that the trial court properly found that the plaintiffs failed to provide adequate notice, we need not determine whether the court properly determined that the plaintiffs failed to exercise due diligence in pursuit of a commitment or waived their right to the deposits.

of real property located at 45 Wickford Place in the town of Madison (property) for $810,000. Pursuant to the agreement, the plaintiffs made three separate deposits totaling $25,000, which were held in escrow by the defendant's real estate agent, Lorey Walz.

The agreement included a mortgage contingency clause, which stated: "Buyer's obligation is contingent upon Buyer obtaining financing as specified in this paragraph. Buyer agrees to apply for such financing immediately and diligently pursue a written mortgage commitment on or before the Commitment Date. . . . If Buyer is unable to obtain a written commitment and notifies Seller in writing by 5:00 p.m. on said Commitment Date, this Agreement shall be null and void and any Deposits shall be immediately returned to Buyer. Otherwise, the Financing Contingency shall be deemed satisfied and this Agreement shall continue in full force and effect." The commitment date was November 26, 2012.[4] The closing was to occur no later than December 3, 2012.

The agreement also included a liquidated damages clause, which stated in relevant part: "If Buyer fails to comply with any Terms of this Agreement by the time set forth for compliance and Seller is not in default, Seller shall be entitled to all initial and additional deposit funds provided for in section 4 [of the agreement], whether or not Buyer has paid the same, as liquidated damages and both parties shall be relieved of further liability under this Agreement. . . ."

On Saturday, November 24, 2012, the plaintiffs e-mailed the defendant to request an extension of the commitment and closing dates. The subject line of the e-mail was "Mortgage Commitment Extension Request." The

[4] Under the agreement, the commitment date was the thirtieth day after the agreement was signed on October 26, 2012. Because the thirtieth day after the agreement was signed fell on November 25, which was a Sunday, the commitment date was the following day, Monday, November 26, 2012.

e-mail stated in relevant part: "Attached is a request of mortgage extension. Due to the Hurricane Sandy and Thanksgiving holiday. We won't be able to obtain a mortgage commitment by 5 [p.m.] *today*. We request your approval of extension. *We expect a commitment from a bank next week*. Please sign and return to us ASAP." (Emphasis added.) The plaintiffs attached to the e-mail a signed, proposed amendment to the agreement, seeking to extend the commitment date to December 3, 2012, and the closing date to December 14, 2012.

That same day, the defendant forwarded the e-mail to Walz. Walz e-mailed the plaintiffs' real estate agent, Blake Ruchti, stating: "We have received the request to extend the mortgage commitment date and closing date. The sellers, Hank and Val Yaggi, are willing to do so after receiving verification from the bank that you have a mortgage approval contingent upon a bank appraisal. . . . Hank and Valerie Yaggi would like to see [the plaintiffs] purchase the home but have to be confident that a bank commitment will be given." The defendant never signed the plaintiffs' proposed amendment to the agreement.

On Thursday, November 29, 2012, three days after the commitment date had passed, the plaintiffs informed Ruchti that they were experiencing a delay in obtaining a mortgage because of a credit issue, but stated that the loan would be approved and that the parties would be able to close by the end of December. The plaintiffs sent the defendant a second proposed amendment to the agreement, which was signed by the plaintiffs and dated November 30, 2012. The second proposed amendment proposed a commitment date of December 14, 2012, and a closing date of December 21, 2012. The defendant signed the second amendment on December 4, 2012. Next to both the amended commitment and closing dates, however, the defendant handwrote the phrase "[t]ime is of the essence" and initialed next to

the handwritten modifications. The plaintiffs did not initial those modifications.

On December 8, 2012, the plaintiffs' counsel, James Tsui, e-mailed the defendant's counsel, James Segaloff, stating that the "mortgage is in process and [the plaintiffs] expect a written commitment late next week." Thereafter, the plaintiffs sent the defendant a third proposed amendment to the agreement, proposing to extend the commitment and closing dates to December 21, 2012, and January 11, 2013, respectively. The defendant did not sign the third proposed amendment to the agreement.

On December 21, 2012, Tsui sent Segaloff a letter, which stated in relevant part: "Re: Notice to Terminate/Rescind . . . . This is to provide notice to Sellers that as of this date, Buyers have not obtained a satisfactory unconditional written mortgage loan commitment or a clear to close. The Buyers have previously submitted an extension request to extend the mortgage contingency date to December 21, 2012, and no response or written acknowledgement was ever signed by Sellers. . . . Annexed hereto is another extension signed by Buyers, requesting that the [m]ortgage [c]ontingency date be extended through January 18, 2013, and the [c]losing [d]ate changed and extended through January 25, 2013. If acceptable, please instruct the Sellers to sign and return a fully executed copy to my attention. If unacceptable, this letter shall serve as notice that the contract shall be and is hereby rescinded and terminated." The defendant did not sign the fourth proposed amendment to the agreement.

On December 28, 2012, Segaloff informed Tsui and Ruchti that he believed the plaintiffs had breached the parties' agreement, entitling the defendant to retain the plaintiffs' deposits as damages. In January, 2013, the defendant re-listed the property and another buyer

made a purchase offer. On February 17, 2013, the plaintiffs e-mailed Segaloff to provide an update about their loan applications. The plaintiffs also requested an update on the status of their request to terminate the contract and have their deposits returned. The plaintiffs further informed Segaloff that they were aware that the defendant had re-listed the property and contended that the defendant was not entitled to sell the home to another buyer, unless the defendant terminated the parties' agreement. The defendant ultimately sold the home to another buyer for $135,000 less than the purchase price set forth in the parties' agreement.

The plaintiffs initiated this action on February 27, 2014, alleging in relevant part that the defendant had breached the parties' agreement by "not timely releas-[ing] . . . the deposit[s] . . . ." The action was tried to the court on March 9, 2017. The court, *Wilson*, *J.*, found that, because only the plaintiffs signed the first, third, and fourth proposed amendments to the agreement and the plaintiffs did not assent to the defendant's handwritten additions with respect to the second proposed amendment, the parties never agreed to modify the original commitment and closing dates. It also found that the plaintiffs did not diligently pursue financing or provide proper notice that they intended to terminate the agreement prior to the commitment date. The court concluded that the plaintiffs had defaulted on the agreement by failing to close on the property, which entitled the defendant to retain the deposit funds pursuant to the liquidated damages provision set forth in the agreement.

The plaintiffs appealed and this court reversed the judgment of the trial court and remanded the case for a new trial. See *Li* v. *Yaggi*, supra, 185 Conn. App. 713. This court concluded that the trial court's finding as to whether the plaintiffs diligently pursued a mortgage commitment was clearly erroneous because the court relied exclusively on two loan denial notices that were

issued by lenders *after* the commitment date had passed, which were ambiguous with respect to the plaintiffs' efforts to obtain financing *before* the commitment date had passed. Id., 704. Pertinent to this appeal, this court further held that the trial court improperly had interpreted the notice provision to require the plaintiffs to provide *notice of termination* rather than *notice of an inability to obtain a written commitment*. Id., 705. More specifically, this court concluded that "[t]he clear meaning of [the notice] provision is that if the plaintiffs were to give the defendant notice by the commitment date of their inability to obtain a written commitment by the commitment date, the agreement would be null and void and the plaintiffs would be entitled to the return of their deposits. The trial court instead [had] considered whether the plaintiffs complied with the terms of the agreement by providing the [defendant] with *notice of termination of the agreement* . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 707. This court stated that, "[b]ecause the provision at issue does not require the buyer to include in the writing a notice of termination of the agreement, the court addressed the wrong question." Id. "Accordingly, the court should have determined whether the plaintiffs' November 24 e-mail, taken as a whole, contained sufficient language to notify the defendant of the plaintiffs' inability to obtain financing by the commitment date." Id., 708.

Following a new trial to the court on remand, the court, *Hon. Thomas J. Corradino*, judge trial referee, rendered judgment in favor of the defendant on all counts.[5] In a memorandum of decision dated January 23, 2020, the court found that, although the plaintiffs had proposed several extensions of the commitment and closing dates, no agreement to amend those dates

[5] Trial commenced on June 17, 2019, and continued on June 18 through 20, 2019, and July 1, 2019.

had been reached by the parties.[6] Thus, the dates set forth in the parties' agreement were the controlling dates for the purpose of resolving the claims raised at trial. Regarding the question of whether the plaintiffs had provided to the defendant adequate and timely notice of their inability to obtain a mortgage commitment, the court concluded that the plaintiffs' November 24 e-mail proposing an extension of the commitment date did not satisfy the requirements of the agreement.[7] It found that the November 24 e-mail was ambiguous with respect to whether the plaintiffs would obtain a written commitment by the commitment date and that the plaintiffs' actions after the commitment date were inconsistent with their claim that the notice they had provided to the defendant nullified the agreement. The court thus concluded that the plaintiffs were not entitled to recover their deposits. This appeal followed.

On appeal, the parties do not dispute that the plaintiffs were unable to obtain a written commitment by

[6] The plaintiffs filed a motion for articulation on March 23, 2020, and the trial court granted that motion by way of its October 26, 2020 memorandum of decision.

[7] We note that the court's decision with respect to the notice issue is not entirely clear. However, we construe the court's judgment as finding that the plaintiffs' November 24 e-mail was ambiguous as to whether they were unable to obtain a mortgage commitment by the commitment date and that, consequently, it was inadequate notice under the terms of the agreement. See generally *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 428, 219 A.3d 801 (2019) ("The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.)), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020). Moreover, our interpretation of the court's decision is consistent with the parties' own interpretations, as evidenced by the issues raised and arguments made to this court.

the commitment date. The parties disagree, however, about whether the plaintiffs satisfied the notice requirement in the agreement. The plaintiffs argue that the November 24 e-mail to the defendant properly notified the defendant that the plaintiffs were unable to secure a written mortgage commitment on or before the commitment date. The defendant counters that the November 24 e-mail was simply a request to extend the commitment and closing dates and that the e-mail was equivocal with respect to whether the plaintiffs would be able to obtain a written commitment by the commitment date. We agree with the defendant.

Before we reach the merits of the plaintiffs' claim, we set forth the relevant legal principles and standard of review. If the factual basis of a trial court's decision is challenged, the clearly erroneous standard of review applies. *Bartomeli* v. *Bartomeli*, 65 Conn. App. 408, 411–12, 783 A.2d 1050 (2001). "While conducting our review, we properly afford the court's findings a great deal of deference because it is in the unique [position] to view the evidence presented in a totality of circumstances . . . ." (Internal quotation marks omitted.) *Tulisano* v. *Schonberger*, 74 Conn. App. 101, 105, 810 A.2d 806 (2002). "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . The legal conclusions of the trial court will stand, however, only if they are legally and logically correct and are consistent with the facts of the case." (Internal quotation marks omitted.) *Blackwell* v. *Mahmood*, 120 Conn. App. 690, 694, 992 A.2d 1219 (2010).

"A mortgage contingency clause contained in a contract for the sale of real property generally allows the purchaser to recover his or her deposit if the purchaser is unable to secure a mortgage and has complied with

the provisions of the contingency clause. See generally 77 Am. Jur. 2d, Vendor and Purchaser § 531 (2016) ('The purchaser may be expressly given the privilege or option to rescind the contract and to recover any payments made by him or her where the contract of sale provides for the cancellation of the contract in the event that the purchaser is unable to obtain a mortgage or loan within a specified time. . . . On the other hand, where the purchaser disregards the terms of a financing contingency contained in a contract for sale . . . the purchaser would not be entitled to invoke the contractual contingency and recover his or her down payment. . . .')." (Footnote omitted.) *Li* v. *Yaggi*, supra, 185 Conn. App. 699–700; see also *Semac Electric Co.* v. *Skanska USA Building, Inc.*, 195 Conn. App. 695, 715, 226 A.3d 1095 ("[a]lthough it is generally accepted that contracting parties may reserve the right to terminate a contract for convenience or cause upon a specified period of notice . . . [i]f a party who has a power of termination by notice fails to give the notice in the form and at the time required by the agreement, it is ineffective as a termination" (internal quotation marks omitted)), cert. denied, 335 Conn. 944, 238 A.3d 17 (2020), and cert. denied, 335 Conn. 945, 238 A.3d 19 (2020). A contingency clause, generally, "is meant to protect the buyer. It is a condition of the buyer's duty, not a condition of the seller's duty under the contract." (Footnote omitted.) 92 C.J.S. 178, Vendor and Purchaser § 197 (2010).

The contingency clause in the parties' agreement provided in relevant part: "If Buyer is unable to obtain a written commitment and notifies Seller in writing by 5:00 p.m. on said Commitment Date, this Agreement shall be null and void and any Deposits shall be immediately returned to Buyer." In *Li* v. *Yaggi*, supra, 185 Conn. 706–707, this court concluded that the plain language of this provision gave the plaintiffs the right to cancel

the agreement by providing the requisite notice to the defendant. If the plaintiffs timely notified the defendant that they were unable to obtain a written commitment, the agreement would be rendered null and void and the plaintiffs were entitled to the return of their deposits. Id., 707. If the plaintiffs did not exercise their right to terminate the agreement by the commitment date, however, the contingency clause provided that "the [f]inancing [c]ontigency shall be deemed satisfied and this [a]greement shall continue in full force and effect." In that event, the plaintiffs were required to perform under the agreement and risked forfeiting their deposits by failing to do so. See generally *Southport Congregational Church—United Church of Christ* v. *Hadley*, 320 Conn. 103, 116–17, 128 A.3d 478 (2016).

Thus, the relevant inquiry at trial was whether the plaintiffs' November 24 e-mail adequately notified the defendant of the plaintiffs' inability to obtain financing by the commitment date. In reviewing whether the plaintiffs' purported notice satisfied the requirements set forth in the contingency clause, the court was required to look to the entirety of the communication sent to the defendant. See *Zullo* v. *Smith*, 179 Conn. 596, 605, 427 A.2d 409 (1980) (notice, "taken as a whole," contained sufficient language to notify seller that buyer was unable to obtain building permit). Furthermore, notice must be "sufficiently clear and unequivocal so as clearly to apprise the other party of the action being taken." Id., 604. On the basis of the record in this case, we conclude that the trial court properly determined that the November 24 e-mail sent to the defendant did not satisfy the notice requirement in the agreement's contingency clause.

Viewing the plaintiffs' e-mail in its entirety, it was equivocal with respect to whether the plaintiffs would obtain a written mortgage commitment on or before the commitment date. Both the subject line ("Mortgage

Commitment Extension Request") and the body of the e-mail ("Attached is a request of mortgage extension. . . . We request your approval of extension.") plainly indicate that the plaintiffs were seeking only to amend the commitment and closing dates, not to provide unequivocal notice that they were unable to obtain financing by the commitment date or to exercise their corresponding right of termination pursuant to the contingency clause. Although the plaintiffs' request for an extension may be understood to have implied that the plaintiffs were unlikely to obtain a written commitment by the commitment date, the plaintiffs' e-mail, taken as a whole, did not unequivocally communicate to the defendant that they would not obtain a written commitment on or before the November 26 commitment date. Rather, the plaintiffs explained that, due to a recent hurricane and the Thanksgiving holiday, they were unable to obtain a written commitment by 5 p.m. *on Saturday, November 24* and that they "expect a commitment from a bank *next week*." (Emphasis added.) Their notice of an expectation of receiving the commitment from a bank "next week" left open the possibility that they might receive a written commitment by the November 26 commitment date. The e-mail in response from Walz, the defendant's real estate agent, to Ruchti, the plaintiffs' real estate agent, indicating that the defendant was willing to amend the commitment and closing dates only if the plaintiffs provided proof of a mortgage commitment that was contingent solely on a bank appraisal, buttresses our conclusion. Walz' response to the plaintiffs' extension request clearly demonstrates that the defendant did not understand the plaintiffs' November 24 e-mail to evince an intent to terminate the parties' agreement in the event the defendant refused to sign the proposed extension.

Although the ambiguity of the plaintiffs' November 24 e-mail is, by itself, dispositive of the plaintiffs' claim,

the record includes further evidence in support of the court's conclusion that the November 24 e-mail did not constitute notice sufficient to terminate the parties' agreement. If, as the plaintiffs contend, they understood the agreement to be null and void as a result of their November 24 e-mail, it would have made little sense for them to have sought subsequent amendments proposing to extend the commitment and closing dates on three separate occasions after the November 26 commitment date had passed.[8] Moreover, the plaintiffs' February 17, 2013 e-mail to Segaloff is wholly inconsistent with their claim that they had effectively nullified the agreement prior to the November 26 contingency date. In that e-mail, which was sent nearly three months after the commitment date had passed, the plaintiffs claimed that the parties remained under contract and that the defendant therefore was not entitled to sell the home to another buyer, unless the defendant agreed to terminate the parties' agreement.

In light of the specific facts and circumstances of this case, we are not convinced that the court erred in finding that the plaintiffs' November 24 e-mail did not constitute sufficient notice to the defendant that the plaintiffs would not obtain a mortgage commitment by the commitment date. When the defendant declined to sign the proposed amendment attached to the plaintiffs' November 24 e-mail, the plaintiffs did not provide notice on or before the commitment date that they would not be able to obtain a written commitment by the commitment date or take any other subsequent actions

[8] We also find instructive the striking contrast between the plaintiffs' November 24 e-mail to the defendant and Tsui's December 21 letter to Segaloff, which stated in no uncertain terms that the plaintiffs had "not obtained a satisfactory unconditional written mortgage loan commitment or a clear to close" and that if the defendant did not agree to execute the fourth request to amend the commitment and closing dates, the letter "shall serve as notice that the contract shall be and is hereby rescinded and terminated."

consistent with a termination of the agreement and the right to a return of their deposits. As a result, the parties' agreement remained in effect and the defendant was entitled to retain the plaintiffs' deposits when the plaintiffs subsequently breached the agreement by failing to close on the property in accordance with the agreement. We therefore conclude that the trial court properly determined that the plaintiffs did not provide adequate notice to the defendant that they would not obtain a written commitment on or before the commitment date.

The judgment is affirmed.

In this opinion the other judges concurred.

BARRY PRINGLE *v.* NORMAN PATTIS ET AL.
(AC 44830)

Prescott, Clark and DiPentima, Js.

Syllabus

The self-represented plaintiff, who was incarcerated following his conviction, on pleas of guilty, of various criminal charges including attempted murder, sought damages for, inter alia, the alleged legal malpractice of the defendants, attorneys who represented the plaintiff with respect to his criminal convictions. The plaintiff claimed that he suffered monetary damages as a result of the defendants' representation, alleging that, after entering into flat fee agreements for their services, the defendants demanded additional funds to continue their representation and that one of the defendants executed asset forfeiture agreements relating to approximately $17,000 that the state had seized from the plaintiff, without the plaintiff's knowledge or consent and after the applicable statutory (§§ 54-36h (b) and 54-36p (b)) period for the seizures had ended. The plaintiff also claimed that the defendants had pressured him into pleading guilty to the charges against him, even though he was not competent to do so at the time as a result of emotional distress caused by his mother's recent death. The trial court granted the defendants' motion to dismiss, concluding that it was without subject matter jurisdiction due to the exoneration rule, which required the plaintiff to demonstrate that his underlying convictions had been invalidated prior to proceeding with his legal malpractice claims. On the plaintiff's appeal to this court,

held that the trial court improperly dismissed the plaintiff's claims relating to the fee dispute and the forfeiture agreements but properly dismissed, for lack of subject matter jurisdiction, the plaintiff's legal malpractice claim as to the actions of the defendants in allegedly pressuring him to enter guilty pleas with respect to the charges against him: contrary to the plaintiff's claim, Connecticut courts have adopted and applied the exoneration rule to bar civil claims that necessarily imply the invalidity of an underlying conviction, however, such rule does not bar civil claims that do not challenge the validity of an underlying conviction; moreover, the plaintiff's claims relating to the fee dispute and the forfeiture agreements were entirely collateral to, and did not seek to attack, the plaintiff's guilty pleas and convictions, as his fee dispute claims challenged only the fees that the defendants charged for their representation and his forfeiture agreement claims did not allege that the forfeiture agreements were a component of his criminal sentence but, rather, asserted only that, at the time the agreements were executed, it was too late for the state to seek the forfeiture of his seized assets pursuant to §§ 54-36h (b) and 54-36p (b); furthermore, the plaintiff's legal malpractice claim as to the actions of the defendants in improperly pressuring him to enter into his guilty pleas did constitute a collateral attack on his guilty pleas and convictions and created a risk of inconsistent judgments; accordingly, the plaintiff's claims relating to the fee dispute and the forfeiture agreements were ripe and were not barred by the exoneration rule, however, his claim relating to the improper pressure the defendants allegedly exerted against him with respect to his guilty pleas was not ripe and was barred by the exoneration rule.

(*One judge concurring separately*)

Argued March 8—officially released May 31, 2022

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Barry Pringle, self-represented, the appellant (plaintiff).

Cameron L. Atkinson, with whom, on the brief, was *Earl Austin Voss*, for the appellees (defendants).

Opinion

DiPENTIMA, J. The self-represented plaintiff, Barry Pringle, appeals[1] from the judgment of the trial court granting the motion to dismiss filed by the defendants, Norman Pattis, Frederick M. O'Brien and Daniel M. Erwin.[2] On appeal, the plaintiff claims that the court improperly dismissed his complaint for lack of subject matter jurisdiction on the basis of the exoneration rule, which generally provides that a legal malpractice claim is not ripe for adjudication unless the plaintiff can demonstrate that the relevant underlying conviction has been invalidated. We reverse in part the judgment of the trial court.

The following facts, as alleged in the complaint or as otherwise undisputed in the record, and procedural history are relevant to this appeal. Between February, 2014, and February, 2015, the plaintiff was arraigned on myriad charges, including promoting prostitution, possession of narcotics with intent to sell, sale of narcotics and attempted murder. In connection therewith, the state seized and/or froze approximately $17,000 of the plaintiff's assets. In February, 2015, the plaintiff retained the defendants, of the law firm Pattis & Smith, to represent him in connection with his pending criminal charges and the related asset seizure.[3]

On February 5, 2016, the plaintiff pleaded guilty to charges of the sale of certain illegal drugs in violation of General Statutes (Rev. to 2013) § 21a-278 (b), tampering

[1] After the plaintiff's previous appeals from the judgment of the trial court were rejected and dismissed as untimely; *Pringle* v. *Pattis*, Connecticut Appellate Court, Docket No. 44212 (filed August 12, 2020); *Pringle* v. *Pattis*, Connecticut Appellate Court, Docket No. 44141 (filed June 19, 2020); this court granted the plaintiff permission to proceed with the present appeal.

[2] In this opinion, we refer to Pattis, O'Brien and Erwin collectively as the defendants and individually by name where appropriate.

[3] The plaintiff had retained different counsel, Timothy Moynahan, between February, 2014, and February, 2015.

with a witness in violation of General Statutes (Rev. to 2015) § 53a-151, assault in the first degree in violation of General Statutes § 53a-59, promoting prostitution in the second degree in violation of General Statutes (Rev. to 2013) § 53a-87 and possession of narcotics with the intent to sell in violation of General Statutes (Rev. to 2013) § 21a-277 (a). The court canvassed the plaintiff, accepted his pleas and sentenced the plaintiff to a total effective sentence of ten years of imprisonment followed by ten years of special parole.

The plaintiff subsequently made several challenges seeking to invalidate his guilty pleas, none of which has been successful. On March 11, 2016, the plaintiff filed a motion to vacate his guilty pleas on the grounds that they were involuntary and entered under duress because of the recent death of his mother; that motion was denied. On April 6, 2017, the plaintiff filed a petition for a writ of habeas corpus alleging that the defendants provided him ineffective assistance of counsel in connection with his guilty pleas and that his guilty pleas were not voluntary. The plaintiff's habeas corpus petition remains pending. See *Pringle* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-17-4008733-S. Accordingly, despite his attempts,[4] the plaintiff's convictions remain valid.

On January 28, 2019, the plaintiff commenced the underlying civil action against the defendants by way of a two count complaint. The crux of the plaintiff's complaint is that the defendants' representation of the plaintiff in the criminal and forfeiture proceedings caused the plaintiff to suffer monetary damages. The

[4] On January 21, 2021, the plaintiff also filed a motion to correct an illegal sentence, arguing, among other things, that he was incompetent at the time of his sentencing. On April 8, 2021, the trial court denied the plaintiff's motion to correct. See *State* v. *Pringle*, Superior Court, judicial district of Waterbury, Docket Nos. CR-14-0422840-T, CR-14-0424978-T, CR-14-0429402-T, and CR-14-036349 (April 8, 2021).

complaint specifically alleges the following: the plaintiff entered into an oral contract with Pattis, whereby Pattis agreed to represent him as to the prostitution, drugs and asset forfeiture matters for the flat fee of $10,000 and as to the attempted murder charge for the flat fee of $25,000; Pattis later orally demanded an additional $20,000 for his representation with respect to the attempted murder charge; and the plaintiff paid the defendants a total sum of $45,000.

As to the forfeiture proceedings, the complaint alleges that O'Brien signed three forfeiture agreements as to the approximately $17,000 of assets that the state had seized from the plaintiff; that the plaintiff was not consulted about these forfeiture agreements and that they were executed without his consent; and that these agreements failed to include $1800 of "unaccounted for" assets that were seized in relation to his prostitution charges.

As to the events leading to his guilty pleas, the complaint alleges the following: because the plaintiff's mother unexpectedly died on the eve of the trial set for his "drug charges," and because he was arrested for tampering with a witness on the day after her burial, he experienced intense grief and psychological trauma, becoming severely depressed; Pattis demanded the outstanding balance of $10,000 prior to the trial of the attempted murder charge and withdrew the plaintiff's request for a speedy trial when he learned of the plaintiff's inability to pay; and the defendants pressured the plaintiff into pleading guilty to "various charges" in exchange for a total effective sentence of ten years of incarceration with ten years of special parole, resulting in his entering guilty pleas on February 5, 2016, despite the fact that he was not competent, given the recent death of his mother and the pressure applied on him by the defendants.

On the basis of these factual allegations, the plaintiff purported to make a variety of legal claims in his complaint. Count one of the complaint is titled "Breach of Contract; Legal Malpractice; Breach of Fiduciary Duty; Fraud; Fraudulent Misrepresentation." Count two of the complaint is titled "Negligent Infliction of Emotional Distress; Intentional Infliction of Emotional Distress." The complaint concludes with a demand for specific amounts of money damages from the defendants.

On April 22, 2019, the defendants moved to dismiss the plaintiff's entire complaint for lack of subject matter jurisdiction on the ground that it is barred by the exoneration rule. The defendants argued that the exoneration rule bars the plaintiff's complaint because it challenges his criminal convictions that remain valid and, therefore, his action is not ripe. On May 10, 2019, the plaintiff filed a memorandum of law in opposition, arguing that Connecticut courts have neither adopted nor rejected the exoneration rule and, alternatively, that his complaint contains colorable claims that the court should address.

On September 11, 2019, the court, after oral argument, granted the defendants' motion to dismiss. The court concluded that "[t]he issue in this case is whether the court is without [subject matter] jurisdiction based on the 'exoneration rule.' While both parties maintain that the rule has not been adopted at the appellate level in Connecticut, this court is of the opinion that it was adopted in the case of *Taylor* v. *Wallace*, 184 Conn. App. 43, 52, 194 A.3d 343 (2018), and, as a result, the motion to dismiss is granted." This appeal followed.

On appeal, the plaintiff claims that the court improperly dismissed his entire complaint on the ground of the exoneration rule. The plaintiff makes two primary arguments in support of his claim. First, he argues that Connecticut courts have not adopted the exoneration

rule. Second, he argues, alternatively, that the court improperly applied the exoneration rule to dismiss all of the claims in his complaint.

We begin with the applicable legal principles and standard of review. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Tremont Public Advisors, LLC* v. *Connecticut Resources Recovery Authority*, 333 Conn. 672, 688, 217 A.3d 953 (2019). Our interpretation of the plaintiff's complaint also is a question of law subject to plenary review, and "we are not bound by the label affixed" by the plaintiff to his claims. *BNY Western Trust* v. *Roman*, 295 Conn. 194, 210, 990 A.2d 853 (2010). Consistent with our policy of leniency to self-represented litigants, we construe the plaintiff's complaint " 'broadly and realistically, rather than narrowly and technically.' " *Santana* v. *Commissioner of Correction*, 208 Conn. App. 460, 465, 264 A.3d 1056 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022).

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. . . . [T]he rationale behind the ripeness requirement is

to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Emphasis omitted; internal quotation marks omitted.) *Francis* v. *Board of Pardons & Paroles*, 338 Conn. 347, 358–59, 258 A.3d 71 (2021). "[I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

Generally, the exoneration rule provides that "a legal malpractice claim is not ripe for adjudication unless the plaintiff can demonstrate that the relevant underlying conviction has been invalidated." *Green* v. *Paz*, 211 Conn. App. 152, 153, 271 A.3d 1138 (2022). Accordingly, "if success in a tort action would necessarily imply the invalidity of a conviction, the action is to be dismissed unless the underlying conviction has been invalidated." *Taylor* v. *Wallace*, supra, 184 Conn. App. 51. Contrary to the plaintiff's first argument, "this court repeatedly has applied the exoneration rule . . . ." *Green* v. *Paz*, supra, 155.[5]

[5] The exoneration rule, as applied in Connecticut, stems from this court's adoption in *Taylor* of the standard set forth in *Heck* v. *Humphrey*, 512 U.S. 477, 486–87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (holding that claim pursuant to 42 U.S.C. § 1983 was not ripe on basis of exoneration rule because success of claim would necessarily imply invalidity of underlying conviction; however, plaintiff's action would not be barred if action "will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff" (emphasis omitted)). See *Taylor* v. *Wallace*, supra, 184 Conn. App. 51–52. Although our Supreme Court has cited *Heck* with approval on several occasions, we agree with the concurrence that our Supreme Court has not expressly adopted the exoneration rule. See, e.g., *Mangiafico* v. *Farmington*, 331 Conn. 404, 421, 204 A.3d 1138 (2019) (quoting *Heck* for proposition that " '§ 1983 contains no exhaustion requirement beyond what Congress has provided' "); *Lopes* v. *Farmer*, 286 Conn. 384, 389, 944 A.2d

In *Taylor*, this court concluded that the legal malpractice action brought by the plaintiff, David Taylor, was unripe on the basis of the exoneration rule. *Taylor* v. *Wallace*, supra, 184 Conn. App. 47–52. Taylor, serving a sentence pursuant to a valid conviction, filed a complaint alleging, among other things, that his prior habeas attorney provided him with deficient representation. Id., 45–46. This court rejected Taylor's argument "that he is not attacking the conviction, but is merely seeking monetary damages," and held that, "[t]o prove his malpractice action, [Taylor] presumably would have to prove that he would not have sustained the injury had professional negligence not occurred. Thus, a successful result in this case would necessarily imply that the conviction was improper." Id., 52 n.5. This court concluded that Taylor's action was not ripe because Taylor "has been convicted and that conviction has withstood a number of attacks. For so long as the conviction stands, an action collaterally attacking the conviction may not be maintained." (Footnote omitted.) Id., 52.

Next, in *Dressler* v. *Riccio*, 205 Conn. App. 533, 534–35, 259 A.3d 14 (2021), this court concluded that the exoneration rule barred the plaintiff's complaint. The plaintiff, Lawrence Dressler, filed a complaint asserting legal malpractice and breach of fiduciary duty claims, alleging that his prior criminal trial counsel's faulty representation caused him to incur, as part of his sentence, an order to pay $403,450.75 as restitution. Id., 535. This court concluded that Dressler's claims were not ripe pursuant to the exoneration rule because, "[t]o succeed on these claims, the plaintiff would have to demonstrate that the defendant's alleged conduct led to the imposition of an erroneous restitution order by

921 (2008) (citing *Heck* for proposition that, "[b]ecause one of the elements of the tort of malicious prosecution is favorable termination of the underlying action, a cause of action for malicious prosecution accrues only when the underlying action terminates in the plaintiff's favor").

the federal sentencing court, which would necessarily undermine the validity of his sentence. Such a collateral attack on the plaintiff's sentence is not permissible. In short, as long as the plaintiff's sentence stands, his tort claims are not ripe for review." Id., 552.

Thereafter, in *Cooke* v. *Williams*, 206 Conn. App. 151, 165, 177, 259 A.3d 1211, cert. denied, 339 Conn. 919, 262 A.3d 136 (2021), cert. denied, U.S. , S. Ct. , L. Ed. 2d (2022), this court concluded that the exoneration rule barred only some of the claims made in the complaint. The plaintiff, Ian T. Cooke, serving a sentence pursuant to a valid conviction, filed a complaint against his prior habeas attorneys, alleging claims for legal malpractice, negligence, fraud, breach of the covenant of good faith and fair dealing and breach of contract. Id., 153–54. "The gravamen of [Cooke's] claims was that the defendants neglected to prosecute his actions fully and properly and that they fraudulently billed him for the work performed." Id., 154. This court held that Cooke's legal malpractice claim was not ripe because it was a "collateral attack on his underlying conviction that has not been invalidated either on direct appeal . . . or through habeas proceedings." (Citation omitted.) Id., 162–63. Conversely, this court held that Cooke's fraud claim was ripe and not barred by the exoneration rule because "some of the allegations made in support of his fraud claim are significantly distinct from his legal malpractice claim allegations because, if successful, they would not demonstrate the invalidity of his underlying conviction." Id., 166. Relying on Cooke's allegations that his habeas attorneys "overcharged for their work by misrepresenting their standard rate for habeas clients, inflated or padded the hours worked on matters in connection with their representation of the plaintiff, or charged the plaintiff for work they did not perform"; id., 176; this court concluded that "the allegations that the plaintiff makes in support of his fraud

claim that merely constitute a fee dispute and that do not implicate the validity of his underlying conviction are not controlled by *Taylor*, and that dismissal of his fraud claim was unwarranted." Id., 177.

Most recently, in *Green* v. *Paz*, supra, 211 Conn. App. 155, this court held that the civil action filed by the validly convicted plaintiff, Courtney Green, against his former habeas counsel was barred by the exoneration rule. Green's complaint asserted "three counts sounding in legal malpractice against [his former habeas counsel] stemming from their representation of the plaintiff in the habeas appeal." Id., 154. This court concluded that "the application of the exoneration rule to the plaintiff's claims does not warrant expansive discussion, as our adoption of the exoneration rule remains good law, and it is undisputed that the plaintiff's conviction, which the plaintiff's legal malpractice claims collaterally attack, presently remains valid. Thus, applying the holding of *Taylor*, as well as its progeny, we conclude that the trial court properly dismissed the plaintiff's legal malpractice action for lack of subject matter jurisdiction." Id., 155.

In short, the exoneration rule bars civil claims that necessarily imply the invalidity of an underlying conviction; however, the exoneration rule *does not* bar civil claims that do not challenge the validity of an underlying conviction. Consequently, we turn to the claims contained within the plaintiff's complaint in the present case to determine whether they seek to invalidate his guilty pleas and resultant convictions and, thus, are barred as unripe by the exoneration rule.

Although the complaint contains two counts and the plaintiff attaches many talismanic labels to his claims, we read the complaint to assert four separate claims.[6]

[6] The defendants did not file a request to revise the complaint to separate the many claims contained therein; see *Doe* v. *Cochran*, 332 Conn. 325, 332 n.2, 210 A.3d 469 (2019); and the defendants' appellate brief does not attempt to separate the various claims made in the plaintiff's complaint. We iterate

First, the plaintiff claims that Pattis' demand of an additional $20,000 to represent him on the attempted murder charge breached the parties' oral contract whereby they agreed to a fixed sum of $25,000. Second, the plaintiff claims that the defendants engaged in fraud when they charged and collected an unreasonable fee because he had paid Pattis $35,000 to represent him on the attempted murder charge despite the fact that this charge never proceeded to trial. Third, the plaintiff claims that O'Brien engaged in legal malpractice, breached his fiduciary duties, and breached the oral retainer agreement by executing the forfeiture agreements without the plaintiff's consent and after the time frame for the state to commence a civil action in equity to obtain the forfeiture of such assets pursuant to General Statutes §§ 54-36h (b) and 54-36p (b). Fourth, the plaintiff asserts a broad claim that the defendants engaged in legal malpractice, breached their fiduciary duties, and caused him to suffer emotional distress by improperly pressuring him to enter into guilty pleas. Guided by *Taylor*, *Dressler*, *Cooke*, and *Green*, we conclude that the exoneration rule bars only the plaintiff's fourth claim.

Neither the plaintiff's first nor second claim implicates the validity of his convictions because each claim simply challenges the fees that the defendants charged the plaintiff for their representation. The fee dispute between the plaintiff and the defendants is entirely collateral to the plaintiff's guilty pleas and convictions. The plaintiff need not invalidate his pleas nor his convictions to prevail on his fee dispute claims. The question as to whether the plaintiff is entitled to damages as a result of the defendants' demand for additional fees has nothing to do with his criminal convictions. Indeed, this type of fee dispute is markedly similar to the claim that survived the exoneration rule in *Cooke*. See *Cooke* v.

that our interpretation of the plaintiff's complaint is subject to plenary review. See *BNY Western Trust* v. *Roman*, supra, 295 Conn. 210.

Williams, supra, 206 Conn. App. 176–77 (holding that plaintiff's claim that defendants "overcharged for their work by misrepresenting their standard rate for habeas clients, inflated or padded the hours worked on matters in connection with their representation of the plaintiff, or charged the plaintiff for work they did not perform" was not barred by exoneration rule because "in a fee dispute, the criminally convicted plaintiff is not seeking to shift the responsibility for and consequences of his criminal acts to his former counsel, nor is the client's own criminal act the ultimate source of his predicament"). Therefore, we conclude that the plaintiff's claims relating to the fees charged by the defendants are ripe and are not barred by the exoneration rule.

The plaintiff's third claim, which concerns O'Brien's allegedly improper execution of the asset forfeiture agreements, likewise does not implicate the validity of the plaintiff's convictions. In particular, the complaint alleges with respect to this claim that the plaintiff was not consulted as to these agreements and that they were executed after the time frame for the state to commence a civil action in equity to obtain the forfeiture of such money pursuant to §§ 54-36h (b) and 54-36p (b).[7] Both §§ 54-36h (b) and 54-36p (b) impose a

[7] We note that there *are* separate forfeiture proceedings made as part of the criminal proceedings for "contraband" and "stolen property" seized as part of a criminal arrest. See General Statutes § 54-36a (authorizing judicial disposition of contraband and stolen property at conclusion of criminal trial); *State* v. *Garcia*, 108 Conn. App. 533, 552–54, 949 A.2d 499 (delineating difference between forfeiture at conclusion of criminal trial pursuant to § 54-36a, and civil forfeiture through separate equitable proceeding pursuant to § 54-36h), cert. denied, 289 Conn. 916, 957 A.2d 880 (2008); see also *State* v. *Redmond*, 177 Conn. App. 129, 140–41, 171 A.3d 1052 (2017) (holding that there was sufficient nexus between seized weapons and defendant's illicit narcotics business and, thus, court's order of forfeiture, pursuant to § 54-36a, at conclusion of criminal trial was proper). The plaintiff's claim, however, is founded on the forfeiture agreements' purported violation of the civil prescriptions of §§ 54-36h (b) and 54-36p (b). These parallel criminal forfeiture proceedings do not change the outcome of this appeal because (1) our review is confined to the allegations of the plaintiff's complaint; (2) the plaintiff's complaint does not allege that the asset forfeiture agreements

ninety day time frame within which the state may commence a civil action in equity to order the forfeiture of seized property.[8] Particularly, both statutes provide that the state must commence the forfeiture proceedings "[n]ot later than ninety days after the seizure of moneys or property subject to forfeiture . . . ." General Statutes §§ 54-36h (b) and 54-36p (b). Both statutes also provide that each such forfeiture proceeding "shall be deemed a civil suit in equity, in which the state shall have the burden of proving all material facts by clear and convincing evidence" and that, "[a]t such hearing the court shall hear evidence and make findings of fact and enter conclusions of law and shall issue a final order, from which the parties shall have such right of appeal as from a decree in equity." General Statutes §§ 54-36h (b) and 54-36p (b); see also *State* v. *Garcia*, 108 Conn. App. 533, 554, 949 A.2d 499 (holding that unambiguous language of § 54-36h permits state to petition "court in the nature of a proceeding in rem to order forfeiture" (internal quotation marks omitted)), cert. denied, 289 Conn. 916, 957 A.2d 880 (2008).

Accordingly, the plaintiff's asset forfeiture agreement claim is not barred by the exoneration rule because it does not seek to invalidate his guilty pleas, convictions, or sentence. Rather, the plaintiff's claim is that, at the time the forfeiture agreements were executed, it was too late for the state to seek the forfeiture of his seized assets, pursuant to §§ 54-36h (b) and 54-36p (b), because

were part of his criminal sentence, part of a plea agreement, improper because his seized property insufficiently was connected to his illicit business dealings, or entered at the conclusion of a criminal trial; and (3) we are required to interpret the complaint in the light most favorable to the plaintiff and indulge every presumption favoring jurisdiction. See *Dorry* v. *Garden*, supra, 313 Conn. 521.

[8] The only material difference between §§ 54-36h and 54-36p is that § 54-36h applies to seized property relating to the sale of controlled substances, whereas § 54-36p applies to seized property relating to sexual exploitation and prostitution.

more than ninety days had lapsed since the seizure of his assets. His claim is entirely contingent on the time in which the state could commence an in rem proceeding to obtain an order requiring the forfeiture of his seized assets. The narrow claim as to the timing of the state's ability to commence forfeiture proceedings is collateral to, and does not seek to invalidate, the plaintiff's convictions. The plaintiff could prevail on this legal malpractice claim without having to demonstrate the invalidity of his underlying conviction, so this claim is not barred by the exoneration rule. We further note that the plaintiff's forfeiture agreements claim in the present case is dissimilar from the monetary claim at issue in *Dressler*, which was barred by the exoneration rule. See *Dressler* v. *Riccio*, supra, 205 Conn. App. 551–52 (holding that exoneration rule barred civil action seeking to challenge restitution order because restitution is "component of" plaintiff's criminal sentence and reiterating that crux of rule is that "so long as a plaintiff's conviction or sentence remains valid, it cannot be vitiated indirectly by a tort action commenced against counsel"). Here, unlike in *Dressler*, the plaintiff does not allege that the forfeiture agreements were a component of his criminal sentence. See footnote 7 of this opinion. Therefore, indulging every presumption in favor of jurisdiction, we conclude that the plaintiff's forfeiture agreements claim is ripe and is not barred by the exoneration rule.

Finally, the plaintiff's legal malpractice claim as to the actions of the defendants in improperly pressuring him to enter into his guilty pleas constitutes a collateral attack on his guilty pleas and convictions. This is the precise type of legal malpractice claim that the exoneration rule prohibits because such a claim challenges the validity of his convictions. In pursuit of a legal malpractice claim that challenges a valid conviction, the plaintiff in the present case, like the plaintiffs in

Taylor, *Cooke*, *Dressler* and *Green*, would "have to prove that he would not have sustained the injury had professional negligence not occurred. Thus, a successful result in this case would necessarily imply that the conviction was improper." *Taylor* v. *Wallace*, supra, 184 Conn. App. 52 n.5; see also *Dressler* v. *Riccio*, supra, 205 Conn. App. 546 (outlining elements required to prove legal malpractice claim). The plaintiff's allegations in his complaint as to the validity of his pleas largely are founded on the pressure that the defendants allegedly exerted on the plaintiff to plead guilty and, accordingly, clearly implicate the sufficiency of the defendants' representation in the plaintiff's criminal proceedings. See *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 797–98, 189 A.3d 135 (explaining proof required to prevail on legal malpractice claim challenging counsel's deficient representation), cert. denied, 329 Conn. 911, 186 A.3d 707 (2018).

The plaintiff's legal malpractice claim as to his pleas creates a risk of inconsistent judgments that the exoneration rule is intended to prevent. See *Cooke* v. *Williams*, supra, 206 Conn. App. 162 (exoneration rule promotes consistency of judgments). If the plaintiff were allowed to continue prosecuting his legal malpractice claim against the defendants, the trial court in this case and the habeas court considering the plaintiff's pending habeas petition conceivably could render inconsistent judgments in which one court determines that the defendants' performance was deficient while the other court determines that it was not deficient. For as long as the plaintiff's convictions stand, his civil legal malpractice action against the defendants challenging the validity of his convictions is not ripe for adjudication and may not be maintained. Therefore, we conclude that the plaintiff's legal malpractice claim as to the actions of the defendants in improperly pressuring him

to enter into his guilty pleas is not ripe and is barred by the exoneration rule.[9]

The judgment is reversed with respect to the claims regarding the fee dispute and the forfeiture agreements, and the case is remanded with direction to deny the motion to dismiss as to those claims and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion CLARK, J., concurred.

PRESCOTT, J., concurring. I concur in the result reached by the majority. I agree that this court previously has adopted and applied a version of the exoneration rule in a series of cases; see *Green* v. *Paz*, 211 Conn. App. 152, 155, 271 A.3d 1138 (2022); *Cooke* v. *Williams*, 206 Conn. App. 151, 176, 259 A.3d 1211, cert. denied, 339 Conn. 919, 262 A.3d 136 (2021), cert. denied, U.S. , S. Ct. , L. Ed. 2d (2022); *Dressler* v. *Riccio*, 205 Conn. App. 533, 552, 259 A.3d 14 (2021); *Taylor* v. *Wallace*, 184 Conn. App. 43, 51–52, 194 A.3d 343 (2018); and that, under this court's long-standing policy, this panel is bound by those previous decisions. See *State* v. *Carlos P.*, 171 Conn. App. 530, 545 n.12, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017). In my view, the majority has properly applied that rule to the particular claims brought by the plaintiff in this case and, thus, I agree that we must affirm in part and reverse in part the judgment of the trial court.

I write separately only to note that the exoneration rule is a jurisprudential, policy based doctrine that at least nine states have chosen not to adopt.[1] See *Mylar*

[9] Our decision is confined to the narrow legal issue as to the ripeness of the plaintiff's claims. We do not reach the relative merits of any of the plaintiff's claims.

[1] Although courts have described the rule as affecting the justiciability, i.e., the ripeness, of the malpractice action, that reason is self-fulfilling because, in the absence of a jurisdiction's adoption of the exoneration rule, the malpractice action would otherwise be justiciable.

v. *Wilkinson*, 435 So. 2d 1237, 1238–39 (Ala. 1983); *Rantz* v. *Kaufman*, 109 P.3d 132, 136 (Colo. 2005); *Silvers* v. *Brodeur*, 682 N.E.2d 811, 818 (Ind. App.), transfer denied, 690 N.E.2d 1189 (Ind. 1997); *Gebhardt* v. *O'Rourke*, 444 Mich. 535, 554, 510 N.W.2d 900 (1994); *Duncan* v. *Campbell*, 123 N.M. 181, 185–86, 936 P.2d 863 (N.M. App.), cert. denied, 123 N.M. 168, 936 P.2d 337 (1997); *Krahn* v. *Kinney*, 43 Ohio St. 3d 103, 105, 538 N.E.2d 1058 (1989); *Paxman* v. *King*, 448 P.3d 1199, 1202 (Utah 2019); *Thomas* v. *Hillyard*, 445 P.3d 521, 525 (Utah 2019); *Dockter* v. *Lozano*, 472 P.3d 362, 366 (Wyo. 2020); see also *Jepson* v. *Stubbs*, 555 S.W.2d 307, 313 (Mo. 1977) ("[w]e conclude that it was not a condition to maintaining [a plaintiff's legal malpractice] suit [against his criminal defense attorney] that the judgment of conviction be set aside"); cf. *Goodman* v. *Wampler*, 407 S.W.3d 96, 102 (Mo. App. 2013) ("[a]bsent an allegation of actual innocence, [a legal malpractice plaintiff's] petition [brought against her criminal defense attorney] failed to state a claim for legal malpractice"). I also note that the decisions of this court discussing and applying the rule did not engage in a full-throated analysis of the various policy considerations that militate against and in favor of the rule. It is also important to recognize that our Supreme Court has not yet had occasion to decide whether to adopt the exoneration rule.

In my view, I do not believe that the policy considerations that support the rule necessarily justify depriving a criminal defendant access to civil relief unless his or her criminal conviction has first been overturned. In reaching that conclusion, I find the recent decision of the Wyoming Supreme Court in *Dockter* v. *Lozano*, supra, 472 P.3d 366–67, to contain a particularly helpful discussion of the policy considerations weighing against adoption of the exoneration rule. I hope that our Supreme Court will address in a more comprehensive manner

the soundness of the rule when presented with the appropriate case to do so. Accordingly, I concur in the result.

WILLIAM GHIO *v.* LIBERTY INSURANCE UNDERWRITERS, INC.
(AC 44127)

Bright, C. J., and Alexander and Bishop, Js.

Syllabus

The plaintiffs in error, four individual insureds, filed a writ of error, challenging a discovery order issued by the trial court finding that the insureds had waived the attorney-client privilege as to all communications concerning the merits of the claims of the plaintiffs in the underlying action, W and J. In a prior action, W and J brought a claim against the insureds and their company, B Co., which owned an insurance policy issued by the defendant in error, L Co., which provided liability coverage for B Co. and its directors and officers. Pursuant to the policy, L Co. paid the costs of defending against W and J's action. Thereafter, L Co. denied that the policy provided coverage for any judgment in that action, and the insureds entered into a stipulated judgment assigning their rights under the policy to W and J and directed their attorney, E, to provide W and J with copies of all communications with L Co. regarding coverage under the policy, redacted as necessary to protect the attorney-client privilege. W and J then brought the underlying action against L Co., seeking to enforce the stipulated judgment, during which they served on L Co. a discovery request seeking all communications between L Co. and E regarding the prior action against the insureds. After L Co. informed W and J that the responsive documents were protected by the attorney-client privilege, the court held a discovery conference and ordered L Co. to produce all communications between L Co. and E that constituted statements of fact or related to the issue of insurance coverage. The insureds reviewed and redacted portions of the relevant documents and instructed L Co. as to which documents to withhold entirely, and L Co. provided the redacted documents and a privilege log to W and J. Thereafter, W and J filed a motion for summary judgment in the underlying action, in which they relied on certain privileged communications between E and L Co., which E had disclosed to them pursuant to the stipulated judgment in the prior action. Subsequently, L Co. notified the insureds that it would seek the court's permission to produce and disclose all communications between it and E regarding the merits of W and J's claims in the prior action to defend itself in the underlying action because the insureds had waived the attorney-client

privilege by producing some communications on the same subject. Counsel for the insureds requested that L Co. identify specific documents that allegedly constituted waiver of that privilege, and L Co. identified six documents, two of which had been used in the motion for summary judgment. At a hearing on the privilege issue, the court, which noted that it had limited time to hear argument on the issue, concluded that the documents E provided to W and J waived the privilege, basing its decision solely on brief excerpts of documents read by L Co.'s attorney during the hearing without conducting an in camera review of the undisclosed documents to determine which were encompassed by the subject matter waiver. The court subsequently denied the motion for reconsideration filed by the insureds, and they filed a writ of error. *Held*:

1. Because the subject matter waiver rule is consistent with Connecticut's precedent and is based on the same fairness principle supporting the implied waiver rule, this court adopted it as the law in this state: the voluntary disclosure of a privileged attorney-client communication constitutes a waiver of the privilege as to all other communications concerning the same subject matter when the trial court has determined that the waiver was intentional and that fairness dictates that the disclosed and undisclosed communications be considered together; moreover, where a party asserts that the rule applies on the basis of disclosed communications, the court must review the relevant disclosed and undisclosed communications to determine whether a waiver has occurred and, if so, must determine the scope of that waiver through a fact intensive inquiry into the nature of the communications.

2. The trial court erred in not holding an evidentiary hearing and reviewing the communications in question:

   a. The trial court abused its discretion in failing to review the actual documents on which the claim of waiver was based: given the parties' conflicting positions regarding the importance of the documents at issue, the court was required to review the relevant communications before issuing its ruling finding that the insureds had waived the privilege as to all communications regarding E's analysis of W and J's claims; moreover, if the court, following a review of the documents, determines that there had been a subject matter waiver, it would need to conduct an in camera review of the claimed privileged documents to determine which documents were covered by the waiver and should be produced; accordingly, this court remanded the case for an evidentiary hearing.

   b. Because this court found error and remanded the case for an evidentiary hearing, it addressed the claims of the insureds likely to arise on remand: because not all of the communications were disclosed in compliance with a court order, on remand, the trial court was required to determine which privileged communications were voluntarily disclosed by the insureds and whether fairness requires that the voluntarily disclosed communications and any undisclosed communications regarding the same subject matters be considered together; moreover, because

L Co. produced only those communications authorized by the insureds, which they had reviewed and redacted, its actions did not neglect its duty to protect the attorney-client privilege and its productions of communications could have constituted a subject matter waiver of the insureds' privilege; furthermore, although the insureds were not parties to the underlying action, they had an interest in the action notwithstanding their lack of status and, therefore, the subject matter waiver rule may properly be applied to them.

Argued December 2, 2021—officially released May 31, 2022

Procedural History

Writ of error from orders of the Superior Court in the judicial district of Hartford, *Moukawsher*, *J.*, ruling that the plaintiffs in error had waived the attorney-client privilege as to certain discovery materials and denying their motion for reconsideration, brought to the Supreme Court and transferred to this court. *Writ granted*; *further proceedings*.

Proloy K. Das, with whom were *Erik H. Beard*, and, on the brief, *Kevin W. Munn* and *Rachel Snow Kindseth*, for the plaintiffs in error (Paul Pendergast et al.).

Ronald P. Schiller, pro hac vice, with whom were *Bonnie M. Hoffman*, pro hac vice, and *Elizabeth M. Cristofaro*, for the defendant in error (Liberty Insurance Underwriters, Inc.).

Opinion

BRIGHT, C. J. With this writ of error, the plaintiffs in error, Paul Pendergast, J. Reid Gorman, Carlos Silva, and Charles Cox (insureds), challenge a discovery order issued in the underlying action, which was brought by William Ghio and Janet Ghio (collectively, the Ghios) against the defendant in error, Liberty Insurance Underwriters, Inc. (Liberty).[1] In a prior action, the Ghios settled their claims against the insureds and brought the

[1] After the parties filed their briefs, this court, sua sponte, ordered them to file supplemental briefs addressing whether the court's discovery order is a final judgment. See Practice Book 72-1 (a) ("[w]rits of error for errors in matters of law only may be brought from a final judgment of the Superior Court to the Appellate Court"). We conclude, and the parties agree, that the court's discovery order is immediately appealable under the second

underlying action against Liberty, which had issued an insurance policy to the insureds. Relevant to this writ of error, in the underlying action the Ghios sought the production of all communications between Liberty and the attorney who represented the insureds in the prior action, and the insureds instructed Liberty as to which of those communications to withhold as protected by the attorney-client privilege. Liberty, wishing to use certain of the designated privileged documents to defend itself in the underlying action, claimed that the insureds waived the privilege as to all communications concerning the merits of the Ghios' claims by selectively disclosing to the Ghios privileged communications on that

prong of the finality test set forth in *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983).

"[A]n order issued upon a motion for discovery ordinarily is not appealable because it does not constitute a final judgment, at least in civil actions. . . . Typically, a nonparty must be found in contempt of a discovery order before it may appeal that ruling. . . .

"Nevertheless, appellate courts may deem interlocutory orders or rulings, including discovery rulings, to have the attributes of a final judgment if they fit within either of the two prongs of the test set forth in *State* v. *Curcio*, [supra, 191 Conn. 31]. . . . Under *Curcio* . . . interlocutory orders are immediately appealable if the order or ruling (1) terminates a separate and distinct proceeding or (2) so concludes the rights of the parties that further proceedings cannot affect them." (Citations omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 730, 207 A.3d 493 (2019); see also *Abreu* v. *Leone*, 291 Conn. 332, 346, 968 A.2d 385 (2009) ("an order issued upon a motion for discovery ordinarily is not appealable because it does not constitute a final judgment, and . . . a witness' only access to appellate review is to appeal a finding of contempt").

In the present case, Liberty has possession of the privileged documents and, therefore, is able to provide them to the Ghios or make use of them itself pursuant to the court's order. Thus, because the insureds are unable to withhold the documents and be found in contempt, from which judgment they could appeal, we conclude that the court's order of production so concludes their rights to maintain the privilege that no further proceedings before the court can affect them. Cf. *Redding Life Care, LLC* v. *Redding*, supra, 331 Conn. 739 (finding that further proceedings could affect plaintiff in error because he "may be held in contempt by the trial court for failing to comply with the discovery order, which then would constitute an appealable final judgment"). Accordingly, this court has jurisdiction over the writ of error.

subject. The trial court agreed and found that the insureds had waived the privilege as to all communications concerning the merits of the Ghios' claims, clearing the way for Liberty to use those communications in the underlying action.

In this writ of error, the insureds claim that the court improperly concluded that they waived the attorney-client privilege because (1) the communications were produced pursuant to a court order, (2) Liberty had a duty to preserve the privilege and, therefore, could not have waived the insureds' privilege by producing the communications, and (3) the court abused its discretion in finding that the privilege was waived without holding an evidentiary hearing or reviewing the relevant communications. We agree with the insureds' final claim and, accordingly, grant the writ of error and remand the case for an evidentiary hearing.

The record reveals the following facts and procedural history. The Ghios invested in the insureds' company, Back9 Network, Inc. (Back9), which owned an insurance policy issued by Liberty providing liability coverage for Back9 and its directors and officers (policy). In 2015, the Ghios brought an action against Back9 and the insureds, asserting claims related to their investment in Back9. Attorney Joshua Berman represented the insureds, and Liberty, pursuant to the policy, paid the insureds' costs of defending against the Ghios' claims.

In October, 2018, shortly before the scheduled trial, Attorney R. Stacy Lane, Liberty's coverage counsel, notified Berman that Liberty denied that the policy provided coverage for any judgment in the Ghios' action. After receiving Lane's letter, the insureds and the Ghios entered into a stipulated judgment agreeing that judgment would enter for the Ghios in the amount of $1,901,056 and that the Ghios would seek to enforce

the judgment against Liberty only. The court, *Graham*, *J.*, rendered judgment in accordance with the parties' agreement. Pursuant to the judgment, the insureds assigned their rights under the policy to the Ghios and directed Berman to provide the Ghios with copies of all communications with Liberty regarding coverage under the policy, redacted as necessary to protect any applicable privilege.

In December, 2018, the Ghios brought the underlying action against Liberty[2] pursuant to General Statutes § 38a-321.[3] In their three count amended complaint, the Ghios sought to enforce the stipulated judgment and alleged that Liberty had acted in bad faith and violated the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-815 et seq. Liberty filed an answer and special defenses, as well as a counterclaim seeking a declaratory judgment that it does not have an obligation to pay the judgment against the insureds.

During discovery, the Ghios served on Liberty a request for production, seeking all communications between Liberty and Berman regarding the prior action against the insureds. After consulting with the insureds, Liberty informed the Ghios that the insureds claimed that the

[2] The Ghios also named the following additional defendants: Berman and his law firm, White & Case, LLP; Back9; the insureds; and Attorney R. Stacy Lane, Liberty's attorney, and his law firm, Bailey Cavalieri, LLC. The court, *Moukawsher*, *J.*, granted the motions to dismiss filed by the additional defendants, leaving Liberty as the sole remaining defendant.

[3] General Statutes § 38a-321 provides in relevant part: "Upon the recovery of a final judgment against any person, firm or corporation by any person . . . for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

responsive documents in Liberty's possession were protected by the attorney-client privilege. On August 6, 2019, after a discovery conference, the court, *Moukawsher*, *J.*, ordered Liberty to produce all communications between Liberty and Berman that are statements of fact or relate to the issue of insurance coverage. Thereafter, the insureds reviewed the relevant documents, redacted portions of those documents, and instructed Liberty as to which documents to withhold entirely. Liberty complied with the insureds' instruction and provided the documents and a privilege log to the Ghios.

On November 25, 2019, the Ghios moved for summary judgment on the first count of their amended complaint seeking to enforce the stipulated judgment. In that motion, the Ghios relied on certain privileged communications between Berman and Lane in support of their argument that the settlement was reasonable. As acknowledged by the insureds in their brief to this court, Berman disclosed three of those communications to the Ghios pursuant to the stipulated judgment in the prior action. In a February 7, 2020 e-mail, Attorney Bonnie Hoffman, counsel for Liberty, notified the insureds that Liberty would seek the court's permission to produce and disclose all communications between Berman and Liberty regarding the merits of the Ghios' claims in the prior action because the insureds had waived the attorney-client privilege by producing some communications on the same subject. Hoffman claimed that Liberty was entitled to use these communications to defend itself in the underlying action because the Ghios had relied on some of Berman's communications regarding the merits of the prior action in their motion for summary judgment. In response, Attorney Erik Beard, counsel for the insureds, requested that Hoffman identify the specific documents that she asserted constituted waiver of the privilege, and Hoffman identified six documents,

two of which had been included in the Ghios' motion for summary judgment.

At a March 6, 2020 hearing, the court heard argument on several matters, including the Ghios' motion to strike Liberty's counterclaim and the privilege issue. At the outset of the hearing, the Ghios' attorney noted that the court had a limited amount of time because it was presiding over a trial that morning, and the court proceeded to hear the parties on the motion to strike. Before turning to the claimed waiver of the attorney-client privilege, the court stated, "Let's try to move as quickly as we can because I'm running short of time." Attorney Ronald P. Schiller, counsel for Liberty, proceeded to argue that the privilege had been waived because the insureds disclosed some of Berman's communications with Liberty regarding the merits of the Ghios' claims in the prior action but claimed that other communications on the same subject were privileged. In addition, Schiller claimed that Berman's communications regarding the merits of the Ghios' claims in the prior action had been put at issue in the underlying action because the Ghios are "saying [Liberty was] unreasonable and they're relying on Berman's communications that he did share with them. And so, yes, it bleeds into the waiver issue, but it also bleeds into what they're relying on, Your Honor . . . ."

On behalf of the insureds, Beard denied that any waiver occurred and claimed that the only documents identified by Liberty as constituting waiver "were documents relating to coverage issues, exclusively. They were the back and forth in October, 2018, between Liberty . . . and Attorney Berman about the declination of coverage letters and the positions that were taken." The court then engaged in the following exchange with Schiller and Beard:

"The Court: Okay, can I stop you right there so that we can see—is there a perfect example in terms of the document—

"[Schiller]: Yes.

"The Court: —of what you claim Berman did to waive the privilege?

"[Schiller]: Yes.

"The Court: Just give me a document and tell me what it says.

"[Schiller]: Yes, Your Honor, and I have a notebook where we have the documents at issue, and it's not just the six . . . .

"The Court: Well, I just want one.

"[Schiller]: Okay.

"The Court: Can you . . . just give me your very best one that would say Berman provided . . . a document that shows his advice and it—and it opens the door?

"[Schiller]: Okay. And to be clear, this is post Beard's redacting and what he redacted were sometimes things that were just critical of judges or critical of [the Ghios' attorney]. They were—they did not go to the merits . . . .

"[A]nd I don't have a Bates number, so I'm going to give you the e-mail date and time.

"The Court: Yeah just tell me what it says. That's what I'm more interested in.

"[Schiller]: Okay. It's Joshua Berman to Eileen Leviton. She's at Liberty LIU, dated September 26, 2017: 'It pains me to offer [the Ghios] a single red cent in response to their extortionate and unsupportable legal claim.' There's a reference to the demand. 'The guy has

no case and is making offers like this,' referring to a demand from [the Ghios' attorney].

"The Court: All right. I—that's enough.

"[Schiller]: 'The offer should be a nonstarter.'

"The Court: I—I heard it.

"[Beard]: Two—two things, actually.

"The Court: How can you argue that that isn't about the merits?

"[Beard]: Two things, Your Honor, actually.

"The Court: Yeah.

"[Beard]: That particular e-mail that he is reading, and he's not putting it in context, was a coverage dispute about whether [defending] a motion for sanctions would be covered by Liberty . . . .

"The Court: But whatever it does, it—it is the lawyer's statements about the—the quality of the case.

"[Beard]: And—and Your Honor, I will not dispute that if that is deemed privileged information, that one sentence, then it's waived, it's out there; but that does not open the door under—

"The Court: Well, not the sentence, it's the topic; in other words, if—if what's going to happen is that—that certain evidence is going to come in where Attorney Berman makes his statements concerning the relative strengths and weaknesses of the case as that does, then why don't they all come in?

"[Beard]: Because, Your Honor, if you look at [*In re von Bulow*, 828 F.2d 94 (2d Cir. 1987] out of the Second Circuit, which is a case that deals with this idea of subject matter and implied waiver. What the—what that case says, and it's been cited by a lot of Connecticut court cases, but what that case says is when a—when

the disclosure is made not to—essentially to use the—the language earlier, not to yield a sword and a shield.

"So, we did not disclose anything in this case as a party to this case. We're not disclosing it to produce—to prove a claim that we have in this case. We're not disclosing it to—or withholding anything to prevent somebody else from hurting—helping their claim or defense.

"The Court: Well—well, wait a minute, let me stop you there, because what—I mean, in other words, you—the insured, the Back9 insureds made a deal with [the Ghios], and now they're saying, 'Well, maybe we didn't make such a good deal.'

"And Berman's saying, 'You know, here's some stuff, you can use this.'

"And now, Liberty's saying, 'You give [them]—sent [them] some things to help [their] case, then you got to give us everything.'

"[Beard]: They—

"The Court: That's their argument. . . .

"[Beard]: I still maintain the stuff that was given to them, except for very conclusory language, which by the way, Your Honor, every lawyer in the world when negotiating a case says to the other side, 'Your case has no merit. Your case isn't worth what you think it's worth.'

"The Court: Is this an e-mail to the other side?

"[Beard]: No, no—

"[Schiller]: No, this was to Liberty on Berman's assessment.

"[Beard]: My point—

"[Schiller]: And just, Your Honor, there are dozens of these. There's literally no viable case. Plaintiff's counsel is milking his client for every penny he can in fees and he's showing no signs of discontinuing the nonclaim. On the contrary, his tactic is to litigate as vexatious[ly] as possible for the sole purpose of extorting money from Liberty. I have dozens of—

"The Court: This is an e-mail delivered to Liberty.

"[Schiller]: Yes.

"The Court: So it's not to the other side.

"[Beard]: That's my point, though, is, Your Honor, is that worst case scenario, we say something like that to the other side in a litigation, nobody claims that that statement means that it opens up the door for all the underlying internal analysis of the lawyer. No plaintiff's lawyer would ever come into court and say, 'Your Honor, in our settlement negotiations, they told me that I don't have a case. Therefore, I get to know everything that led to that conclusion.' That's not the case. But back to . . . Your Honor's point . . . these disclosures were made in an extrajudicial context as to . . . the Back9 insureds. We're not a part [of] this case. We complied with the court's order to produce coverage information and statements of fact.

"The Court: Well, you were a witness claiming, apparently, attorney-client privilege as a reason that you don't have to produce documents.

"[Beard]: That's correct.

"The Court: And then I'm confronted with a situation where the claim is, and it seems to be supported, that you gave some of the documents to the other side in the case, and now you want to . . . not give them to Liberty.

"[Beard]: We did not give to the other side any documents that, for example, delve into the—the analysis of the legal strengths and weaknesses of the case. We did not give [the Ghios] anything other than . . . Schiller . . . has represented to the court. And I will also add that if he's about to bring out an entire notebook, I did ask for that information and I got six e-mails. That's what I got.

"[Schiller]: He has the notebook, Your Honor. He's the one who went through them and took out all the disparaging—

"The Court: All right.

"[Schiller]: And Your Honor, just the point is, we have these documents. They cherry-picked a small group of documents from one period of time where they say, 'Hey Liberty, you have to settle this case now,' because they cut a deal with [the Ghios], or because they wanted to cut a deal with [the Ghios]. And those documents say, and [the Ghios are] going to use them as [they] have a right to, but now they don't want me to use the rest of them and [they have] all these documents."

Before hearing from the Ghios' attorney, the court noted that it was "right about out of time." The Ghios' attorney then explained, "We've had all kinds of discovery, we've had motions for summary judgment filed with all of the essentials of those summary judgments being teed up, and now they want to revisit discovery. And I don't even know that I got the e-mails that counsel is referring to."

The court allowed Beard to offer closing remarks, and the following exchange occurred:

"[Beard]: [W]e have . . . a real tangible concern about whether or not this throws the door open to all of the underlying analyses of the legal strengths and

weaknesses of the [Ghios'] case, and what [their attorney] said at the beginning of today's hearing only underscores it, which is he's not ruling out the fact that if things don't go his way in this case, he's going to come back and try to drag my clients back into court on the underlying case. And if all of this comes out, suddenly he's got the entire roadmap for everything that we were going to do in the underlying case.

"The Court: Perhaps Berman should've thought carefully about that possibility before he started providing documents to the [Ghios] here.

"[Beard]: Well—but, Your Honor, the documents, as I said, that we provided were either coverage documents which I would argue are not privileged.

"The Court: Look, it's already established that that's not the limit of them.

"[Beard]: Or . . . they were conclusory documents that to the extent of what was said is waived; but as the Second Circuit in the *von Bulow* case says, the stuff that was not disclosed remains confidential and privileged because we are not a party to this case, period."

After hearing from Hoffman, Liberty's cocounsel, regarding Liberty's delay in raising the waiver issue, the court issued its ruling, stating: "I am convinced by what I have heard today, in particular the nature of the documents that were disclosed to the [Ghios] by Attorney Berman, that it discusses the substance of . . . the analysis that he gave with respect to the merits of the other case; and once you open that door to certain of his comments, you're bound to provide the rest of them as well. It would simply be, and this is the basic guide, an injustice here to allow one side to have a selected number of . . . those comments and not allow the other side to have them.

"I suggest in this instance a specific written order is appropriate, so I'd ask [Liberty] to provide a proposed order for me to execute." Although the court never issued a written order, it signed the transcript of its oral decision after this writ of error was filed.

It is clear from our review of the transcript that the court never reviewed the notebook of documents on which Liberty relied for its claim of waiver or the six documents that were exchanged between Beard and Hoffman when Hoffman first raised the waiver issue. Instead, it appears that the court based its decision solely on the brief excerpts read aloud by Schiller at the hearing. The court also did not conduct an in camera review of the undisclosed documents to determine which were encompassed by the subject matter waiver.

The insureds filed a motion for reconsideration and a supporting memorandum of law, claiming that the court's discovery order "was premised on several misapprehensions of fact" and that the court "failed to consider critical legal authority" in issuing its ruling. Specifically, the insureds claimed that, at the March 6, 2020 hearing, Schiller improperly read and relied on redacted portions of one of the e-mails that the insureds had produced in response to the court's August 6, 2019 discovery order. As to that excerpt, the insureds argued that they could not be found to have waived the privilege when they specifically instructed Liberty to withhold as privileged the precise language Schiller improperly read at the hearing. The insureds further maintained that the only communications actually disclosed concerned coverage issues and invited the court to conduct an in camera review of the relevant documents. They further claimed that the disclosures at issue were made in an extrajudicial context and, therefore, that under *In re von Bulow*, supra, 828 F.2d 102–103, a broad subject matter waiver was inappropriate.[4]

[4] On appeal, the insureds have abandoned their claim that the disclosures to the Ghios were made in an extrajudicial context.

Liberty filed an objection, explaining that, before reading from the redacted e-mail, Schiller informed the court that he was referencing a document that had been redacted by the insureds. Liberty further explained that Schiller then read a portion of a second e-mail from Berman to Liberty, which had been provided to the Ghios pursuant to the court's discovery order, to demonstrate the claimed waiver. We note that neither of these e-mails was included in the Ghios' motion for summary judgment. Liberty also denied that the insureds' disclosures occurred in an extrajudicial context, noting that the insureds had disclosed communications pursuant to the stipulated judgment in the prior action before disclosing additional communications pursuant to the court's August 6, 2019 discovery order. Liberty emphasized that, in *In re von Bulow*, supra, 828 F.2d 102, the Second Circuit Court of Appeals distinguished disclosures made in a trial setting from extrajudicial disclosures and held that "extrajudicial disclosure of an attorney-client communication—one not subsequently used by the client in a judicial proceeding to his adversary's prejudice—does not waive the privilege as to the undisclosed portions of the communication."

On May 4, 2020, the court issued an order denying the motion for reconsideration, stating: "The court agrees with and adopts the reasoning of the objection to the motion. The court understood the facts and applied the applicable law in making its ruling. Its ruling was correctly aimed at preventing a party to this litigation from offering an attorney's advice as evidence selectively, offering the advice that favors the current claim while opposing the discovery of other advice from the same source that might disfavor the current claim." This writ of error followed.

I

As a threshold matter, because neither this court nor our Supreme Court has considered the applicability

of the subject matter waiver rule, we must determine whether the court properly concluded that the rule applies in Connecticut. For the reasons that follow, we adopt the subject matter waiver rule.

We first set forth our standard of review. "Whether the trial court properly concluded that there is an exception to the attorney-client privilege . . . and, if so, whether it properly delineated the scope and contours of such an exception, are questions of law. . . . Accordingly, our review of these issues is plenary." (Citation omitted.) *Hutchinson* v. *Farm Family Casualty Ins. Co.*, 273 Conn. 33, 38, 867 A.2d 1 (2005).

The subject matter waiver rule provides that the "voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject. . . . Under this rule, disclosure of information resulting in the waiver of attorney-client privilege constitutes waiver only as to communications about the matter actually disclosed." (Citations omitted; internal quotation marks omitted.) *United States* v. *Sanmina Corp.*, 968 F.3d 1107, 1117 (9th Cir. 2020). "The purpose underlying the rule of partial disclosure is one of fairness to discourage the use of the privilege as a litigation weapon in the interest of fairness. A party should not be permitted to assert the privilege to prevent inquiry by an opposing party where the professional advice, itself, is tendered as a defense or explanation for disputed conduct." *Zirn* v. *VLI Corp.*, 621 A.2d 773, 781–82 (Del. 1993).

"Courts have characterized this reasoning as the sword and the shield approach, in that a litigant should not be able to disclose portions of privileged communications with his attorney to gain a tactical advantage in litigation (the sword), and then claim the privilege

when the opposing party attempts to discover the undisclosed portion of the communication or communications relating to the same subject matter." (Internal quotation marks omitted.) *Center Partners, Ltd.* v. *Growth Head GP, LLC*, 981 N.E.2d 345, 357 (Ill. 2012).

The subject matter waiver rule is applied uniformly in the federal courts pursuant to rule 502 (a) of the Federal Rules of Evidence, which provides, "[w]hen the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." The advisory committee notes to rule 502 (a) explain that "a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."[5]

[5] Several state courts also apply the subject matter waiver rule. See, e.g., *Citadel Holding Corp.* v. *Roven*, 603 A.2d 818, 825 (Del. 1992) ("It is clear that the disclosure of even a part of the contents of a privileged communication surrenders the privilege as to those communications. . . . The so-called rule of partial disclosure limits the waiver to the subject matter of the disclosed communication." (Citations omitted; internal quotation marks omitted.)); *In re Grand Jury January 246*, 272 Ill. App. 3d 991, 997, 651 N.E.2d 696 ("where a client reveals portions of her conversation with her attorney, those revelations amount to a waiver of the attorney-client privilege as to the remainder of the conversation or communication about the same subject matter"), appeal denied, 163 Ill. 2d 558, 657 N.E.2d 622 (1995); *Miller* v. *Continental Ins. Co.*, 392 N.W.2d 500, 504–505 (Iowa 1986) ("voluntary disclosure of the content of a privileged communication constitutes waiver as to all other communications on the same subject"); *Smith* v. *Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1144 (La. 1987) ("[t]he introduction into evidence of documents disclosing privileged communications also waives the privilege against testimony or production of further documents disclosing communications on the same subject"); *Marshall* v. *Marshall*, 282 S.C.

"In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice. . . . The privilege applies, however, only when necessary to achieve its purpose; it is not a blanket privilege." (Citation omitted; internal quotation marks omitted.) *State* v. *Kosuda-Bigazzi*, 335 Conn. 327, 342, 250 A.3d 617 (2020).

"Exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications." *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 52, 730 A.2d 51 (1999); see also *Ullmann* v. *State*, 230 Conn. 698, 713, 647 A.2d 324 (1994) (because "the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose" (internal quotation marks omitted)).

It is well established that "voluntary disclosure of the content of a privileged communication constitutes waiver of the privilege." (Internal quotation marks omitted.) *State* v. *Taft*, 258 Conn. 412, 421, 781 A.2d 302 (2001). The privilege belongs to the client and may be waived only by the client or his attorney acting with the client's authority. See *Gebbie* v. *Cadle Co.*, 49 Conn. App. 265, 274, 714 A.2d 678 (1998). "[I]f the holder of the privilege fails to claim his privilege by objecting to

534, 538, 320 S.E.2d 44 (App. 1984) ("[a]ny voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject").

disclosure by himself or another witness when he has an opportunity to do so, he waives his privilege as to communications so disclosed. . . . This result is reached because once the confidence protected has been breached, the privilege has no valid continuing office to perform." (Citation omitted; internal quotation marks omitted.) Id.

Although there is no appellate authority in this state applying the subject matter waiver rule, our Supreme Court has recognized the related doctrine of implied waiver, which is founded on the same fairness considerations justifying the subject matter waiver rule. See *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 249 Conn. 52–53. The implied waiver rule "is invoked only when the contents of the legal advice is integral to the outcome of the legal claims of the action. . . . Such is the case when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the attorney-client relationship. In those instances the party has waived the right to confidentiality by placing the content of the attorney's advice directly at issue because the issue cannot be determined without an examination of that advice." (Citation omitted; footnotes omitted.) Id.

The implied waiver rule "rest[s] on the fairness principle, which is often expressed in terms of preventing a party from using the privilege as both a shield and a sword. . . . In practical terms, this means that parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." (Internal quotation marks omitted.) *United States* v. *Sanmina Corp.*, supra, 968 F.3d 1117; see also *People* v. *Trujillo*, 144 P.3d 539, 543 (Colo. 2006) ("[t]he rationale

for an implied waiver . . . is that the law will not permit a client to use as a sword the protection which is awarded him as a shield" (internal quotation marks omitted)).

As the Second Circuit Court of Appeals has explained, the "subject matter waiver [rule] . . . is simply another form of the waiver by implication rule . . . . Like the implied waiver, the subject matter waiver also rests on the fairness considerations at work in the context of litigation. . . .

"For this reason, it too has been invoked most often where the privilege-holder has attempted to use the privilege as both a sword and a shield or where the attacking party has been prejudiced at trial." (Citation omitted; internal quotation marks omitted.) *In re von Bulow*, supra, 828 F.2d 102–103; see also *In re Keeper of Records* (*Grand Jury Subpoena Addressed to XYZ Corp.*), 348 F.3d 16, 24 (1st Cir. 2003) ("[C]ourts have identified a common denominator in waiver by implication: in each case, the party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, and the court found that to allow the privilege to protect against disclosure of that information would have been unfair to the opposing party. . . . Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process." (Citations omitted; internal quotation marks omitted.)).

Thus, the subject matter waiver rule is consistent with this state's precedent recognizing that, because "the [attorney-client] privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." (Internal quotation marks omitted.) *Ullmann* v. *State*, supra, 230 Conn. 713.

In addition, our Supreme Court has rejected the doctrine of selective waiver, which allows a client to disclose privileged communications to certain individuals while maintaining the privilege as to others. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 60–61, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, 558 U.S. 991, 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009). In *Rosado*, the court reasoned that a client "cannot be permitted to pick and choose among [its] opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." (Internal quotation marks omitted.) Id., quoting *Permian Corp.* v. *United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981). This reasoning also supports the application of the subject matter waiver rule, which serves to prevent a party from strategically using the attorney-client privilege to further the client's interests by selective disclosure of otherwise privileged information. See, e.g., *Center Partners, Ltd.* v. *Growth Head GP, LLC*, supra, 981 N.E.2d 357 ("[t]he purpose behind the doctrine of subject matter waiver is to prevent partial or selective disclosure of favorable material while sequestering the unfavorable").

Thus, because the subject matter waiver rule is consistent with this state's precedent and is based on the same fairness principle supporting the implied waiver rule, we adopt it as the law in this state. We find that rule 502 (a) of the Federal Rules of Evidence provides the proper analytical framework for analyzing whether a subject matter waiver has occurred in a particular case.[6] Accordingly, we hold that the voluntary disclosure of a privileged attorney-client communication constitutes a waiver of the privilege as to all other communications concerning the same subject matter when the

[6] Although rule 502 (a) of the Federal Rules of Evidence also applies to waiver of the work product protection, our holding is limited to the waiver

trial court determines that the waiver was intentional and that fairness dictates that the disclosed and undisclosed communications be considered together. Because the waiver must be intentional, "an inadvertent disclosure of protected information can never result in a subject matter waiver." Fed. R. Evid. 502, advisory committee notes.

Finally, if the trial court finds that the subject matter waiver rule applies, it must determine the scope of the waiver, which necessarily involves a fact intensive inquiry into the nature of the disclosed communications, as well as those communications withheld as privileged. See *Fort James Corp.* v. *Solo Cup Co.*, 412 F.3d 1340, 1349–50 (Fed. Cir. 2005) ("[t]here is no bright line test for determining what constitutes the subject matter of a waiver, rather courts weigh the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties of permitting or prohibiting further disclosures"), cert. denied, 547 U.S. 1069, 126 S. Ct. 1768, 164 L. Ed. 2d 515 (2006). Consequently, where a party asserts that the subject matter waiver rule applies on the basis of disclosed communications, a court must review the relevant disclosed and undisclosed communications to determine whether a subject matter waiver has occurred and, upon finding waiver, to define the scope of the waiver. In this regard, the central question for the court is whether the disclosed and undisclosed communications "ought in fairness to be considered together." Fed. R. Evid. 502 (a) (3). The court must exercise its discretion in defining the category of information for which the privilege has been waived, mindful of the fairness principle supporting the subject matter waiver rule—that it would be unfair to allow the privilege to be used as both a sword and a shield.

of the attorney-client privilege, as that is the only issue presented in this writ of error.

II

Having determined that the subject matter waiver rule applies in Connecticut, we now consider the insureds' claim that the court improperly found that they waived the attorney-client privilege in the present case. The insureds argue that (1) the subject matter waiver rule does not apply when privileged communications were disclosed in compliance with a court order, (2) Liberty had a duty to preserve the privilege and, therefore, could not have waived the insureds' privilege by producing the communications, and (3) the court abused its discretion in finding that the privilege was waived without holding an evidentiary hearing and reviewing the relevant communications. Because we conclude that the insureds' third argument is dispositive, we address it first.

A

The insureds argue that the court abused its discretion because it failed to conduct an evidentiary hearing or in camera review of the claimed privileged communications before finding that the insureds had waived the privilege as to those documents. The insureds contend that the court misunderstood the nature of the disclosures and failed to review the relevant documents after the insureds alerted the court to the apparent misunderstanding in their motion for reconsideration. Liberty responds that the court, in its order denying reconsideration, expressly stated that it understood the facts. Liberty also claims that, to the extent there was any confusion, the facts in the record establish that the insureds waived the privilege by selectively disclosing communications regarding the merits of the Ghios' claims in the prior action. We agree with the insureds.

As a preliminary matter, we address the applicable standard of review. The insureds argue that the abuse of discretion standard applies, whereas Liberty contends

that, because the insureds essentially challenge the court's factual finding that they waived the privilege, the clearly erroneous standard applies. Although the insureds, in arguing that an evidentiary hearing or in camera review was required, assert that the court "misunderstood the actual facts and circumstances surrounding the disclosures," they expressly state that the "court's decision cannot stand without at least an evidentiary hearing or an in camera review of the privileged communications." Thus, the insureds are challenging the court's refusal to conduct an evidentiary hearing or in camera review of the privileged communications, not the court's factual findings.

When an appellant claims that the court erred in failing to conduct an evidentiary hearing, this court "consistently [has] held that, unless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court." (Internal quotation marks omitted.) *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 797, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019). Therefore, we agree with the insureds that the abuse of discretion standard applies to this claim.

Under the abuse of discretion standard, "[w]e must make every reasonable presumption in favor of the trial court's action. . . . The trial court's exercise of its discretion will be reversed only [when] the abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Erickson*, 297 Conn. 164, 176, 997 A.2d 480 (2010).

In the present case, the court considered the subject matter waiver issue during a portion of a short hearing regarding multiple issues. The entire discussion of the waiver issue is contained in eighteen pages of the fifty-

four page transcript of the hearing, and the court never reviewed the communications at issue. Instead, the court noted that it had a limited amount of time to hear the parties on the issue and told Schiller to "just give me your very best one that would say Berman provided a document that shows his advice . . . ." In a somewhat confusing exchange, Schiller read two communications from Berman to Liberty; the first communication was not disclosed to the Ghios, but the second one was disclosed.[7] After Schiller read the undisclosed communication, but before he read the disclosed communication, the court interjected: "All right. I—that's enough." Schiller then read the disclosed communication, and the court stated, "I heard it."

We conclude that the court abused its discretion by failing to review the actual documents on which the claim of waiver was based. Instead, the court relied on Schiller's reading of excerpts from two documents, one of which should not have been read because the insureds had instructed Liberty to redact the excerpt and not to produce it to the Ghios. It is unclear from the record how much weight the court placed on the excerpt that should not have been read versus the excerpt that had been produced. In addition, Liberty claimed that it had a notebook full of dozens of documents evidencing the privilege waiver. The insureds disputed Liberty's characterization of those documents. Despite this factual dispute, the court did not review any of the documents. As previously noted in this opinion, determining whether there was a waiver of the attorney-client privilege and defining the scope of any such waiver is a fact intensive inquiry. Given the parties'

[7] This exchange was confusing because, before reading from the undisclosed communication, Schiller stated that "this is post . . . Beard's redacting . . . ." Ordinarily, "post redacting" would mean that the excerpt being read was disclosed after other portions of the document had been redacted.

respective and conflicting positions regarding the import of the documents at issue, the court was required to review the relevant communications before issuing its oral ruling finding that the insureds had waived the privilege as to all communications regarding Berman's analysis of the merits of the Ghios' claims.

In short, given the significance of the privilege and the factual nature of the inquiry, the court's cursory consideration of the issue without reviewing the relevant documents was inadequate. Furthermore, if the court, following a review of the documents, had determined that there had been a subject matter waiver, the court would then have to conduct an in camera review of the claimed privileged documents and "weigh the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties of permitting or prohibiting further disclosures" to determine which documents were covered by the waiver and should be produced. *Fort James Corp.* v. *Solo Cup Co.*, supra, 412 F.3d 1349–50. The court conducted no such review. Accordingly, we remand the case for an evidentiary hearing.

B

Although our resolution of the insureds' third claim is dispositive of this writ of error, we address their remaining claims because they are likely to arise on remand. The insureds claim that the subject matter waiver may not be applied in the present case because (1) the communications were produced pursuant to a court order, (2) Liberty had a duty to preserve the privilege and, therefore, could not have waived the insureds' privilege by producing the communications, and (3) the insureds are not parties to the underlying action.[8] These

[8] Although Liberty argues that these claims are unpreserved and, therefore, we should decline to review them, we address them because they likely will arise on remand. See, e.g., *State* v. *Manuel T.*, 337 Conn. 429, 437 n.7, 254 A.3d 278 (2020) ("[i]n light of our conclusion . . . that the defendant is entitled to a new trial due to the improper exclusion of the text messages,

claims implicate the scope and contours of the subject matter waiver rule and, therefore, our review is plenary. See *Hutchinson* v. *Farm Family Casualty Ins. Co.*, supra, 273 Conn. 38 (whether court properly delineated scope and contours of exception to attorney-client privilege is question of law).

1

First, relying on several federal cases, the insureds argue that, "when a person discloses privileged communications only after being compelled to do so, it cannot be said that the privilege holder sought to gain an unfair advantage through selective disclosure." They argue that a "good faith effort to comply with a court order . . . should not serve as the basis for a subject matter waiver." We are not persuaded.

As previously noted in part I of this opinion, only the *voluntary* disclosure of a privileged attorney-client communication constitutes a waiver of the privilege as to all other communications concerning the same subject matter. When a client is ordered by a court to disclose a privileged communication, the disclosure of that communication would not be a voluntary waiver of the privilege. In the present case, however, Liberty argues that the insureds disclosed privileged communications that were not subject to the court's discovery order and that they did so in order to assist the Ghios in their action against Liberty. In fact, Liberty did not raise the waiver issue until the Ghios filed a motion for summary judgment that included three communications between Berman and Liberty, which the insureds acknowledge were provided to the Ghios *before* the court issued its discovery order. Thus, those communications were not produced pursuant to the court's order. Furthermore, because of the cursory manner in

we would address the proper standard for admission of this evidence even if the issue was unpreserved, as it would be likely to arise on remand").

which the court resolved the waiver issue, it is unclear from the record whether Liberty is relying on other voluntary disclosures made by the insureds that were made beyond the scope of the court's August 6, 2019 discovery order. Consequently, on remand the court must determine which privileged communications were voluntarily disclosed by the insureds and whether fairness requires that the voluntarily disclosed communications and any undisclosed communications regarding the same subject matters be considered together.

2

Second, the insureds contend that, as a matter of law, because Liberty had a duty to preserve the privilege, Liberty could not have waived the insureds' privilege by producing the communications. They argue that, pursuant to the common interest doctrine,[9] Liberty had a duty to preserve the privilege by not disclosing privileged communications, and its failure to so preserve the privilege could not constitute a subject matter waiver of the insureds' privilege. We are not persuaded.

First, this argument ignores the fact that the insureds directly produced privileged communications to the Ghios, which the Ghios then used in support of their motion for summary judgment. Therefore, the insureds waived the attorney-client privilege independent of any action of Liberty. Second, to the extent that there was an additional waiver when Liberty produced documents in response to the court's order, there is no dispute that the insureds, after reviewing and redacting the documents to their satisfaction, instructed Liberty to disclose the communications at issue. Liberty satisfied

[9] "[T]he common interest doctrine extend[s] the attorney-client privilege to any privileged communication shared with another represented party's counsel in a confidential manner for the purpose of furthering a common legal interest." (Internal quotation marks omitted.) *Hanover Ins. Co.* v. *Rapo & Jepsen Ins. Services, Inc.*, 449 Mass. 609, 612, 870 N.E.2d 1105 (Mass. 2007).

its duty to preserve the privilege by relinquishing control of the production of the communications to the insureds, thereby allowing the insureds to decide which communications to disclose pursuant to the court's discovery order. Accordingly, although Liberty produced the relevant communications, it is undisputed that Liberty produced only those communications that the insureds instructed it to produce. Accordingly, this claim fails.

3

Finally, the insureds assert that the subject matter waiver rule should not apply here, because they are not parties to the underlying action and, therefore, "there is no unfair advantage for them to gain . . . ." We disagree.

In the present case, although the insureds are not parties to the litigation, there is no dispute that they assigned their rights under the policy to the Ghios in order to settle the prior action brought against them. This alone would suggest that the insureds have an interest in the underlying action notwithstanding their lack of party status. Moreover, this assertion is undermined by Beard's representations before the court that the insureds had "a real tangible concern about whether or not this throws the door open to all of the underlying analyses of the legal strengths and weaknesses of the underlying case, and what [the Ghios' attorney] said at the beginning of today's hearing only underscores it, which is he's not ruling out the fact that if things don't go his way in this case, he's going to come back and try to drag [the insureds] back into court on the underlying case. And if all of this comes out, suddenly now he's got the entire roadmap for everything that we were going to do in the underlying case."

Furthermore, the subject matter waiver rule properly may be applied to a nonparty if the court determines

that "*the privilege-holder* has attempted to use the privilege as both a sword and a shield or where the attacking party has been prejudiced at trial." (Emphasis added; internal quotation marks omitted.) *In re von Bulow*, supra, 828 F.2d 102–103. In other words, because the focus of the rule is on the abuse of the privilege by the privilege holder, it may be applied where the privilege holder, although not a party to the litigation, has attempted to use the privilege as a sword and a shield.

The writ of error is granted and the case is remanded with direction to hold an evidentiary hearing to determine whether to apply the subject matter waiver rule and, if the rule applies, to identify specifically which documents must be produced.

In this opinion the other judges concurred.

ANGELA FOGEL *v.* RAFAEL FOGEL
(AC 44387)

Cradle, Clark and Harper, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting the defendant's motion to modify alimony. The separation agreement that was incorporated into the judgment of dissolution required the defendant to pay the plaintiff a percentage of his "income from employment" as alimony. The dissolution judgment was subsequently modified by agreement of the parties, and that agreement deleted the provisions defining "income from employment," including language pertaining to phantom income. After a hearing, the trial court granted the defendant's motion to modify alimony on the basis that he had been involuntarily terminated from his employment at F Co., and, therefore, concluded that he did not have the ability to pay his remaining alimony obligation. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendant's motion for modification of alimony: the defendant testified that his termination from F Co. was involuntary, partners and/or directors of F Co. testified that the defendant's termination was involuntary, and because there was evidence that he was involuntarily terminated, this court could not conclude that the court's

factual determination was clearly erroneous; moreover, although the plaintiff claimed that the court abused its discretion in declining to consider phantom income allocated to the defendant in determining his ability to pay alimony, the plaintiff relied on language in the dissolution judgment that defined income from employment, and this reliance was misplaced because the original judgment was superseded by the subsequent modification; furthermore, the court did not fail to consider the applicable statutory (§ 46b-82) criteria, as the court referenced the statutory factors and discussed many of them in its decision.

Argued February 15—officially released May 31, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Schofield*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Colin*, *J.*, approved a stipulation of the parties to modify the judgment; subsequently, the court, *Hon. Michael E. Shay*, judge trial referee, granted the defendant's motion to modify alimony, and the plaintiff appealed to this court. *Affirmed.*

Kenneth M. Potash, with whom was *Rebecca L. DeBiase*, for the appellant (plaintiff).

Campbell D. Barrett, with whom was *Johanna S. Katz*, for the appellee (defendant).

Opinion

PER CURIAM. In this matter arising from the dissolution of the parties' marriage, the plaintiff, Angela Fogel, appeals from the judgment of the trial court granting a motion to modify alimony filed by the defendant, Rafael Fogel.[1] On appeal, the plaintiff claims that the

[1] Although the appeal form filed by the plaintiff indicates that she is appealing from the trial court's November 2, 2020 decision, in which the court also denied the plaintiff's motion for contempt that alleged that the defendant had wilfully failed to pay his alimony obligation, the plaintiff has not challenged the court's denial of her motion for contempt in her brief to this court.

court erred in (1) finding that the defendant had been involuntarily terminated from his employment, (2) declining to consider "phantom income"[2] for purposes of determining the defendant's alimony obligation, and (3) failing to consider all of the factors set forth in General Statutes § 46b-82 in deciding whether to modify the defendant's alimony obligation. We affirm the judgment of the trial court.

The following procedural history is relevant to the plaintiff's claims on appeal. The marriage of the parties was dissolved on February 5, 2009. Pursuant to the separation agreement that was incorporated into the judgment of dissolution, the defendant was required to pay the plaintiff $16,666.67 per month as unallocated alimony and child support, plus an additional percentage of his gross "income from employment," until the death of either party, the remarriage of the plaintiff, or January 31, 2019, whichever occurred first. The term "income from employment" was defined in detail in the separation agreement and provided, inter alia, that "[d]istributions which are solely distributions to provide for income taxes on phantom income and which are indicated as such in a communication prepared in the ordinary course of business from the payor to the defendant, shall not be included as income from employment in calculating support payments due."

On February 27, 2017, the dissolution judgment was modified by agreement of the parties. The parties' agreement modified the dissolution judgment in that it deleted the provisions that defined "income from employment,"

[2] "Phantom income is an accounting term given to income generated by [a] . . . limited liability company . . . or [a] . . . limited partnership . . . that hasn't been distributed to the members. It's called phantom income because it exists on paper. It's taxable income and you pay tax on it, even though there is no cash that comes to you." (Internal quotation marks omitted.) *Bongiorno* v. *J & G Realty, LLC*, Docket No. CV-12-6014465-S, 2019 WL 1875510, *28 (Conn. Super. March 12, 2019).

including the language pertaining to " 'phantom income.' " The agreement also provided, inter alia, that the defendant would make certain payments to the plaintiff as alimony, until January 31, 2019, and that the payments were modifiable only in the event that "[t]he defendant is involuntarily terminated from his current job at Falcon Investment Advisors, LLC [(Falcon)] . . . ."

On January 2, 2018, the defendant filed a motion to modify alimony, alleging a substantial change in circumstances in that he had been involuntarily terminated from his job at Falcon on May 12, 2017. On February 6, 2018, the plaintiff filed a motion for contempt, alleging that the defendant unilaterally reduced his alimony payment to her for the month of February, 2018.

On November 2, 2020, following a three day hearing, the court filed a memorandum of decision in which it granted the defendant's motion to modify alimony and denied the plaintiff's motion for contempt. The court found that, although the defendant and Falcon had executed a "Transition Agreement," which indicated that the defendant had "retired," the defendant had, in fact, been terminated involuntarily for making an investment that cost Falcon more than $40,000,000. The court further found that, since his termination, the defendant had been unable to secure employment at a comparable salary. The court therefore concluded that there had been a substantial change in circumstances and that the defendant did not have the ability to pay his remaining alimony obligation. In so concluding, the court rejected the plaintiff's argument that the defendant had the ability to pay based on his receipt of approximately $3.2 million in " 'phantom income' " in 2018. The court held that the " 'phantom income' " was "not available to the defendant for his use" and declined to consider it in determining his ability to pay alimony. Accordingly, the court granted the defendant's motion to modify and terminated his alimony obligation. The court also found

that the plaintiff failed to meet her burden to demonstrate that the defendant wilfully failed to pay the alimony order and denied her motion for contempt. This appeal followed.

On appeal, the plaintiff claims that the court erred in (1) finding that the defendant had been involuntarily terminated from his employment, (2) declining to consider "phantom income" for purposes of determining the defendant's alimony obligation, and (3) failing to consider all of the factors set forth in § 46b-82 in deciding whether to modify the defendant's alimony obligation. We disagree.

"[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . 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.) *Coleman* v. *Bembridge*, 207 Conn. App. 28, 33–34, 263 A.3d 403 (2021).

The plaintiff first argues that the court erroneously found that the defendant was involuntarily terminated from his position at Falcon, where there was "evidence that he [had] retired." In so arguing, the plaintiff misunderstands the scope of our review. In determining whether a trial court's factual finding is clearly erroneous, we

examine the record to determine whether there is any evidence to support that finding, not whether there is evidence to support a different finding or whether there is an alternative interpretation of the evidence. At the hearing, the defendant testified that his termination from Falcon was not voluntary. Five of the partners and/or directors of Falcon also testified that the defendant's termination was not voluntary. Thus, although the transition agreement between the defendant and Falcon indicated that the defendant retired, there was evidence presented to the court that he was involuntarily terminated. Because there is evidence in the record that supports the court's finding that the defendant was involuntarily terminated, we cannot conclude that this factual determination was clearly erroneous.

The plaintiff next argues that the court abused its discretion in declining to consider "phantom income" allocated to the defendant in 2018 in determining his ability to pay alimony. In so arguing, the plaintiff relies heavily on the language of the original dissolution judgment that set forth a detailed definition of the term "income from employment," which, the plaintiff contends, did not exclude "phantom income." The plaintiff's reliance on the original dissolution judgment is misplaced because that judgment was modified in 2017, deleting the definition of "income from employment" on which the plaintiff now relies. The plaintiff concedes that the dissolution judgment was superseded by the parties' 2017 agreement.[3] The plaintiff's argument is therefore without merit.[4]

[3] Because the 2017 modification superseded the 2009 judgment, we need not determine whether the plaintiff's interpretation of the 2009 judgment is correct.

[4] At oral argument before this court, the plaintiff's counsel argued that the trial court made a legal error in declining to consider the defendant's "phantom income" in determining his ability to pay alimony. Because the plaintiff raised this issue for the first time at oral argument, it is not properly before us. *Rousseau* v. *Weinstein*, 204 Conn. App. 833, 855, 254 A.3d 984 (2021) ("[i]t is well settled that claims on appeal must be adequately briefed,

Finally, the plaintiff contends that the court failed to consider the statutory criteria set forth in § 46b-82[5] when it terminated the defendant's alimony obligation. Specifically, the plaintiff asserts that the court considered only the defendant's net income. The plaintiff's argument is belied by the court's memorandum of decision, in which the court specifically referenced the statutory factors and discussed many of them, such as the age, health and education of the parties, and their respective incomes. It is well settled that a court need not recite each of the statutory factors that it considers or give equal weight to those factors. *Oudheusden* v. *Oudheusden*, 338 Conn. 761, 769, 259 A.3d 598 (2021). Moreover, the plaintiff's argument in this regard is simply a recasting of her claim that the trial court failed to consider the defendant's "phantom income" when it determined that he no longer had the ability to pay alimony. Because we have concluded that the court did not err in doing so, this claim also fails.

The judgment is affirmed.

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and cannot be raised for the first time at oral argument before the reviewing court" (internal quotation marks omitted)).

[5] General Statutes § 46b-82 provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ."