CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE OMAR I. ET AL.*
(AC 45092)

Alvord, Prescott and DiPentima, Js.

Syllabus

The respondent father, whose parental rights to his three minor children previously had been terminated, appealed to this court from the judgment of the trial court denying his motion to open and set aside the adoptions of the children, claiming that he had not received timely and proper notice of the court's prior ruling regarding his amended petition for a new trial. *Held* that, although the trial court properly determined that the respondent father lacked standing to challenge the adoption decrees, that court having correctly determined that, because notice of its ruling regarding his amended petition for a new trial had been sent timely and properly, the father's parental rights had been adjudicated fully and fairly prior to its issuance of the decrees, the court should have dismissed the father's motion rather than denied it on its merits.

Argued May 25—officially released July 20, 2022**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' three minor children

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

** July 20, 2022, the date this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

neglected, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Lobo*, *J.*; judgments adjudicating the minor children neglected and committing them to the custody of the Commissioner of Children and Families; thereafter, petitions by the three minor children to terminate the respondent parents' parental rights, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session, and tried to the court, *Burgdorff*, *J.*; subsequently, the court, *Burgdorff*, *J.*, denied the respondent father's motions to revoke the court's order committing the minor children to the custody of the Commissioner of Children and Families and rendered judgments terminating the respondents' parental rights, from which the respondent father appealed to this court, *Lavine*, *Keller* and *Bishop*, *Js.*, which affirmed the judgments of the trial court; thereafter, the trial court, *Huddleston*, *J.*, rendered judgment denying the motion of the respondent father to open and set aside adoption decrees issued for the minor children, from which the respondent father appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed*.

Ammar I., self-represented, the appellant (respondent father).

Andrei Tarutin, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner Commissioner of Children and Families).

Brian T. Walsh, assigned counsel, with whom, on the brief, were *Katarzyna Maluszewski*, assigned counsel, and *Robert W. Lewonka*, assigned counsel, for the appellees (minor children).

Opinion

PER CURIAM. The self-represented respondent, Ammar I., whose parental rights had been terminated in a prior

proceeding,[1] appeals from the judgment of the trial court denying his motion to open and set aside the adoptions of his three minor children, Omar I., Safiyah I. and Muneer I.,[2] on the ground that he lacked standing under *In re Zen T.*, 165 Conn. App. 245, 252–54, 138 A.3d 469, cert. denied, 322 Conn. 905, 138 A.3d 934 (2016), cert. denied sub nom. *Heather S.* v. *Connecticut Dept. of Children and Families*, 580 U.S. 1135, 137 S. Ct. 1111, 197 L. Ed. 2d 214 (2017). On appeal, the respondent claims that he did not receive timely and proper notice of the court's July 27, 2021 ruling regarding his amended petition for a new trial so that the court incorrectly determined that he lacked standing to challenge the adoption decrees issued on August 20, 2021. We conclude that, because the court correctly determined that notice of its July 27, 2021 decision had been sent properly to the respondent the same date as its issuance, the respondent's parental rights had been adjudicated fully and fairly prior to the issuance of the adoption decrees. Thus, the court properly determined that the respondent lacked standing to challenge the adoption decrees.[3] See *In re Zen T.*, supra, 252–54; see also Practice Book § 7-5 ("[t]he clerk shall give notice, by mail *or by electronic delivery*, to the attorneys of record and self-represented parties" (emphasis added)).

We further conclude, however, that the form of the court's judgment is improper. The court should have

[1] See *In re Omar I.*, 197 Conn. App. 499, 504, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020).

[2] The three minor children, each of whom is represented by separate counsel, filed a single brief. Counsel for the Commissioner of Children and Families and counsel for Omar participated in oral argument before this court.

[3] In light of our conclusion that he lacked standing to pursue his motion to open and set aside the adoptions, we need not address the respondent's claim that his procedural due process rights were violated by the court's failure to hold a hearing.

dismissed, rather than denied, the motion to open and set aside. Accordingly, we reverse the judgment and remand the case to the trial court with direction to dismiss the motion to open and set aside. See *State* v. *Tabone*, 301 Conn. 708, 715, 23 A.3d 689 (2011) ("[w]hen a trial court mistakenly denies a motion instead of dismissing it for lack of subject matter jurisdiction, the proper remedy is to reverse the order denying the motion and remand the case with direction to dismiss the motion").

The form of the judgment is improper; the judgment is reversed and the case is remanded with direction to render judgment dismissing the motion to open and set aside the adoption decrees.

CHERYL ABBOTT OLSON *v.* BRIAN MATTHEW OLSON
(AC 44033)

Elgo, Clark and Bishop, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved pursuant to a foreign judgment of dissolution, appealed to this court from the judgment of the trial court dismissing his motion for modification of alimony for lack of subject matter jurisdiction. The parties, who were United States citizens, had been married in Pennsylvania. The parties moved to the United Kingdom, where a court later dissolved the parties' marriage, incorporating the parties' consent order into its final judgment. The consent order provided for the distribution of the parties' property and assets and for the payment of maintenance, including spousal and child support. The parties thereafter moved back to the United States, and the plaintiff filed the United Kingdom divorce decree with the trial court in Connecticut. The plaintiff filed a motion, seeking to enforce the parties' judgment of dissolution and to approve two qualified domestic relations orders, which the trial court granted. Both parties subsequently filed motions for modification of alimony, which the trial court considered but denied on the basis of a failure of supporting evidence and procedural defects in the plaintiff's motion. Thereafter, the defendant filed another motion for modification of alimony on the basis of the plaintiff's cohabitation with a third party. The plaintiff filed her own

motion to modify alimony and child support, seeking an increase of both, then filed a motion to dismiss the defendant's motion for modification of alimony for lack of subject matter jurisdiction. The court granted the plaintiff's motion to dismiss on the basis of its belief that the United Kingdom had continuing, exclusive jurisdiction over the spousal support order. Specifically, the court, relying on an order of the United Kingdom regarding the reciprocal enforcement of maintenance orders with the United States, concluded that neither party provided it with evidence that the courts of the United Kingdom released or waived their exclusive jurisdiction over its spousal support order. *Held* that the trial court improperly dismissed the defendant's motion for modification of alimony on the basis that it lacked subject matter jurisdiction: it was unclear whether the provisions in the United Kingdom order relied on by the plaintiff were even applicable to the circumstances presented in this case, as certain conditions precedent to its application had not been fulfilled, and, even assuming that the provisions of the order were applicable, nowhere in the context of the order was it manifest that the United Kingdom retained exclusive, rather than concurrent, jurisdiction to modify the spousal support order at issue; moreover, the trial court did not rely on any particular provisions of the order to support its conclusion that it lacked jurisdiction and, instead, cited to an explanatory note that was not part of the order and should not have been considered; furthermore, this court found no other United Kingdom authority that made clear that the United Kingdom retained exclusive jurisdiction, and, therefore, the trial court had subject matter jurisdiction to consider the defendant's motion pursuant to the applicable statute (§ 46b-321).

(One judge dissenting)

Argued January 12—officially released July 26, 2022

Procedural History

Action to register a foreign judgment of dissolution, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Wenzel*, *J.*, granted the plaintiff's motion seeking to enforce the judgment of dissolution and approve certain qualified domestic relations orders; thereafter, the court, *S. Richards*, *J.*, denied the parties' motions for modification of alimony; subsequently, the court, *McLaughlin*, *J.*, dismissed the defendant's motion for modification of alimony for lack of subject matter jurisdiction, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Alexander J. Cuda, for the appellant (defendant).

Thomas M. Shanley, for the appellee (plaintiff).

Opinion

BISHOP, J. The defendant, Brian Matthew Olson, appeals from the judgment of the trial court granting a motion to dismiss filed by the plaintiff, Cheryl Abbott Olson, in which the court concluded that it lacked subject matter jurisdiction to modify the parties' spousal support order that had been issued by a court of the United Kingdom. On appeal, the defendant claims that the trial court erred in dismissing his motion for modification of alimony on the basis that it lacked subject matter jurisdiction, and argues that (1) the court misapplied the Uniform Interstate Family Support Act, General Statutes § 46b-301 et seq., in determining that the United Kingdom had continuing, exclusive jurisdiction over the spousal support order; (2) the United Kingdom could not have continuing, exclusive jurisdiction because it lost its exclusiveness when the trial court, *S. Richards, J.*, decided motions to modify alimony in 2013; (3) the application of the doctrine of comity demonstrates that Connecticut courts have jurisdiction to modify the foreign country order in this case; (4) the trial court erred in its reliance on this court's decision in *Hornblower* v. *Hornblower*, 151 Conn. App. 332, 94 A.3d 1218 (2014); and (5) the court erroneously relied on a United Kingdom statutory instrument, the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007, in determining that the United Kingdom had continuing, exclusive jurisdiction to modify the support order. On the basis of our thorough review of the record and the applicable law, we agree with the defendant that the court erred in concluding that it lacked subject matter jurisdiction to modify the spousal support order at issue. Accordingly, we reverse the judgment of the trial court.

The record reveals the following facts and procedural history. The parties, who are United States citizens,

were married on May 30, 1998, in Doylestown, Pennsylvania. The parties later moved to the United Kingdom and were present there in November, 2009. On December 16, 2009, a court of the United Kingdom dissolved the parties' marriage and incorporated the parties' November 19, 2009 consent order into its final judgment. The consent order was a separation agreement, which provided for the distribution of the parties' property and assets and for the payment of spousal and child support.

In or around 2010, the parties moved back to the United States. The plaintiff relocated to Connecticut and the defendant moved to New York. On April 5, 2010, the plaintiff filed the United Kingdom divorce decree with the trial court in Connecticut under principles of comity. On January 25, 2011, the plaintiff filed a motion seeking an order to enforce the parties' foreign judgment of dissolution and approve two Qualified Domestic Relations Orders (QDROs) prepared by an attorney retained by both parties. On March 7, 2011, the court, *Wenzel*, *J.*, granted, by agreement of the parties, the plaintiff's motion for order to enforce judgment, postjudgment, and entered the two QDROs as orders of the court.

Subsequently, in May, 2011, the plaintiff sought a modification of alimony in the Superior Court for the judicial district of Stamford-Norwalk. She argued, among other things, that the parties' marital judgment provides that "[e]ither party will remain at liberty during the continuation of the periodical payments to apply for an upward or downward variation, or termination or capitalism of such maintenance." (Internal quotation marks omitted.) Accordingly, she argued that a "substantial change of circumstances has arisen since the entry of the orders of the [United Kingdom] court on December 16, 2009, in that the defendant's income from

employment, salary, and bonus structure have significantly changed such that the plaintiff's receipt of alimony is greatly reduced based upon the present formula."

On July 5, 2012, the defendant similarly sought a modification of the spousal support order in the same court as the plaintiff's filing, alleging that the plaintiff began living with another person, resulting in a change in the circumstances contemplated in General Statutes § 46b-86 (b).

The trial court, *S. Richards*, *J.*, considered the motions for modification but ultimately denied them in a memorandum of decision dated October 4, 2013. The court did not deny the motions for modification on the basis of a want of jurisdiction; rather, the motions were denied because of a failure of supporting evidence and procedural defects in the plaintiff's motion.[1] The court stated that the "the plaintiff requests a modification of the court-ordered alimony under paragraph 2 (d) of the parties' separation agreement based on a substantial change in circumstances. Upon reviewing the plaintiff's pleading, the court denies the plaintiff's motion for modification on the grounds that the plaintiff failed to state the specific factual and legal basis for the claimed modification in accordance with Practice Book § 25-26 (e), failed to provide the court with the applicable substantive law of the controlling jurisdiction and failed to provide the court with currency conversion calculations." The court similarly denied the defendant's motion for modification, concluding that the "defendant did not provide the court with any evidence of the applicable substantive law of the controlling jurisdiction that would permit the modification of alimony on the basis

[1] During oral argument before this court and in her appellate brief, the plaintiff asserted that the court in 2013 had denied the parties' respective motions for modification on the basis that the court lacked jurisdiction. This is not an accurate portrayal of the court's memorandum of decision.

of a showing of cohabitation or a substantial change in circumstances pursuant to Connecticut law." However, the court exercised jurisdiction over the marital judgment by ordering the defendant to make specific payments in accordance with it, to wit, payments of $8552 and $184,479, which represented the plaintiff's share of certain stock owed to her.

On August 19, 2019, the defendant filed a new motion for modification of alimony asking the court to modify alimony due to the plaintiff's cohabitation. On September 11, 2019, the plaintiff also filed her own motion to modify alimony and child support seeking an increase of both. In October, 2019, the parties worked with the caseflow office of the Superior Court for the judicial district of Stamford-Norwalk to schedule the motions to be heard on January 28, 2020.

On January 23, 2020, five days before the scheduled hearing, the plaintiff filed a motion to dismiss the defendant's motion to modify alimony, arguing for the first time that the court lacked subject matter jurisdiction to modify the judgment. On January 27, 2020, the defendant filed an objection to the plaintiff's motion through which he argued, inter alia, that the court had jurisdiction to consider the motion and that "the plaintiff's position sets up a double standard that cannot possibly be sustained: that when the plaintiff sought modification of the existing alimony order in 2011, this court had jurisdiction to consider such motion but now that the defendant seeks the same relief, the court lacks jurisdiction to act." (Emphasis omitted.) He argued that the "plaintiff's sole purpose in filing the motion to dismiss is to delay the impending hearing on the defendant's motion to modify. . . . If the plaintiff genuinely had a question as to this court's subject matter jurisdiction, that objection would have, and should have, been raised in 2010 when the plaintiff asked this court to domesticate the judgment, in 2011 when the plaintiff

filed her first motion to modify alimony, or prior to the plaintiff filing her pending motion seeking a modification of alimony and child support, rather than five days before the scheduled hearing." (Emphasis omitted.) The defendant also noted that the plaintiff filed a motion to dismiss solely with respect to the defendant's motion for modification despite her also having filed a motion for modification.

In a memorandum of decision dated February 21, 2020, the trial court, *McLaughlin*, *J.*, concluded that the court did not have subject matter jurisdiction to modify the parties' foreign country spousal support order on the basis of its belief that the United Kingdom had continuing, exclusive jurisdiction over it. In particular, the court stated that, "under the United Kingdom's Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 ([REMO]), the courts of the United Kingdom keep exclusive jurisdiction over all maintenance orders." In support of this conclusion, the court quoted the explanatory note to the REMO, which states in relevant part: "The principal modification effected by [the REMO] is that a maintenance order made in the United States of America may not be varied or revoked in the United Kingdom and that a maintenance order made in the United Kingdom may not be varied or revoked in the United States of America (see sections 5 and 9 in Schedule 2)." The court, however, recognized that the explanatory note is not a part of the REMO itself. The court then stated: "Neither party provided the court with evidence that the courts of the United Kingdom have released or waived their exclusive jurisdiction to modify the maintenance orders in the consent order. While the court recognizes that all parties currently reside in the United States of America, including the minor children, which may make modification of support orders more complicated, based on the clear language of [General Statutes] § 46b-321 (b),

this court lacks subject matter jurisdiction to modify the United Kingdom's spousal support orders." The defendant timely appealed.

This case requires us to interpret the Uniform Interstate Family Support Act (UIFSA) to determine whether Connecticut courts lack subject matter jurisdiction to modify spousal support orders issued by a court of the United Kingdom. See General Statutes § 46b-301 et seq. The plaintiff argues that the court properly interpreted UIFSA in reaching its conclusion that the court lacked subject jurisdiction. The defendant argues that the court's determination was erroneous. We agree with the defendant.

We begin with the standard of review governing a trial court's disposition of a motion to dismiss that challenges jurisdiction. "A determination regarding a trial court's subject matter jurisdiction is a question of law." (Internal quotation marks omitted.) *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 276, 105 A.3d 857 (2015). "[O]ur review of the court's ultimate legal conclusion[s] and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Feehan* v. *Marcone*, 331 Conn. 436, 446, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019). "In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Markley* v. *State Elections Enforcement Commission*, 339 Conn. 96, 106, 259 A.3d 1064 (2021). "[T]he Superior Court of this state as a court of law is a court of general jurisdiction. It has jurisdiction of all matters expressly committed to it and of all others cognizable by any law court of which the exclusive jurisdiction is not given to some other court. The fact that no other court has exclusive

jurisdiction in any matter is sufficient to give the Superior Court jurisdiction over that matter." (Internal quotation marks omitted.) *In re Joshua S.*, 260 Conn. 182, 215, 796 A.2d 1141 (2002). "[T]he general rule of jurisdiction . . . is that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and . . . nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly so alleged. . . . [N]o court is to be ousted of its jurisdiction by implication." (Internal quotation marks omitted.) *Raftopol* v. *Ramey*, 299 Conn. 681, 695, 12 A.3d 783 (2011).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [we] first . . . consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Kinsey* v. *Pacific Employer Ins. Co.*, 277 Conn. 398, 405, 891 A.2d 959 (2006).

As background, UIFSA is one of numerous uniform acts drafted by the National Conference of Commissioners on Uniform State Laws in the United States. "UIFSA,

which has been adopted by all states,[2] including Connecticut, governs the procedures for establishing, enforcing and modifying child and spousal support, or alimony, orders, as well as for determining parentage when more than one state is involved in such proceedings." (Footnote added; footnote omitted.) *Hornblower* v. *Hornblower*, supra, 151 Conn. App. 333; see also General Statutes § 46b-301 et seq.; *Studer* v. *Studer*, 320 Conn. 483, 487, 131 A.3d 240 (2016).

In this appeal, we are asked to determine whether § 46b-321 (b) divested the court of subject matter jurisdiction to modify the United Kingdom spousal support order that is at the heart of this dispute. Section 46b-321 (b) provides: "A tribunal of this state may not modify a spousal support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country."[3] From this text, it is clear that, although Connecticut courts do not have subject matter jurisdiction over a spousal support order issued by a court of another state or a foreign country having *continuing, exclusive jurisdiction* over that order, a Connecticut court *does* have subject matter jurisdiction to modify a spousal support order issued in another state or a foreign country if that state or foreign country

[2] In 1996, Congress mandated the enactment of UIFSA as a precondition to states' eligibility for obtaining federal grant money to fund child and spousal support programs. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 321, 110 Stat. 2105, 2221, codified as amended at 42 U.S.C. § 666 (f). Congress later passed the Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301 (f), 128 Stat. 1919, 1944–95 (2014), requiring states to adopt amendments to UIFSA, again as a precondition to certain federal funding. Connecticut adopted these amendments pursuant to No. 15-71 of the 2015 Public Acts, titled "An Act Adopting the Uniform Interstate Family Support Act of 2008."

[3] We note that the jurisdictional rules under UIFSA differ for child support orders. See General Statutes § 46b-393; see also General Statutes §§ 46b-315 and 46b-388.

does not, by the terms of its laws, maintain continuing, *exclusive* jurisdiction over the spousal support order at issue. Accordingly, we must determine whether the United Kingdom, under its laws, has continuing, *exclusive* jurisdiction to modify the spousal support order in question.[4]

Both before the trial court and this court, the plaintiff argued that the REMO[5] makes clear that the United Kingdom retains continuing, exclusive jurisdiction to modify the spousal support order at issue and that the trial court correctly so held. The defendant argues that the United Kingdom does not have continuing, exclusive jurisdiction to modify the spousal support order, and argues that the REMO does not preclude a Connecticut court from modifying the United Kingdom support order at issue.

The trial court, in determining that the United Kingdom maintained exclusive jurisdiction over the present spousal support order, stated: "[U]nder the United Kingdom's Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 . . . the courts of the United Kingdom keep exclusive jurisdiction over all maintenance orders. There is no distinction in the [REMO] of spousal support [versus] child support. The term 'maintenance orders' appears to apply to both.

[4] Although not material to the question before us, it appears that all the states of the United States, by adopting UIFSA, maintain continuing, exclusive jurisdiction to modify spousal support orders originally issued in each respective state. See Thomson Reuters, Alimony, Maintenance, and other Spousal Support, 50 STATE STATUTORY SURVEYS: Family Law: Divorce and Dissolution (May 2021); see also General Statutes § 46b-321 (a) ("[a] tribunal of this state issuing a spousal support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation").

[5] REMO is a United Kingdom order, which, among other things, designates the United States of America as a reciprocating country with the United Kingdom for the purposes of the Maintenance Orders (Reciprocal Enforcement) Act, 1972, c. 18 (U.K.).

Moreover, the court found the explanatory notes of this order instructive. The explanatory notes state in pertinent part '[t]he principal modification effected by [the REMO] is that a maintenance order made in the United States of America may not be varied or revoked in the United Kingdom and that a maintenance order made in the United Kingdom may not be varied or revoked in the United States of America (see sections 5 and 9 in Schedule 2).' " (Emphasis in original; footnote omitted.)

Our review of the REMO mandates a different conclusion. First, there is a serious question as to whether the provision in the REMO relied on by the plaintiff for her contention that the United Kingdom retains exclusive jurisdiction to modify the order is even applicable to the circumstances presented. Section 5 of Schedule 2 of the REMO, titled "Variation and revocation of maintenance order made in United Kingdom," begins: "(1) This section applies to *a maintenance order certified copies of which have been sent in pursuance of section 2 to the United States of America for enforcement*." (Emphasis added.) Reciprocal Enforcement of Maintenance Orders (United States of America) Order, 2007, S.I. 2007/2005, schedule 2, § 5 (U.K.). Section 2 of Schedule 2 details the process by which a party may obtain and send certified copies to the United States.[6] It thus

[6] Section 2 of Schedule 2 provides: "(1) Subject to subsection (2) below, where the payer under a maintenance order made, whether before, on or after 1st October 2007, by a court in the United Kingdom is residing or has assets in the United States of America, the payee under the order may apply for the order to be sent to the United States of America for enforcement.

"(2) Subsection (1) above shall not have effect in relation to an order made by virtue of a provision of Part II of this Act.

"(3) Every application under this section shall be made in the prescribed manner to the prescribed officer of the court which made the maintenance order to which the application relates.

"(4) If, on an application duly made under this section to the prescribed officer of a court in the United Kingdom, that officer is satisfied that the payer under the maintenance order to which the application relates is residing or has assets in the United States of America, the following documents, that is to say—

appears that fulfillment of the requirements under section 2 is a condition precedent to section 5's application. None of those conditions was fulfilled in this case because, as noted, the United Kingdom judgment was simply registered in Connecticut pursuant to common-law notions of comity.

Second, even if we were to assume that the provisions in the REMO relied on by the plaintiff are applicable to the circumstances presented here, nowhere in the context of the REMO is it manifest that the United Kingdom retains *exclusive* jurisdiction to modify the spousal support order at issue. Section 5 of Schedule 2 of the REMO further provides: "(2) The jurisdiction of a court in the United Kingdom to revoke, revive or vary a maintenance order shall be exercisable notwithstanding that the proceedings for the revocation, revival

"(a) three certified copies of the maintenance order;

"(b) a certificate signed by that officer certifying that the order is enforceable in the United Kingdom;

"(c) a certificate of arrears so signed or, in Scotland, signed by the applicant or his solicitor;

"(d) a sworn statement signed by the payee giving the following information—

"(i) the address of the payee;

"(ii) such information as is known as to the whereabouts of the payer; and

"(iii) a description, so far as is known, of the nature and location of any assets of the payer available for execution;

"(e) a statement giving such information as the officer possesses for facilitating the identification of the payer; and

"(f) where available, a photograph of the payer;

shall be sent by that officer, in the case of a court in England and Wales or Northern Ireland, to the Lord Chancellor, or, in the case of a court in Scotland, to the Scottish Ministers, with a view to their being transmitted by him to the responsible authority in the United States of America if he is (or they are) satisfied that the statement relating to the whereabouts of the payer and the nature and location of his assets gives sufficient information to justify that being done.

"(5) Nothing in this section shall be taken as affecting any jurisdiction of a court in the United Kingdom with respect to a maintenance order to which this section applies, and, subject to section 5 below, any such order may be enforced, varied or revoked accordingly." Reciprocal Enforcement of Maintenance Orders (United States of America) Order, 2007, S.I. 2007/2005, schedule 2, § 2 (U.K.).

or variation, as the case may be, of the order are brought by or against a person residing in the United States of America." Section 5 then sets forth certain conditions related to notice that a court of the United Kingdom must undergo before it makes any variation or revocation to an order originally made in the United Kingdom.

Although it appears from these provisions that the United Kingdom maintains continuing jurisdiction to modify a spousal support order initiated in the United Kingdom, as noted, we have not found any language in the REMO that demonstrates that the United Kingdom keeps *exclusive*, rather than *concurrent*, jurisdiction to modify the spousal support order in this case. To import language into the REMO that is not present would, in our view, not only be legally incorrect, but it would work an unreasonable burden on the parties in this case—two citizens of the United States who have returned home to the United States with no indication that they intend to return to the United Kingdom. While the states of the United States have made explicit in their laws that their jurisdiction over such orders is "exclusive,"[7] the United Kingdom's REMO is conspicuously devoid of similar limiting language.

We note, in particular, that in rendering its decision, the trial court did not cite to any particular provisions of the REMO to support its conclusion that it lacked

[7] See, e.g., General Statutes § 46b-321 (a) ("[a] tribunal of this state issuing a spousal support order consistent with the law of this state has continuing, *exclusive* jurisdiction to modify the spousal support order throughout the existence of the support obligation" (emphasis added)); Mass. Gen. Laws c. 209D, § 2-211 (a) (Cum. Supp. 2021) ("[a] tribunal of the commonwealth issuing a spousal support order consistent with the law of the commonwealth has continuing, *exclusive* jurisdiction to modify the spousal support order throughout the existence of the support obligation" (emphasis added)); N.Y. Jud. Ct. Acts § 580-211 (a) (McKinney Cum. Supp. 2021) ("[a] tribunal of this state issuing a spousal-support order consistent with the law of this state has continuing, *exclusive* jurisdiction to modify the spousal-support order throughout the existence of the support obligation" (emphasis added)).

jurisdiction. Rather, it cited to an "Explanatory Note" published at the end of the order, which states in no uncertain terms: "This note is not part of the Order." See *Rubie's Costume Co.* v. *United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003) (explanatory notes not legally binding in international tariff dispute). Connecticut courts "cannot, by judicial construction, read into legislation provisions that clearly are not contained therein." (Internal quotation marks omitted.) *Regan* v. *Regan*, 143 Conn. App. 113, 121, 68 A.3d 172, cert. granted, 310 Conn. 923, 77 A.3d 140 (2013) (appeal dismissed October 15, 2014). Because the order was clear and unambiguous as written, it was inappropriate for the court to go beyond the text of the law. See *Apple, Inc.* v. *United States*, 964 F.3d 1087, 1095–96 (Fed. Cir. 2020) (explanatory notes "cannot be used to . . . create ambiguity").[8]

In addition to our review of the REMO, we similarly have found no other United Kingdom authority that makes clear to this court that the United Kingdom retains exclusive jurisdiction over the spousal support order at issue. We note that the plaintiff provided very little to both this court and the trial court about the foreign law and how it demonstrates the United Kingdom's exclusivity to modify the order. Other than providing a brief history of UIFSA and a copy of the REMO, it provided little or no context, cases, or analysis of how the REMO, a 2007 United Kingdom order, is interpreted by United Kingdom courts; how it was affected, if at all, by the ratification of the Hague Convention on the International Recovery of Child Support and Other

[8] Although the dissent has found some United Kingdom case law to suggest that some United Kingdom courts in some contexts have used explanatory notes as aids to statutory construction in the United Kingdom, it is far from clear that this practice is commonplace there, and, even if so, whether judges in the United States should yield their well trodden methods of statutory construction to the preferences of a foreign legislative body and judiciary.

Forms of Family Maintenance by the European Union in 2014; or if there was any impact on the REMO in light of the United Kingdom's withdrawal (or rather the then anticipated withdrawal) from membership in the European Union.

At bottom, "[i]t is not the court's duty, unaided by the [plaintiff], to scour the annals of the law of the . . . United Kingdom in an effort to locate or to fashion a hook upon which [her motion] can be hung." *Heath* v. *American Sail Training Assn.*, 644 F. Supp. 1459, 1471 (D.R.I. 1986). In light of the foregoing, and in light of the well-known maxim that "every presumption favoring jurisdiction should be indulged"; (internal quotation marks omitted) *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 226, 105 A.3d 210 (2014); we conclude that the trial court did not lack subject matter jurisdiction to entertain the defendant's motion to modify alimony.[9]

[9] The defendant makes various other arguments in support of his claim that the court erred in determining that it lacked subject matter jurisdiction. Among these arguments is his contention that the plaintiff should be precluded, under the rationale employed in *Sousa* v. *Sousa*, 322 Conn. 757, 143 A.3d 578 (2016), from challenging subject matter at this late juncture because it amounts to an impermissible collateral attack. See id., 771–72 ("[A]lthough challenges to subject matter jurisdiction may be raised at any time, it is well settled that [f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal. . . . [A]t least where the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if [she] did have such an opportunity, whether there are strong policy reasons for giving [her] a second opportunity to do so." (Citations omitted; emphasis omitted; internal quotation marks omitted.)). The defendant argues that raising subject matter jurisdiction at this late stage, especially when the plaintiff herself previously has filed multiple motions for modification, results in an impermissible attack of Judge Richards' 2013 judgment deciding the parties' motions to modify alimony.

In light of our resolution of this case, we need not reach this very interesting question (or the other arguments proffered by the defendant), and we leave for another day the question of whether finality considerations should preclude a plaintiff, like the plaintiff in this case, from challenging a court's

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

In this opinion CLARK, J., concurred.

ELGO, J., dissenting. The issue presented in this appeal is whether the Superior Court lacked subject matter jurisdiction over a motion to modify a spousal support decree that was issued in the United Kingdom. In resolving that issue, I believe that the trial court properly considered the explanatory note to the statutory instrument in question, the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 of the United Kingdom (order). Reciprocal Enforcement of Maintenance Orders (United States of America) Order, 2007, S.I. 2007/2005, (U.K.). The explanatory note provides necessary context to the enactment of that order and convinces me that the trial court properly determined that it lacked subject matter jurisdiction over the spousal support decree due to the continuing, exclusive jurisdiction of the United Kingdom. Accordingly, I respectfully dissent.

The underlying facts are largely undisputed and are aptly set forth in the majority opinion. The jurisdictional challenge presented in this appeal involves a question of statutory construction, over which our review is plenary. See *Nelson* v. *Dettmer*, 305 Conn. 654, 662, 46 A.3d 916 (2012).

I

In Connecticut, our courts are guided by the familiar maxim that "[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the

subject matter jurisdiction to modify an alimony order when the trial court previously exercised jurisdiction over the plaintiff's own motion to modify that same alimony order, even in a case, such as this, in which the court did not modify the original order.

apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [a reviewing court must] first . . . consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Citation omitted; internal quotation marks omitted.) *State* v. *Kalil*, 314 Conn. 529, 557–58, 107 A.3d 343 (2014). Statutory language is ambiguous when, read in context, it is susceptible to more than one reasonable interpretation. See *Foisie* v. *Foisie*, 335 Conn. 525, 531–32, 239 A.3d 1198 (2020). In such instances, our courts "may consult extratextual sources" to resolve the issue. *State* v. *Fernando A.*, 294 Conn. 1, 17, 981 A.2d 427 (2009).

As this court has observed, the Uniform Interstate Family Support Act (UIFSA), General Statutes § 46b-301 et seq., "has been adopted by all states, including Connecticut . . . [and] governs the procedures for establishing, enforcing and modifying child and spousal support, or alimony, orders, as well as for determining parentage when more than one state is involved in such proceedings." (Footnote omitted.) *Hornblower* v. *Hornblower*, 151 Conn. App. 332, 333, 94 A.3d 1218 (2014). Relevant to this appeal is General Statutes § 46b-321 (b), which provides: "A tribunal of this state may not modify a spousal support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country."[1] The plaintiff, Cheryl

[1] General Statutes § 46b-302 (5) defines " '[f]oreign country' " in relevant part as "a country . . . other than the United States, that authorizes the issuance of support orders and (A) which has been declared under the law of the United States to be a foreign reciprocating country . . . or (D) in which the [Convention on the International Recovery of Child Support and

Abbott Olson, submits, and the trial court agreed, that the order establishes the continuing, exclusive jurisdiction over spousal support decrees that are issued in the United Kingdom.

The critical issue, then, concerns the proper construction of the order. The order is a "statutory instrument" that was issued pursuant to the powers conferred by §§ 40 and 45 (1) of the Maintenance Orders (Reciprocal Enforcement) Act, 1972 (act),[2] a legislative enactment

Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007 (convention); see General Statutes § 46b-302 (3)] is in force with respect to the United States." The United States Secretary of State has declared the United Kingdom to be a "foreign reciprocating country" for the purpose of family support obligations. See 42 U.S.C. § 659a (2018); Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, 73 Fed. Reg. 72,555 (November 28, 2008). Moreover, as the North Carolina Court of Appeals has noted, "[r]eciprocity currently exists under UIFSA between all American states and the following foreign jurisdictions: Australia, Austria, Bermuda . . . United Kingdom (England, Wales, Scotland, Northern Ireland)." (Internal quotation marks omitted.) *Foreman* v. *Foreman*, 144 N.C. App. 582, 585, 550 S.E.2d 792, review denied, 354 N.C. 68, 553 S.E.2d 38 (2001). In addition, the convention has been ratified by both the United States and the United Kingdom.

[2] Section 40 of the act provides: "Where Her Majesty is satisfied—

"(a) that arrangements have been or will be made in a country or territory outside the United Kingdom to ensure that maintenance orders made by courts in the United Kingdom against persons in that country or territory can be enforced in that country or territory or that applications by persons in the United Kingdom for the recovery of maintenance from persons in that country or territory can be entertained by courts in that country or territory; and

"(b) that in the interest of reciprocity it is desirable to ensure that maintenance orders made by courts in that country or territory against persons in the United Kingdom can be enforced in the United Kingdom or, as the case may be, that applications by persons in that country or territory for the recovery of maintenance from persons in the United Kingdom can be entertained by courts in the United Kingdom,

"Her Majesty may by Order in Council make provision for applying the provisions of this Act, with such exceptions, adaptations and modifications as may be specified in the Order, to such orders or applications as are referred to in paragraphs (a) and (b) above and to maintenance and other orders made in connection with such applications by courts in the United Kingdom or in that country or territory." Maintenance Orders (Reciprocal

of Parliament that specifically pertains to the reciprocal enforcement of maintenance orders in the United Kingdom or a reciprocating country. In the United Kingdom, statutory instruments are used to "fill in the details of Acts" and, when so authorized by Parliament, "to amend existing laws." See UK Parliament, "What Is Secondary Legislation?," available at https://www.parliament.uk/about/how/laws/secondary-legislation/ (last visited July 20, 2022). They "are published with an explanatory memorandum, which outlines the purpose of the [statutory instrument] and why the change is necessary." Id.

The order was issued on July 25, 2007, at which time UIFSA had been adopted in every state in the United States. See, e.g., *O'Donnell* v. *Abbott*, 393 F. Supp. 2d 508, 514 n.14 (W.D. Tex. 2005) (noting that "[e]very state has adopted either the 1996 or 2001 version of [UIFSA]"), aff'd, 481 F.3d 280 (5th Cir. 2007); *Bouquety* v. *Bouquety*, 933 So. 2d 610, 611 n.1 (Fla. App. 2006) (noting that "Congress required all states to enact UIFSA by January 1, 1998," and that "[b]y the year 2000, UIFSA was in effect in all states"). The order begins by stating that "Her Majesty is . . . satisfied that arrangements have been made in the United States of America to ensure that maintenance orders made by courts in the United Kingdom can be enforced in the United States of America. Her Majesty is also satisfied that in the interests of reciprocity it is desirable to ensure that maintenance orders made by courts in the United States of America can be enforced in the United

Enforcement) Act, 1972, c. 18, § 40 (U.K.), available at https://www.legislation.gov.uk/ukpga/1972/18/section/40/enacted (last visited July 20, 2022).

Section 45 (1) of the act provides: "An Order in Council under section 1, section 25 or section 40 of this Act may be varied or revoked by a subsequent Order in Council thereunder, and an Order made by virtue of this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient for the purposes of that section." Maintenance Orders (Reciprocal Enforcement) Act, 1972, c. 18, § 45 (1) (U.K.).

Kingdom. . . .” Schedule 2, § 1 (1), of the order similarly provides in relevant part that “Her Majesty, if satisfied that, in the event of the benefits conferred by the Part of the Act being applied to . . . maintenance orders made by the courts of any country or territory outside the United Kingdom, similar benefits will in that country or territory will be applied to . . . maintenance orders made by the courts of the United Kingdom . . . .”

The order then outlines procedures for two distinct scenarios. The first involves the “[t]ransmission of [a] maintenance order made in the United Kingdom for enforcement in the United States of America.” Schedule 2, § 2 (1), of the order provides in relevant part: “[W]here the payer under a maintenance order made . . . by a court in the United Kingdom is residing or has assets in the United States of America, the payee under the order may apply for the order to be sent to the United States of America *for enforcement*.” (Emphasis added.) The order then addresses the “[v]ariation and revocation of [a] maintenance order made in the United Kingdom” and Schedule 2, § 5 (1), of the order specifically indicates that “[t]his section applies to a maintenance order certified copies of which have been sent in pursuance of [§] 2 to the United States of America for enforcement.” Section 5 (2) of the order further provides that “[t]he jurisdiction *of a court in the United Kingdom* to revoke, revive or vary a maintenance order shall be exercisable notwithstanding that the proceedings for the revocation, revival or variation, as the case may be, of the order are brought by or against a person residing in the United States of America.” (Emphasis added.) Schedule 2, § 5, of the order then addresses various situations in which a modification order is varied or revoked by a court in the United Kingdom. By its plain language, the order contemplates only the *enforcement* of a maintenance order made in the United Kingdom

by a court in the United States. It does not contemplate the revocation or variance of such an order by a United States court.

The second scenario addressed by the order involves the "[r]egistration in [a] United Kingdom court of [a] maintenance order made in the United States of America." Schedule 2, § 6, of the order provides that "a maintenance order made . . . by a court in the United States of America" shall be registered in a United Kingdom court upon receipt of a certified copy thereof. Schedule 2, § 8, of the order then addresses the enforcement of such a maintenance order registered in the United Kingdom and § 9 addresses the "[v]ariation and revocation of [a] maintenance order registered in [a] United Kingdom [c]ourt," stating in relevant part: "(1) Where a registered order *has been varied by a court in the United States of America*, the registered order shall . . . have effect as varied by that order. . . . (2) Where a registered order *has been revoked by a court in the United States of America*, the registered order shall . . . be deemed to have ceased to have effect." (Emphasis added.) The order thus expressly contemplates a United States court revoking or varying a maintenance order that originally was made by a United States court.

Because the order by its plain terms is amendatory in nature, in that it expressly sets forth numerous "modifications" to the act with respect to the United States and orders the amendment or substitution of various sections, I believe it is necessary to also consider the relevant provisions of the act, as originally enacted in 1972. See 1A N. Singer & J. Singer, Sutherland Statutory Construction (7th Ed. 2009) § 22:29, p. 349 ("[t]o ascertain the meaning of amendatory language, courts must look to prior law"); id., § 22:32, p. 377 ("[t]he original act must be compared with the amendment to determine what defect or defects in the original act the legislature intended to remedy"); see also *State* v. *AFSCME*,

Council 4, Local 1565, 249 Conn. 474, 478–80, 732 A.2d 762 (1999) (comparing text of statute and recent amendment to that statute to construe its meaning); *Turner* v. *Turner*, 219 Conn. 703, 717, 595 A.2d 297 (1991) ("[a]ccording to well established principles of statutory construction, an amendment that construes and clarifies a prior statute operates as the legislature's declaration of the meaning of the original act"). Significantly, § 9 of the act, as enacted in 1972, authorized a United Kingdom court to vary or revoke a maintenance order that originally was made in a reciprocating country and registered in a United Kingdom court.[3] The order, however, eliminates the authority of a United Kingdom court to vary or revoke a maintenance order made by a United States court.[4]

Section 5 of the act, as originally enacted in 1972, likewise permitted "a competent court in a reciprocating country" to vary or revoke a maintenance order made by a United Kingdom court.[5] By contrast, § 5 of the order, which is titled "Variation and revocation of maintenance order made in United Kingdom," omits all such references to "a competent court in a reciprocating country" and recognizes only the authority of "a court in the United Kingdom" to vary or revoke a maintenance order made by a United Kingdom court.

It is axiomatic that statutory provisions are not to be read in isolation, but must be read in light of their

[3] Section 9 (1) of the act previously provided in relevant part that a court of the United Kingdom in which a maintenance order made in a reciprocating country was registered "(a) shall have the . . . power, on an application made by the payer or payee under a registered order, to vary or revoke the order as if it had been made by the registering court and as if that court had had jurisdiction to make it; and (b) shall have power to vary or revoke a registered order by a provisional order." Maintenance Orders (Reciprocal Enforcement) Act, 1972, c. 18, § 9 (1) (U.K.).

[4] In both the act and the order, § 9 is titled "Variation and revocation of maintenance order registered in United Kingdom Court."

[5] See Maintenance Orders (Reciprocal Enforcement) Act, 1972, c. 18, § 5 (7) and (8) (U.K.).

"relationship to the broader statutory scheme." *Foisie* v. *Foisie*, supra, 335 Conn. 531; see also *Norris* v. *Trumbull*, 187 Conn. App. 201, 219, 201 A.3d 1137 (2019) ("[w]e do not read statutory language in isolation, but rather must consider it within the context of the statute as a whole and in harmony with surrounding text"). Schedule 2, § 5 (2), of the order specifically provides that "[t]he jurisdiction of a court in the United Kingdom to revoke, revive or vary a maintenance order *shall be exercisable* notwithstanding that the proceedings for the revocation, revival or variation, as the case may be, of the order are brought by or against a person residing in the United States of America." (Emphasis added.) When viewed in relation to the broader statutory scheme set forth in the order and the act—which both provide for the reciprocal enforcement of domestic maintenance orders as a matter of international law—I would conclude that Schedule 2, § 5, of the order is susceptible to more than one reasonable interpretation as to whether it recognizes the "continuing, exclusive jurisdiction"; see General Statutes § 46b-321 (b); of United Kingdom courts over maintenance orders that were made in the United Kingdom and subject to enforcement in the United States. For that reason, I believe that Schedule 2, § 5, is ambiguous, and thus resort to extratextual materials is warranted. See *Foisie* v. *Foisie*, supra, 531; *State* v. *Fernando A.*, supra, 294 Conn. 17.

Appended to the order is an "Explanatory Note" (note) that states in relevant part: "The principal modification effected by this Order is that a maintenance order made in the United States of America may not be varied or revoked in the United Kingdom and that a maintenance order made in the United Kingdom may not be varied or revoked in the United States of America . . . ." In addition, the United Kingdom's Ministry of Justice prepared an "Explanatory Memorandum" to the order

(memorandum) that was "laid before Parliament by Command of Her Majesty."[6] That memorandum similarly explains that the order "remove[s] the power of courts in the United Kingdom to vary or revoke incoming orders which makes the application consistent as *the competent authorities in the United States do not have a power to vary orders from the United Kingdom*." (Emphasis added.) See Explanatory Memorandum to the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 and the Recovery of Maintenance (United States of America) Order 2007, available at https://www.legislation.gov.uk/uksi/2007/2005/pdfs/uksiem_20072005_en.pdf (last visited July 20, 2022). In opposing the motion to dismiss, the defendant, Brian Matthew Olson, provided no extratextual material to rebut the proposition set forth in the note and the memorandum.[7]

To my mind, those explanatory materials resolve any issue as to the intent of the order and persuade me that the trial court properly determined that it lacked subject matter jurisdiction over the spousal support decree in question due to the continuing, exclusive jurisdiction of the United Kingdom.

II

The foregoing analysis is predicated on the assumption that the analytical framework for statutory interpretation under Connecticut law governs the present

[6] Explanatory memoranda are prepared by government officials to supplement an explanatory note. J. Caird, Public Legal Information and Law-Making in Parliament, Parliament and the Law (A. Horne & G. Drewry eds., 2d Ed. 2018) p. 158.

[7] I also observe that, in *Hornblower* v. *Hornblower*, supra, 151 Conn. App. 333, this court "examine[d] the provisions" of UIFSA. At issue in that appeal was the proper interpretation of General Statutes § 46b-212d (c). Id., 336. Although this court did not find any provision of that statute ambiguous, it did not confine its review to the text of the statute itself and its relationship to other statutes. Rather, the court discussed the "historical and statutory notes" to that statute; id., 337; and then extensively detailed certain comments to the uniform code on which UIFSA was modeled. See id., 337–38.

dispute. I respectfully submit that this assumption may be flawed and that a reviewing court tasked with construing a statutory enactment of a foreign country instead must apply the precepts applicable in that foreign jurisdiction.

As one noted treatise has observed, "[o]ne question that arises [when construing a foreign statute] is whether to follow the forum state's or the state of origin's rules of construction. Some courts look to their own . . . rules of statutory interpretation to resolve the issue. But probably the better approach invokes the state of origin's interpretive rules . . . . Courts are more likely to achieve uniform application of statute law and avoid some of the uncertainties entailed by foreign suits if they apply the interpretive rules to which a foreign statute ordinarily is subject." (Footnotes omitted.) 2 S. Singer, Statutes and Statutory Construction (8th Ed. 2022) § 38:5, pp. 124–25; see also *Magee* v. *Huppin-Fleck*, 279 Ill. App. 3d 81, 88, 664 N.E.2d 246 (1996) (in case involving interpretation of foreign statute, court applied "principles of statutory construction adhered to" by courts of that foreign jurisdiction); *Alropa Corp.* v. *Smith*, 240 Mo. App. 376, 381, 199 S.W.2d 866 (1947) ("[i]n ascertaining the effect of . . . the foreign statutes, courts of the forum will construe the statutes of the [foreign] state as construed by its courts and follow the rules of law of the [foreign] state" (internal quotation marks omitted)).

In *Carbone* v. *Nxegen Holdings, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-13-6039761-S (October 3, 2013) (57 Conn. L. Rptr. 36), the Superior Court noted that it "could find no Connecticut authority concerning what rules of construction should apply in

Given this court's reliance on those "statutory notes" and the comments to a model code in interpreting a provision of our General Statutes, I fail to see how the trial court's reliance on the note in the present case was improper.

interpreting the meaning of another state's statute. As a matter of first impression, the court believes it would be illogical for a Connecticut statute to determine how a [foreign] statute should be interpreted. It is presumed that each set of legislators had their own rules of statutory interpretation in mind when drafting their respective statutes, so [that foreign jurisdiction's] rules of statutory interpretation should be applied to best implement the intended meaning of the [foreign] statute." Id., 42 n.4. I concur with that assessment, particularly in a case such as this, which involves foreign relations and international agreements. See *ESAB Group, Inc.* v. *Zurich Ins. PLC*, 685 F.3d 376, 388 (4th Cir. 2012) ("[w]here a statute touches upon foreign relations and the United States' treaty obligations, we must proceed with particular care in undertaking this interpretive task"); see also *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S. Ct. 216, 220, 81 L. Ed. 255 (1936) (foreign relations is "vast external realm" that presents "important, complicated, delicate and manifold problems"); *de Fontbrune* v. *Wofsy*, 838 F.3d 992, 994 (9th Cir. 2016) ("this appeal illustrates the difficulty that can arise in determining foreign law and the confusion surrounding the role of foreign law in domestic proceedings"); *Al-Bihani* v. *Obama*, 619 F.3d 1, 39 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("[c]ourts are . . . rightly hesitant to construe foreign affairs statutes more narrowly than the text indicates").

When construing a statutory enactment, Connecticut's courts are guided by "considerations of the constitutional separation of powers [and] respect for the authority of a coordinate branch of government . . . ." *Mueller* v. *Tepler*, 312 Conn. 631, 661, 95 A.3d 1011 (2014). Principles of judicial restraint, as well as the legislative mandate of General Statutes § 1-2z, preclude our courts from considering extratextual evidence when no ambiguity exists. See, e.g., *Marciano* v. *Jiminez*,

324 Conn. 70, 75–76, 151 A.3d 1280 (2016) ("we . . . will not consider extratextual evidence of the meaning of a statute unless the text is ambiguous or would yield an absurd or unworkable result"); *State* v. *Cayo*, 143 Conn. App. 194, 202, 66 A.3d 887 (2013) ("[i]f the meaning is clear and workable, we do not consider extratextual evidence").

The legislative process in the United Kingdom is altogether different, as the legislative and executive branches of government frequently work in tandem to craft and amend legislative acts. For that reason, the analytical framework that governs statutory interpretation in Connecticut is inapposite when construing statutory instruments. Indeed, statutory instruments in the United Kingdom are akin to executive orders issued by our governor pursuant to authority conferred by the General Assembly. The statutory instrument at issue here was promulgated not by Parliament, but rather by the executive branch pursuant to the authority granted under §§ 40 and 45 (1) of the act. See footnote 2 of this dissenting opinion.

Whereas acts of Parliament are considered "primary legislation" in the United Kingdom, statutory instruments are considered "secondary" or "delegated" legislation that are enacted pursuant to authority conferred by an enabling act of Parliament. Statutory instruments are drafted by ministerial agencies and, depending on the authorization contained in the enabling act, are scrutinized by Parliament in a manner described as either an affirmative or negative procedure. The order here was "subject to [the] negative resolution procedure"; see Explanatory Memorandum to the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 and the Recovery of Maintenance (United States of America) Order 2007, supra; and was automatically approved when Parliament took no action to annul. See UK Parliament, supra. Significantly,

"Parliament can either approve or reject [a statutory instrument], but cannot amend it." Id. For that reason, explanatory notes and explanatory memoranda to statutory instruments play a major role in facilitating parliamentary scrutiny. See J. Caird, Public Legal Information and Law-Making in Parliament, Parliament and the Law (A. Horne & G. Drewry eds., 2d Ed. 2018) p. 158.

Although explanatory notes routinely incorporate the caveat that they are "not part" of legislation, decisional law from the United Kingdom indicates that explanatory notes nonetheless are "admissible" as aids to statutory construction of both primary and secondary legislation.[8] In the seminal case of *Westminster City Council* v. *National Asylum Support Service*, [2002] UKHL 38 (H.L.), Lord Steyn observed: "In 1999 a new [legislative practice] was introduced. It involves publishing [e]xplanatory [n]otes alongside the majority of public bills introduced . . . . The texts of such notes are prepared by the [g]overnment department responsible for the legislation. The [e]xplanatory [n]otes do not form part of the [b]ill, are not endorsed by Parliament and cannot be amended by Parliament. The notes are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it. The purpose is to help the reader to get his bearings and

[8] As the majority correctly notes, the plaintiff in this case provided very little to the trial court and this court about the foreign law in question. At the same time, "because foreign law interpretation and determination is a question of law, independent judicial research does not implicate the judicial notice and ex parte issues spawned by independent factual research undertaken by a court." *de Fontbrune* v. *Wofsy*, supra, 838 F.3d 999. "Independent research . . . together with extracts of foreign legal materials, has been and will likely continue to be the basic mode of determining foreign law." (Internal quotation marks omitted.) Id., 997. "Although our common law system relies heavily on advocacy by the parties, judges are free to undertake independent *legal* research beyond the parties' submissions. It is no revelation that courts look to cases, statutes, regulations, treatises, scholarly articles, legislative history, treaties and other legal materials in figuring out what the law is and resolving legal issues." (Emphasis in original.) Id., 999.

to ease the task of assimilating the law. . . . The [e]xplanatory [n]otes accompany the [b]ill on introduction and are updated in the light of changes to the [b]ill made in the parliamentary process. Explanatory [n]otes are usually published by the time the legislation comes into force. Unlike [legislative history] material there are no costly researches involved. . . .

"The question is whether in aid of the interpretation of a statute the court may take into account the [e]xplanatory [n]otes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. . . . [I]n his important judgment in *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 WLR 896, 912–13, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. . . .

"Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. Insofar as the [e]xplanatory [n]otes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose [e]xplanatory [n]otes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, [g]overnment green or white papers, and the like. After all, the connection of [e]xplanatory [n]otes with the shape of the proposed

legislation is closer than pre-parliamentary aids which in principle are already treated as admissible . . . .'' (Citations omitted.) Id., ¶¶ 4–5.

Following that decision, United Kingdom courts often have considered explanatory notes when construing statutory instruments. See, e.g., *9 Cornwall Crescent London Ltd.* v. *Kensington & Chelsea*, Docket No. B2/2004/1560, 2005 WL 607512 (EWCA (Civ.) March 22, 2005) (''Courts have moved away from a purely literal approach to statutory interpretation. . . . By 'context', I mean the legislative context, and the policy context, as shown by any admissible material, such as . . . explanatory notes . . . .''); *R* v. *Montila*, [2004] UKHL 50, 35, available at https://publications.parliament.uk/pa/ld200405/ldjudgmt/jd041125/mont.pdf (last visited July 20, 2022) (''[i]t has become common practice for their Lordships to ask to be shown the [e]xplanatory [n]otes when issues are raised about the meaning of words used in an enactment''); *Confederation of Passenger Transport UK* v. *Humber Bridge Board*, 2002 WL 31422280 (EWCH (Admin.) November 1, 2002) (relying in part on explanatory note to statutory instrument to support conclusion that lower court properly supplied language inadvertently omitted from order); R. Munday, ''In the Wake of 'Good Governance': Impact Assessments and the Politicisation of Statutory Interpretation,'' 71 Mod. L. Rev. 385 (2008) (noting growing willingness of United Kingdom judges to employ explanatory notes as aid to interpretation); D. Greenberg, ''All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting,'' 7 Eur. J. L. Reform 31, 37–38 (2005) (discussing use of explanatory notes as aid to statutory construction and observing that ''the courts have appeared to be increasingly relaxed about the use of a wide range of material produced by the executive''). As one commentator on statutory interpretation in the

United Kingdom has observed, "[i]t is the present practice that almost every [b]ill introduced [in] . . . Parliament is accompanied by a set of [e]xplanatory [n]otes, prepared by the [g]overnment, and although these [n]otes declare that they are not necessarily authoritative, the courts early on established their willingness to have regard to them . . . for the purpose of determining the context within which the emerging Act is construed . . . ." (Footnote omitted.) 96 Halsbury's Laws of England (5th Ed. 2018) p. 483.

That authority suggests that, unlike the framework for statutory interpretation under Connecticut law, courts in the United Kingdom may consider an explanatory note to a statutory instrument irrespective of whether an ambiguity exists. In the present case, the note and memorandum both provide necessary context to the enactment of the order, and leave little doubt that it was intended to memorialize the continuing, exclusive jurisdiction of the United Kingdom courts over maintenance orders made in their courts. Accordingly, I would conclude that the trial court properly determined that it lacked subject matter jurisdiction over the spousal support decree in the present case.

For the foregoing reasons, I respectfully dissent.

OMAR J. MILLER *v.* JON DOE ET AL.
(AC 43845)

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

Syllabus

The plaintiff, an inmate in a state correctional institution, sought to recover damages from the defendant M, an employee of the Department of Correction, in his individual capacity, pursuant to federal law (42 U.S.C. § 1983), for the alleged violation of his federal constitutional rights in connection with a motor vehicle accident during which he sustained injuries. The plaintiff, who was being transported to and from a medical appointment in a vehicle operated by M, was placed in full restraints

in the rear seat of the vehicle, in which there was not enough room for the plaintiff to sit upright. The plaintiff informed M that the vehicle was too small, but M said that he could not obtain a larger vehicle. The plaintiff did not ask M to secure his seat belt, and M did not check to see if the seat belt was fastened. On the return trip, M drove erratically and in excess of the speed limit, ultimately colliding with another vehicle. The plaintiff alleged that M had violated his civil rights under the eighth amendment to the United States constitution, claiming that M's failure to abide by reasonable safety standards while transporting him gave rise to a claim of deliberate indifference. The trial court denied M's motion for summary judgment, finding that there was a disputed question of fact as to whether M knew and was indifferent to an excessive risk to the plaintiff's health and safety. On M's appeal to this court from the denial of his motion for summary judgment, *held* that the trial court erred in holding that M was not entitled to qualified immunity, as the allegations in the plaintiff's complaint and the record before the court did not give rise to a claim for deliberate indifference because no federal precedent clearly established that M's conduct violated the eighth amendment constitutional right against cruel and unusual punishment: the Court of Appeals for the Second Circuit, in *Jabbar* v. *Fischer* (683 F.3d 54), held that the failure of prison officials to provide inmates with seat belts does not, without more, violate the eighth amendment, and other federal courts have held the same and largely have held that dangerous road conditions, distracted driving and speeding while transporting inmates do not give rise to a claim for deliberate indifference; moreover, in the few instances in which a federal court has found that a constitutional violation occurred during the transportation of an inmate, the plaintiff typically has alleged that he was not seat belted, the defendant purposefully drove in a reckless manner and the plaintiff asked the defendant to fasten his seat belt or to drive more safely but the defendant ignored the requests, and, in the present case, the plaintiff neither alleged nor presented evidence that he requested to be seat belted, requested that M drive more safely or requested that M obtain a larger vehicle for safety rather than for comfort; furthermore, M's conduct was not severe enough to constitute an obvious constitutional violation in the absence of clearly established law, as the present case involved a motor vehicle accident with circumstances under which no federal court has found an eighth amendment violation.

Argued March 9—officially released July 26, 2022

Procedural History

Action to recover damages for the alleged violation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, denied

the motion to dismiss filed by the defendant Joshua Medina; thereafter, the court, *Moukawsher*, *J.*, denied the motion for summary judgment filed by the defendant Joshua Medina, and the defendant Joshua Medina appealed to this court. *Reversed*; *judgment directed.*

Janelle R. Medeiros, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellant (defendant Joshua Medina).

Omar J. Miller, self-represented, the appellee (plaintiff).

Opinion

BRIGHT, C. J. The defendant Joshua Medina, a central transportation unit officer for the Department of Correction (department), appeals from the trial court's denial of his motion for summary judgment in the action brought by the self-represented plaintiff, Omar J. Miller, pursuant to 42 U.S.C. § 1983, alleging deliberate indifference in violation of the eighth amendment to the United States constitution.[1] On appeal, the defendant claims that the court improperly denied his motion for summary judgment because he is entitled to qualified immunity from the plaintiff's claim.[2] We agree and, accordingly, reverse the judgment of the trial court.

[1] Although the plaintiff originally brought this action against both the defendant and Captain Jon Doe, Doe never was identified, never properly served, and has not appeared in this action. Accordingly, Doe is not participating in this appeal, and the appeal is brought only on behalf of the defendant.

[2] As a general rule, "[t]he denial of a motion for summary judgment . . . is an interlocutory ruling, and, accordingly, not a final judgment for purposes of appeal." (Internal quotation marks omitted.) *Brown & Brown, Inc.* v. *Blumenthal*, 288 Conn. 646, 653, 954 A.2d 816 (2008). The denial of a defendant's motion for summary judgment on the basis of qualified immunity, however, is an exception to this rule and is an appealable final judgment. See *Morgan* v. *Bubar*, 115 Conn. App. 603, 608–609, 975 A.2d 59 (2009). Accordingly, the defendant's claim that he is entitled to qualified immunity is properly before this court. See id.

The record before the court, when viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. At the time of the events underlying the present case, the plaintiff was an incarcerated inmate in the custody of the department at the MacDougall-Walker Correctional Institution (MacDougall-Walker) in Suffield.[3] On July 3, 2013, the plaintiff was transported by the defendant from MacDougall-Walker to the University of Connecticut's Jack Dempsey Hospital (hospital) in Farmington for a medical appointment. Prior to the trip, the defendant placed the plaintiff in full restraints, which included "handcuffs, leg irons, a belly chain, a tether chain, and a 'black box.' "[4]

After the defendant placed those restraints on the plaintiff, the defendant escorted him outside to a Ford Crown Victoria motor vehicle (vehicle), which had been assigned to the defendant for the plaintiff's transportation. The defendant did not choose that particular vehicle or have the authority or ability to obtain a different vehicle. The vehicle had been modified to include a metal barrier between the front and rear seats. Because of that barrier, there was not enough space for the plaintiff to sit upright in the rear seat. Upon seeing the vehicle's modified interior, the plaintiff informed the defendant that the vehicle was too small, but the defendant told him just to lie down on the rear seat instead of sitting upright. The plaintiff then asked the defendant if he could get a larger vehicle, to which the defendant responded, "No," and again told the plaintiff to lie down on the rear seat, which he did.

[3] While this appeal was pending, the plaintiff was extradited to New York and is now incarcerated in a correctional facility there.

[4] According to a department administrative directive, which was attached to the defendant's motion for summary judgment, a black box is "[a] lockable plastic cover designed to limit tampering with a handcuff locking mechanism." Conn. Dept. of Correction, Administrative Directive 6.4 (3) (A) (effective November 13, 2012).

Once in the vehicle, the plaintiff was unable to put his seat belt on because of his restraints and how he was forced to lie on the rear seat. The defendant never checked to see if the plaintiff's seat belt was fastened or offered to fasten his seat belt, despite a department policy that requires inmates to be seat belted during transit. The plaintiff also never asked the defendant to secure his seat belt.

While traveling to the hospital, the defendant exceeded the speed limit, but he and the plaintiff reached the hospital without incident. After the plaintiff's appointment, he was placed in the same vehicle and again lay down on the rear seat. During the trip back to MacDougall-Walker, the defendant drove "erratically" by weaving in and out of traffic, making sharp turns, and, at one point, driving thirty miles per hour above the speed limit. The plaintiff never commented on the defendant's driving or asked him to slow down.

While traveling along Route 159 in Windsor Locks, the defendant noticed a car ahead at the traffic light that had stopped in both the left and right lanes and appeared to be attempting to make a left hand turn from the right lane. The defendant thought that there was enough room for him to continue straight in the right lane and slip past the stopped car. He was mistaken, however, and struck the right rear side of the stopped car. During the collision, the plaintiff was launched into the metal barrier and lost consciousness. After he regained consciousness, "his body was wedged between the [rear] seat and the metal barrier and his head was pinned between the metal barrier and the [vehicle] door."

Immediately after the crash, the defendant called emergency services and department personnel, who quickly responded to the scene of the accident. The

defendant then checked on the driver of the other car[5] and the plaintiff. According to the defendant's evaluation of the plaintiff, the plaintiff was not at risk of immediate harm. The plaintiff later was transported by ambulance to Hartford Hospital so that he could receive medical treatment for the injuries he had suffered in the crash. According to the plaintiff, the accident caused injuries and pain to his head, neck, back, knee, and shoulder.

Thereafter, on September 12, 2013, the plaintiff filed a complaint against the defendant and Jon Doe; see footnote 1 of this opinion; alleging that the defendant had violated the plaintiff's civil rights under the eighth amendment to the United States constitution.[6] Specifically, the plaintiff claimed that the defendant and Doe's failure to abide by reasonable safety standards while transporting him gave rise to a claim for deliberate indifference pursuant to § 1983.[7] On January 23, 2014, the plaintiff filed an amended complaint. The defendant then filed a request for the plaintiff to revise his complaint, wherein he asked him to "[s]eparate [the] claims against each defendant into separate counts." On June 23, 2014, in accordance with that request to revise,

[5] The driver of the other car was uninjured in the crash.

[6] The eighth amendment to the United States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (Emphasis added.) U.S. Const., amend. VIII.

[7] Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . ."

the plaintiff filed the operative complaint,[8] in which he alleged in relevant part that the defendant had acted with deliberate indifference to his safety while transporting him from the hospital to MacDougall-Walker (count two).[9] That claim was brought against the defendant in his individual capacity.

The defendant then filed a motion to dismiss, alleging that the plaintiff's claim was "barred by qualified immunity" because the allegations in the operative complaint did not establish that the defendant had violated clearly established law, given that federal precedent does not require an inmate to be seat belted during transit. The plaintiff opposed the defendant's motion to dismiss, arguing that the defendant had violated his constitutional right to be free from cruel and unusual punishment when the defendant's "reckless behavior led to [the plaintiff] being subjected [to] physical harm when [the defendant] was 'driving erratically and in excess of speed limits.' " The plaintiff further argued that, because he had sued the defendant in his individual capacity, qualified immunity did not apply.

On May 5, 2017, by way of a memorandum of decision, the court, *Elgo*, *J.*, denied the defendant's motion to

[8] On April 12, 2016, the plaintiff filed a motion to amend and an amended complaint. The motion to amend, however, was never ruled on by the court. Accordingly, the June 23, 2014 revised complaint is the operative complaint in this action.

[9] In the operative complaint, the plaintiff also pleaded a state common-law recklessness claim (count four), alleging that the defendant had acted wantonly and recklessly when transporting him. The plaintiff later abandoned that claim in his objection to the defendant's motion for summary judgment, stating, "[the plaintiff] is not suing the [defendant] . . . *pursuant to* [*Connecticut*] *common law* . . . . [The plaintiff] is suing [the defendant] pursuant to 42 U.S.C. § 1983 . . . ." (Emphasis added.) Accordingly, that claim was not argued before the trial court and is not before us on appeal.

The operative complaint further pleaded two counts (counts one and three) against Doe. As explained in footnote 1 of this opinion, however, Doe has never participated in this action. Accordingly, these counts also were not argued before the trial court and, thus, are not before us on appeal.

dismiss after finding that the plaintiff had "alleged sufficient facts to support the claim that it was not objectively reasonable for the defendant to believe his acts were lawful." The court specifically held: "[T]he plaintiff has . . . meticulously and carefully alleged that the defendant was not only aware of the risk of harm to the plaintiff but then disregarded that risk by acting with deliberate indifference to his physical safety, specifically in his failure to abide by [department] administrative directives requiring [seat belts]. . . . Given the allegations that the defendant knew that the plaintiff would be at serious risk of injury in the event of a collision, given that the defendant was alleged to be aware of the requirement that inmates must be seat belted, and given the allegations that the defendant drove erratically and unsafely while the plaintiff was not safely secured, this court concludes that the plaintiff's action is not barred by qualified immunity." (Internal quotation marks omitted.)

On May 25, 2017, the defendant filed a motion for reconsideration of the court's denial of his motion to dismiss, reiterating his claim that he had not violated a clearly established right and was thus entitled to qualified immunity. In a memorandum of decision dated November 24, 2017, the court granted the defendant's motion for reconsideration but again denied the defendant's motion to dismiss.

In its memorandum of decision, the court specifically addressed the defendant's contention that he had not violated a clearly established constitutional right, stating: "Although there were no published decisions from the [United States Court of Appeals for the] Second Circuit addressing [the] specific factual situation [in the present case] at the time of the alleged conduct . . . the absence of case law directly on point is not dispositive." The court then held, based largely on precedent from the Eighth Circuit, that the plaintiff's complaint

sufficiently alleged "a violation of a clearly established constitutional right—namely, that prison employees may not subject an inmate to a substantial risk of serious harm while transporting them in a vehicle. Given that the plaintiff has alleged that the defendant drove erratically and recklessly, notwithstanding the defendant's knowledge of regulations requiring seat belts as well as the plaintiff's expressed concern for his safety, the court concludes that the defendant is not entitled to qualified immunity."

Thereafter, the defendant filed a motion for summary judgment, wherein he again argued that he was entitled to qualified immunity because he had not violated a clearly established constitutional right.[10] The plaintiff filed an objection to the defendant's motion for summary judgment, arguing that the defendant was not entitled to qualified immunity because (1) he was being sued in his personal capacity, not his official capacity, and (2) his failure to follow department policies when transporting the plaintiff demonstrated the defendant's deliberate indifference to the plaintiff's health and safety.

On January 13, 2020, the court, *Moukawsher*, *J.*, held a hearing on the defendant's motion for summary judgment. At the hearing, the defendant argued that summary judgment was proper because he was entitled to qualified immunity on the plaintiff's deliberate indifference claim, given that he had not violated a clearly established right and that "the circumstances [in the present case do not] rise to the level of an obvious excessive risk to the plaintiff's safety." In response, the

[10] The defendant also argued in his motion for summary judgment that the plaintiff had failed to exhaust his administrative remedies before bringing the underlying action. In ruling on the defendant's motion for summary judgment, the court concluded that the plaintiff had exhausted his administrative remedies, and the defendant does not challenge that ruling in this appeal.

plaintiff argued that the defendant's actions constituted deliberate indifference because the defendant had put the plaintiff in the vehicle fully shackled and without a seat belt and then had driven "fast and erratically."[11]

After the hearing, the court denied the defendant's motion for summary judgment from the bench, stating: "I find that there's a disputed question of fact as to whether the officer knew and was indifferent to an excessive risk to the inmate's health and safety. And for those reasons, summary judgment [is] denied." The court further explained its decision in a written ruling that was issued the same day: "[T]here is a genuinely disputed question of fact as to whether the officer knew and was indifferent to an excessive risk to the inmate's health and safety. A reasonable jury could believe such was the case. If it does, any immunity claim would . . . fail as a matter of law and reckless conduct would be proved." The court did not, in either its oral or written ruling, analyze whether the plaintiff had alleged a constitutional right that was clearly established at the time of the challenged conduct. The defendant then appealed from the court's denial of his motion for summary judgment.

We begin by setting forth the applicable standards of review. "The standard of review of a trial court's [ruling on] summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine

[11] At the hearing on the defendant's motion for summary judgment, the plaintiff did not argue that the defendant was not entitled to qualified immunity because he had been sued in his personal capacity. The plaintiff also does not make that argument on appeal. Therefore, we need not consider that claim. We do note, however, that the Second Circuit has held that "qualified immunity shields a defendant official *sued in his individual capacity* from liability for civil damages . . . ." (Emphasis added; internal quotation marks omitted.) *Frank* v. *Relin*, 1 F.3d 1317, 1327–28 (2d Cir.), cert. denied, 510 U.S. 1012, 114 S. Ct. 604, 126 L. Ed. 2d 569 (1993).

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Our review of the trial court's decision to [deny] the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, 341 Conn. 644, 679–80, 267 A.3d 766 (2021). Moreover, "[w]hether an official is entitled to qualified immunity presents a question of law that must be resolved de novo on appeal." *Fleming* v. *Bridgeport*, 284 Conn. 502, 518, 935 A.2d 126 (2007).

We now set forth the relevant law with regard to qualified immunity. "[A] claim for qualified immunity from liability for damages under § 1983 raises a question of federal law . . . and not state law. Therefore, in reviewing these claims of qualified immunity we are bound by federal precedent, and may not expand or contract the contours of the immunity available to government officials. . . . Furthermore, in applying federal law in those instances where the United States Supreme Court has not spoken, we generally give special consideration to decisions of the Second Circuit . . . ." (Internal quotation marks omitted.) *Morgan* v. *Bubar*, 115 Conn. App. 603, 625, 975 A.2d 59 (2009).

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808,

172 L. Ed. 2d 565 (2009). "[The] standard for determining whether an officer is entitled to qualified immunity . . . is forgiving and protects all but the plainly incompetent or those who knowingly violate the law." (Internal quotation marks omitted.) *Amore* v. *Novarro*, 624 F.3d 522, 530 (2d Cir. 2010). "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." (Internal quotation marks omitted.) *Braham* v. *Newbould*, 160 Conn. App. 294, 302, 124 A.3d 977 (2015); see also *Morgan* v. *Bubar*, supra, 115 Conn. App. 625 ("[q]ualified immunity shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (internal quotation marks omitted)). Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson* v. *Callahan*, supra, 236; see also *Edrei* v. *Maguire*, 892 F.3d 525, 532 (2d Cir. 2018) (plaintiff's "[f]ailure to establish either prong" entitles defendant to qualified immunity), cert. denied, U.S. , 139 S. Ct. 2614, 204 L. Ed. 2d 263 (2019). In this opinion, we focus on the second prong of the test, namely, whether the alleged constitutional right was clearly established at the time of the defendant's conduct.

"To determine whether a right is clearly established, we look to (1) whether the right was defined with reasonable specificity; (2) whether Supreme Court or court of appeals case law supports the existence of the right in question, and (3) whether under preexisting law a reasonable defendant would have understood that his

or her acts were unlawful. . . . Even if [the Second Circuit] or other circuit courts have not explicitly held a . . . course of conduct to be unconstitutional, the unconstitutionality of that . . . course of conduct will nonetheless be treated as clearly established if decisions by this or other courts clearly foreshadow a particular ruling on the issue . . . even if those decisions come from courts in other circuits . . . .'' (Citations omitted; internal quotation marks omitted.) *Scott* v. *Fischer*, 616 F.3d 100, 105 (2d Cir. 2010). ''Courts do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.'' (Internal quotation marks omitted.) *Walker* v. *Schult*, 717 F.3d 119, 125–26 (2d Cir. 2013). Moreover, ''[t]he right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense.'' (Internal quotation marks omitted.) *Anderson* v. *Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); see also *White* v. *Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (''clearly established law should not be defined at a high level of generality''). ''If an official's conduct did not violate a clearly established constitutional right . . . then he is protected by qualified immunity.'' *Walker* v. *Schult*, supra, 126.

We next set forth the relevant law with regard to the eighth amendment and deliberate indifference, on which the plaintiff's § 1983 claim is based. ''The [e]ighth [a]mendment's prohibition against cruel and unusual punishment requires prison conditions to be humane, though not necessarily comfortable.'' (Internal quotation marks omitted.) *Jabbar* v. *Fischer*, 683 F.3d 54, 57 (2d Cir. 2012). ''A denial of safe and humane conditions can result from an officer's deliberate indifference to a prisoner's safety.'' *Brown* v. *Fortner*, 518 F.3d 552, 558 (8th Cir. 2008). ''[D]eliberate indifference includes

both subjective and objective components. First, the alleged deprivation must be, in objective terms, sufficiently serious. . . . Second, the [government official] must act with a sufficiently culpable state of mind. . . . An official acts with . . . deliberate indifference when that official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (Internal quotation marks omitted.) *Braham* v. *Newbould*, supra, 160 Conn. App. 302–303. "Deliberate indifference requires more than mere negligence, but does not require acting for the very purpose of causing harm or with knowledge that harm will result. . . . [A]cting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." (Citation omitted; internal quotation marks omitted.) *Brown* v. *Fortner*, supra, 558.

In the operative complaint, the plaintiff claims that the defendant violated his constitutional rights under the eighth amendment when the defendant subjected him to cruel and unusual punishment by transporting him in reckless disregard of reasonable safety standards, including by (1) failing to fasten the plaintiff's seat belt, despite the defendant's knowledge that department policy required inmates to be seat belted, (2) refusing to acquire a larger vehicle in which the plaintiff could sit properly, and (3) driving erratically and well in excess of the speed limit.[12] Given that the plaintiff brings this claim pursuant to § 1983, and not

[12] To the extent that, in his brief, the plaintiff frames the alleged constitutional right at issue as a right to be free from an unreasonable and substantial risk of harm, we conclude that such a description is too broad. See *Escondido* v. *Emmons*, U.S. , 139 S. Ct. 500, 503, 202 L. Ed. 2d 455 (2019) ("clearly established right must be defined with specificity"). Accordingly, we have narrowed the plaintiff's description of the constitutional right at issue.

state common law,[13] we must determine whether it is clearly established under federal law that such conduct violates the constitution. See *Morgan* v. *Bubar*, supra, 115 Conn. App. 625. Accordingly, we begin with an overview of federal case law concerning the transportation of inmates.

Very few cases from either the United States Supreme Court or the Second Circuit have resolved constitutional questions involving inmates and vehicles. Indeed, the sole relevant case is *Jabbar* v. *Fischer*, supra, 683 F.3d 58–59. In *Jabbar*, the plaintiff, an incarcerated inmate, was transported to and from a medical appointment on a " 'hub bus' that did not have seatbelts for inmate[s]" while "shackled from his wrists to his ankles." Id., 56. While in transit, "[t]he bus made a forceful turn and [the plaintiff] . . . was thrown from his seat. He hit his head on another seat and was knocked unconscious. He sustained injuries to his face, head, and back." Id. Thereafter, the plaintiff sued the defendants, "contending that their failure to provide a bus seatbelt violated his [e]ighth . . . [a]mendment rights." Id. The defendants filed a motion to dismiss in the United States District Court for the Southern District of New York, arguing that the failure to provide inmates with seat belts does not violate the constitution, which the District Court granted. Id. The plaintiff then appealed to the Second Circuit. Id.

On appeal, the Second Circuit concluded that "the failure of prison officials to provide inmates with seatbelts does not, without more, violate the [eighth amendment]" because "the failure to provide a seatbelt is not . . . sufficiently serious to constitute an [e]ighth [a]mendment violation . . . [and] because the absence of seatbelts on inmate bus transport is itself not an excessive risk, without more, deliberate indifference—

[13] See footnote 7 of this opinion.

that is, that defendants knew of, and disregarded, an excessive risk to inmate safety—cannot be plausibly alleged." (Citations omitted; internal quotation marks omitted.) Id., 58. This holding arguably left open the possibility that conduct in addition to failing to provide inmates with seat belts could give rise to a constitutional violation, but the Second Circuit did not, and still had not at the time of the challenged conduct in the present case, elaborated on what specific additional conduct would constitute a violation of the eighth amendment.

Other federal courts overwhelmingly have held that the failure to provide an inmate with a seat belt does not, on its own, give rise to a constitutional claim for deliberate indifference. See, e.g., *Dexter* v. *Ford Motor Co.*, 92 Fed. Appx. 637, 643 (10th Cir. 2004) ("failure to seatbelt an inmate does not violate the [c]onstitution"); *Spencer* v. *Knapheide Truck Equipment Co.*, 183 F.3d 902, 906 (8th Cir. 1999) (same), cert. denied sub nom. *Spencer* v. *Board of Police Commissioners*, 528 U.S. 1157, 120 S. Ct. 1165, 145 L. Ed. 2d 1076 (2000); *Daily* v. *CCA-WCFA Whiteville Transportation Officers*, United States District Court, Docket No. 3:18-CV-0146 (WLC) (M.D. Tenn. April 2, 2018) (listing federal cases that have held that transporting inmates without seat belts does not amount to deliberate indifference); see also *Dexter* v. *Ford Motor Co.*, supra, 641 ("The risk of a motor vehicle accident is dependent upon a host of factors unrelated to the use of seatbelts, viz., vehicular condition, time of day, traffic, signage, warning lights, emergency circumstances, weather, road conditions, and the conduct of other drivers. The eventuality of an accident is not hastened or avoided by whether an inmate is seatbelted.").

Although at the time of the challenged conduct, the Second Circuit had considered only whether the failure

to provide inmates with seat belts gave rise to a constitutional violation, other federal courts had considered whether factual scenarios involving inmates and a lack of seat belts in addition to other factors, including dangerous road conditions, distracted driving, and speeding, gave rise to a claim for deliberate indifference. Those courts largely have held that such facts do not amount to a violation of the eighth amendment.

For example, in *Carrasquillo* v. *New York*, 324 F. Supp. 2d 428, 434 (S.D.N.Y. 2004), the plaintiff, an incarcerated inmate, brought a § 1983 claim for deliberate indifference after he was injured while being transported to a courthouse. The plaintiff alleged that the defendant's conduct gave rise to a constitutional violation because the plaintiff "was handcuffed and was not provided with a seatbelt" and, during transit, the defendant "was traveling at an excessive [rate of] speed . . . despite icy conditions." (Internal quotation marks omitted.) Id. The United States District Court for the Southern District of New York concluded that the alleged conduct did not amount to deliberate indifference and dismissed the plaintiff's claim, holding that (1) the constitution does not guarantee an inmate's "right to non-negligent driving by government employees," (2) "[a]llegations of a public official driving too fast for the road conditions are grounded in negligence," and (3) "[the] failure to provide seatbelts to prisoners is not a constitutional violation . . . ." (Internal quotation marks omitted.) Id., 436–37.

Most other federal courts that have considered the lack of an inmate's seat belt along with certain additional conduct have reached the same conclusion: such conduct does not violate the constitution. See, e.g., *Daily* v. *CCA-WCFA Whiteville Transportation Officers*, supra, United States District Court, Docket No. 3:18-CV-0146 (WLC) (inmate's allegations that defendant failed to fasten inmate's seat belt, drove ninety

miles per hour, followed other cars too closely, and was distracted by his cell phone did not constitute deliberate indifference); *Uhl* v. *Wendy*, United States District Court, Docket No. 15 CV 6923 (VB) (S.D.N.Y. December 9, 2016) (inmate's allegations that defendant "failed to secure a safety belt around [him] and drove in excess of [seventy-five] to [eighty] miles per hour" were "insufficient to state a claim under [§] 1983"); *Byerlein* v. *Hamilton*, United States District Court, Docket No. 1:09-CV-841 (PLM) (W.D. Mich. October 7, 2009) (allegations that defendant failed to fasten plaintiff's seat belt, talked on cell phone, and disregarded warning sign about icy conditions did not violate eighth amendment).

In the few instances in which a federal court has found that a constitutional violation occurred during the transportation of an inmate, the plaintiff typically has alleged that (1) he was not seat belted, (2) the defendant purposefully drove in a reckless, fast, and distracted manner, *and* (3) he asked the defendant either to fasten his seat belt or to drive more safely, but the defendant ignored such requests. To demonstrate, in *Brown* v. *Fortner*, supra, 518 F.3d 556, on which Judge Elgo relied in denying the defendant's motion to dismiss, the plaintiff, an incarcerated inmate, brought a § 1983 deliberate indifference claim against the driver of a prison van after he was injured while being transported to another correctional facility. Id. The plaintiff alleged that he was fully shackled, which left him unable to secure his own seat belt without assistance. Id. Because of this, the plaintiff asked the defendant to fasten his seat belt but he refused "and instead replied with taunts." Id. "Other inmates [being transported with the plaintiff] also requested seatbelts and were rebuffed." Id. The plaintiff further alleged that the defendant "[drove] in excess of the speed limit, follow[ed] too closely to the lead van, cross[ed] over double-yellow lines, and pass[ed] non-convoy cars when the road

markings clearly prohibited doing so. Further, [the plaintiff] presented evidence showing that the inmates riding in [the defendant's] van asked him to slow down, and [that the defendant] ignored their requests." Id., 559. The defendant moved for summary judgment, which the United States District Court for the Western District of Missouri denied. Id., 557.

On appeal, the Eighth Circuit affirmed the District Court's denial of the defendant's motion for summary judgment, holding that, on the basis of the uncontested evidence, "a reasonable jury could conclude that there was a substantial risk of harm to [the plaintiff] and that [the defendant] knew of and disregarded the substantial risk [of] harm. As such, [the plaintiff] has presented sufficient evidence that [the defendant's] actions may have violated the [e]ighth [a]mendment prohibition against cruel and unusual punishment." Id., 560.

Other federal courts, when confronted with situations where an inmate either requested to be seat belted or asked that a defendant stop driving recklessly, have reached the same conclusion. See, e.g., *Rogers* v. *Boatright*, 709 F.3d 403, 408 (5th Cir. 2013) (claim of deliberate indifference could survive sua sponte dismissal and was not frivolous when officer did not provide inmate with seat belt despite being aware of repeated past incidents where unseatbelted inmates were injured);[14] *Brown* v. *Morgan*, United States Court of Appeals, Docket No. 94-2023, 1994 WL 610993, *1 (8th Cir. 1994) (unpublished decision) (claim of deliberate indifference sufficiently stated when officer refused to let inmate

[14] We note that the United States Court of Appeals for the Fifth Circuit solely decided in this case that the inmate's deliberate indifference claim was not frivolous. *Rogers* v. *Boatright*, supra, 709 F.3d 409. The court did not specifically decide whether the inmate's allegations sufficiently stated a claim of deliberate indifference or whether the inmate's claim could survive a motion for summary judgment. Id. ("[w]e . . . express no opinion on the ultimate merits of [the inmate's] claim").

wear seat belt, drove at high rate of speed in bad weather, and laughed at and ignored inmate's request to slow down); *Steele* v. *Ayotte*, United States District Court, Docket No. 3:17-CV-1370 (CSH) (D. Conn. February 6, 2018) (relying on Judge Elgo's memorandum of decision denying department's motion to dismiss to determine that claim of deliberate indifference was sufficiently stated when officers used cell phones while driving and denied inmate's request to have seat belt fastened, stating, "Why would you need a seatbelt; you don't believe in my driving" (internal quotation marks omitted)); *Williams* v. *Wisconsin Lock & Load Prisoner Transports, LLC*, United States District Court, Docket No. 15 C 8090 (RWG) (N.D. Ill. August 3, 2016) (claim of deliberate indifference sufficiently stated where "[officer] refused [inmate's request] to properly secure his seat belt, drove too fast for the weather conditions, improperly used his cell phone while driving, and slammed on the van's breaks to avoid a collision caused by his inattention" (footnote omitted)); *Barela* v. *Romero*, United States District Court, Docket No. CIVIL 06-41 (JBDJS) (D.N.M. May 10, 2007) (eighth amendment violation sufficiently stated when officer transported fully shackled inmate without seat belt, drove erratically at high speeds, and ignored and laughed at inmate's requests to stop).

Given our review of the relevant federal case law and the particular facts of the present case—specifically, that (1) the plaintiff was not seat belted, (2) the defendant refused to acquire a larger vehicle, and (3) the defendant drove erratically and exceeded the speed limit—we conclude that the allegations in the plaintiff's complaint and the record before the court in connection with the defendant's motion for summary judgment do not give rise to a claim for deliberate indifference because

no federal precedent clearly establishes that the defendant's conduct violates the constitution.[15]

First, neither the United States Supreme Court nor the Second Circuit has ever concluded that transporting an inmate without a seat belt, in a car that is too small, and while driving erratically and in excess of the speed limit violates the eighth amendment. Indeed, to the contrary, the Second Circuit explicitly has held that transporting an inmate without a seat belt is not deliberate indifference. See *Jabbar* v. *Fischer*, supra, 683 F.3d 58–59. Although *Jabbar* implied that conduct in addition to the failure to provide an inmate with a seat belt could give rise to a constitutional violation, such general language cannot be read as creating a clearly established right for inmates to be seat belted and transported in accordance with safety protocols. See *Anderson* v. *Creighton*, supra, 483 U.S. 640 (1987) ("[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). Moreover, and contrary to the court's conclusion when denying the defendant's motion to dismiss, the fact that *Jabbar* v. *Fischer*, supra, 58, cites to *Brown* v. *Fortner*, supra, 518 F.3d 559–62, wherein the Eighth Circuit held that the defendant's conduct while transporting the plaintiff gave rise to a constitutional violation, does not clearly establish the constitutional violation alleged in the present case. See *Jermosen* v. *Smith*, 945 F.2d 547, 551 (2d Cir. 1991) (declining to rely on dicta when determining whether right was clearly established), cert. denied, 503 U.S.

[15] We recognize that for a right to be clearly established, that right must have been clearly established at the time of the challenged conduct. See *Braham* v. *Newbould*, supra, 160 Conn. App. 302. In the interest of a full analysis, however, we have reviewed cases that were decided both before and after the challenged conduct in the present appeal. Even when considering cases that were decided after the conduct at issue here, we still conclude that the defendant's conduct did not give rise to a clear constitutional violation.

962, 112 S. Ct. 1565, 1181 L. Ed. 2d 211 (1992). As noted previously in this opinion, the facts in *Fortner* were much more egregious than those alleged by the plaintiff in the present case. In particular, in the present case, the plaintiff neither alleged nor presented evidence that he requested to be seat belted or requested that the defendant slow down or drive more cautiously. There is also no evidence that the plaintiff's request that the defendant procure a larger vehicle was made because of a concern for safety instead of comfort. Consequently, the Second Circuit's reference to *Fortner* does not support a conclusion that it would hold that the defendant's conduct in the present case is a clear violation of the plaintiff's eighth amendment rights. Overall, the Second Circuit's precedent regarding the transporting of inmates in vehicles does not clearly establish that the defendant's conduct in the present case violated the plaintiff's constitutional rights.

Second, no other federal courts that have considered factual situations similar to those at issue here have concluded that such facts give rise to a constitutional violation. See *Weber* v. *Dell*, 804 F.2d 796, 801 n.6, 803–804 (2d Cir. 1986) (relying on decisions from other circuits finding similar conduct unconstitutional, even though Second Circuit had not reached issue), cert. denied sub nom. *Monroe* v. *Weber*, 483 U.S. 1020, 107 S. Ct. 3263, 97 L. Ed. 2d 762 (1987). In the present case, the plaintiff alleged that the defendant drove in disregard of the plaintiff's safety by driving thirty miles per hour in excess of the speed limit, making sharp turns, and weaving in and out of traffic, all while the plaintiff was seated in a vehicle that was too small for his stature and was unsecured by a seat belt. Federal courts that have had the opportunity to consider similar facts, however, overwhelmingly have concluded that such conduct does not constitute deliberate indifference. See *Carrasquillo* v. *New York*, supra, 324 F. Supp.

2d 433–34 (no deliberate indifference when defendant drove above speed limit in icy conditions with inmate handcuffed and not seat belted); see also, e.g., *Daily* v. *CCA-WCFA Whiteville Transportation Officers*, supra, United States District Court, Docket No. 3:18-CV-0146 (WLC) (no deliberate indifference when defendant drove ninety miles per hour while "blasting" music and "fumbling with his phone" with inmate handcuffed and not seat belted); *Byerlein* v. *Hamilton*, supra, United States District Court, Docket No. 1:09-CV-841 (PLM) (no deliberate indifference when defendant drove above speed limit on icy road with inmate handcuffed and not seat belted).

In fact, in many of these cases, the defendant's conduct was arguably worse than the conduct at issue here, given that the defendants in those cases drove erratically in bad weather or were distracted while driving. See *Daily* v. *CCA-WCFA Whiteville Transportation Officers*, supra, United States District Court, Docket No. 3:18-CV-0146 (WLC); *Byerlein* v. *Hamilton*, supra, United States District Court, Docket No. 1:09-CV-841 (PLM); *Carrasquillo* v. *New York*, supra, 324 F. Supp. 2d 433–34. Despite that worse conduct, though, each court still concluded that such conduct did not constitute deliberate indifference. See *Daily* v. *CCA-WCFA Whiteville Transportation Officers*, supra, United States District Court, Docket No. 3:18-CV-0146 (WLC); *Byerlein* v. *Hamilton*, supra, United States District Court, Docket No. 1:09-CV-841 (PLM); *Carrasquillo* v. *New York*, supra, 433–34. Thus, this persuasive authority also does not clearly establish that the defendant's conduct in the present case violated the plaintiff's constitutional rights.

On the other hand, as noted previously in this opinion, the cases on which the plaintiff relies that have reached the contrary conclusion are readily distinguishable from the present case. In those instances in which a federal

court has held that a defendant's conduct while transporting an inmate constituted deliberate indifference, the inmate either asked to be seat belted or asked the officer to slow down or stop, thereby putting the defendant on notice of the danger to which the plaintiff felt exposed, or involved officers who personally knew of recent injuries to inmates that had resulted from the inmates not being seat belted. See, e.g., *Rogers* v. *Boatright*, supra, 709 F.3d 408 (claim of deliberate indifference could survive dismissal, even when inmate did not request to be seat belted, when officer knew of recent prior injuries to inmates who were not seat belted); *Brown* v. *Fortner*, supra, 518 F.3d 556 (defendant ignored inmates' requests to have seat belts fastened and to drive more safely); *Brown* v. *Morgan*, supra, 1994 WL 610993, *1 (defendant ignored inmate's request to be seat belted, ignored inmate's pleas to slow down, and laughed when he saw inmate was scared); *Steele* v. *Ayotte*, supra, United States District Court, Docket No. 3:17-CV-1370 (CSH) (defendants ignored inmate's request to be seat belted); *Williams* v. *Wisconsin Lock & Load Prisoner Transports, LLC*, supra, United States District Court, Docket No. 15 C 8090 (RWG) (defendant refused to fasten inmate's seat belt after inmate asked why he was not belted); *Barela* v. *Romero*, supra, United States District Court, Docket No. CIVIL 06-41 (JBDJS) (defendant, who was speeding and stopping suddenly, ignored inmate's request to stop and laughed at inmate). In the present case, the plaintiff never asked the defendant to fasten his seat belt or commented on his driving. See *Walker* v. *Schult*, supra, 717 F.3d 125 (official must be actually aware of risk).

Further, as the plaintiff admitted at oral argument before this court, he never alleged a safety concern as to the defendant's conduct. See id. There is also no evidence that the plaintiff ever told the defendant that his concern that the assigned vehicle was too small for

him was related to any safety concern. Accordingly, because the plaintiff never made the defendant aware of any concerns that he had as to his safety, the present case is distinguishable from the federal cases that have found a constitutional violation based on a defendant's conduct while transporting an inmate. Thus, those cases also do not clearly establish that the defendant's conduct in the present case violated a constitutional right.

Consequently, because no federal case has held that facts similar to those alleged in the present case amount to deliberate indifference, we cannot say that the defendant violated a clearly established right when he transported the plaintiff without a seat belt in a vehicle that was too small and drove over the speed limit while making sharp turns and dipping in and out of traffic. See id., 125–26 (in determining whether conduct violates clearly established law, "existing precedent must have placed the . . . constitutional question beyond debate" (internal quotation marks omitted)).

Our conclusion that federal law does not clearly establish the right at issue in the present case, however, does not end our qualified immunity analysis. As the plaintiff notes in his brief, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). In rare cases, a court can conclude that a defendant's conduct rises to the level of a constitutional violation despite the fact that existing precedent has not yet held that the conduct in question is unlawful. See id.; see also *United States* v. *Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

For example, in *Hope* v. *Pelzer*, supra, 536 U.S. 734–35, the United States Supreme Court concluded that the defendants' conduct, namely, handcuffing an inmate to a hitching post in the hot sun for multiple hours

while denying him water and bathroom breaks and taunting him, was a clear and obvious violation of the eighth amendment, despite the lack of precedent involving similar facts. Similarly, in *Taylor* v. *Riojas*, U.S. , 141 S. Ct. 52, 53, 208 L. Ed. 2d 164 (2020), an inmate spent six days in two different cells, the first of which was covered "in massive amounts of feces" and the second of which was frigidly cold and overflowing with raw sewage. (Internal quotation marks omitted.) The Supreme Court held that the inmate had an obvious constitutional right to be free from "deplorably unsanitary conditions," despite the lack of precedent concerning similar facts, because "no reasonable correctional officer could have concluded that . . . it was constitutionally permissible to house [the inmate] in such deplorably unsanitary conditions for such an extended period of time." Id., 53–54.

The plaintiff thus argues that, despite the lack of any precedent finding a constitutional violation in situations similar to those alleged here, we still can conclude that the defendant's conduct in the present case constitutes deliberate indifference. We are not persuaded. The facts alleged here—specifically, that the plaintiff was injured in a car accident after the defendant neglected to seat belt the plaintiff, transported him in a vehicle that was too small, and drove in excess of the speed limit while making sharp turns and weaving in and out of traffic—are far less egregious than those alleged in *Hope* and *Taylor*, where inmates were treated in ways that were "antithetical to human dignity." *Hope* v. *Pelzer*, supra, 536 U.S. 745. Thus, we cannot say that the defendant's conduct in the present case gave rise to a constitutional violation that should have been readily obvious to the defendant despite the lack of precedent declaring such conduct unlawful.

This is particularly true given that both the United States Supreme Court and the Second Circuit have held

that conduct far worse than that alleged here was not so obvious as to constitute an eighth amendment violation in the absence of existing precedent. See, e.g., *Taylor* v. *Barkes*, 575 U.S. 822, 822–23, 826–27, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015) (defendants who failed to implement suicide prevention protocols, which allegedly led to arrestee's suicide, were entitled to qualified immunity because "[n]o decision of this [c]ourt establishes a right to the proper implementation of adequate suicide prevention protocols"); *Crawford* v. *Cuomo*, 721 Fed. Appx. 57, 60 (2d Cir. 2018) (defendant who sexually abused inmates was entitled to qualified immunity, despite "repugnant and intolerable" conduct, because "unconstitutional nature of [the defendant's] abuse was not clearly established" at time abuse occurred). Therefore, given that the present case involved a car accident with circumstances under which no federal court has found an eighth amendment violation, we decline to conclude, in light of the lack of existing relevant precedent, that the defendant's conduct was so bad as to constitute an obvious violation of the plaintiff's eighth amendment rights.

We are also not persuaded by the plaintiff's contention that, despite the lack of any relevant federal precedent, the defendant had fair notice that his conduct violated the constitution because the plaintiff was unsecured by a seat belt despite the defendant's knowledge of a department policy which states that "[t]ransportation staff and each inmate in all vehicles . . . shall use seat belts while en route." Conn. Dept. of Correction, Administrative Directive 6.4 (19) (A) (effective November 13, 2012). As noted previously in this opinion, the failure to seat belt an inmate does not constitute deliberate indifference. This is true even when the law requires the use of seat belts. See also *Carrasquillo* v. *New York*, supra, 324 F. Supp. 2d 438 (fact that New York law requires seat belts on buses was irrelevant to inmate's deliberate indifference claim).

Accordingly, because the defendant's conduct did not violate a clearly established constitutional right and because his conduct also was not severe enough to constitute an obvious constitutional violation in the absence of such clearly established law, the plaintiff's factual allegations in the present case do not give rise to a constitutional violation. The plaintiff's claim, instead, sounds in negligence. See, e.g., *Hill* v. *Shobe*, 93 F.3d 418, 421 (7th Cir. 1996) ("[a]llegations of a public official driving too fast for the road conditions are grounded in negligence"); *White* v. *New York*, United States District Court, Docket No. 10 CIV. 8689 (RJH) (S.D.N.Y. November 22, 2011) ("a negligence claim arising from one individual's careless conduct toward another is purely a matter of state tort law"); *Carrasquillo* v. *New York*, supra, 324 F. Supp. 2d 436 (constitution does not guarantee inmate's right "to non-negligent driving by government employees"). We decline to elevate what is essentially a common-law tort claim to a constitutional violation under § 1983. See *Parratt* v. *Taylor*, 451 U.S. 527, 544, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (declining to adopt reasoning that could allow "any party who is involved in nothing more than an automobile accident with a state official [to] allege a constitutional violation under § 1983"), overruled on other grounds by *Daniels* v. *Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

In sum, because no federal case has held that the facts alleged in the present case give rise to a constitutional violation, it is not clearly established that the defendant's conduct violated the plaintiff's eighth amendment right against cruel and unusual punishment. Moreover, the defendant's conduct also is not so egregious as to constitute an obvious constitutional violation in the absence of existing precedent involving similar facts.

Accordingly, the defendant is entitled to qualified immunity and the court erred in holding otherwise.[16]

The judgment is reversed and the case is remanded with direction to grant the defendant's motion for summary judgment and to render judgment thereon for the defendant.

In this opinion the other judges concurred.

JEFFREY A. REINER ET AL. *v.* MICHAEL D. REINER ET AL.
(AC 44380)

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

Syllabus

The plaintiff sought, inter alia, a declaratory judgment from the trial court determining the manner in which the plaintiff's buy out of the defendant's interest in certain parcels of real property pursuant to their settlement agreement was to be calculated. The settlement agreement provided that the buyout amount would be based on the fair market value of each property multiplied by the defendant's interest in each property. The parties disagreed as to whether "interest," as used in the settlement agreement, meant equitable interest or a percentage of the fair market value of the property, without taking into account any existing mortgages. This court, in a prior action between the parties, had determined that the settlement agreement was ambiguous with respect to the calculation of the buyout amount. In the present case, the trial court, noting that it was bound by this court's prior decision, determined that the term "interest" meant "equitable interest" and, accordingly, that the calculation of the buyout amount required consideration of the existing mortgages on the properties. On the defendant's appeal to this court, *held* that the trial court properly determined that the buyout amount for the defendant's interests in the properties was to be calculated by multiplying his percentage interest in each property by the difference of its fair market value minus any outstanding mortgage debt: contrary to the defendant's claim, the trial court's reliance on § 201 of the

[16] This conclusion renders it unnecessary for us to consider the defendant's alternative ground for reversal, namely, that the court erred in (1) determining there were material facts in dispute, (2) misstating "the standard for [a] qualified immunity analysis," and (3) defining the plaintiff's alleged constitutional right too broadly.

Restatement (Second) of Contracts in resolving the underlying action, rather than § 220 of the Restatement (Second) of Contracts, was not improper because § 220 was not applicable, as the word "interest" as used in the settlement agreement had no habitual or customary meaning, § 201 was applicable because the parties attached different meanings to the term "interest," and there was ample evidence to support the trial court's determination that the defendant had reason to know that the plaintiff believed that the term, as used in the settlement agreement, meant "equitable interest" because the defendant was aware of the mortgages on the properties and, as an attorney specializing in transactional real estate, he should have known that he did not have legal title to the mortgaged properties and was unable to convey a full legal interest in his share of the fair market value of the properties; moreover, the trial court's decision not to ascribe any weight to certain e-mails between the defendant, his attorney and the plaintiff's attorney, in which the plaintiff's attorney indicated that the buyout amount was to be determined by value, not equity, and which the defendant claimed showed that the plaintiff knew of the defendant's interpretation of the term "interest," was not clearly erroneous because the e-mails were sent after the agreement was negotiated, there was evidence that the plaintiff's attorney was not involved in the negotiations and was unaware of the mortgages encumbering the properties, and there was no evidence that the plaintiff had read the e-mails, discussed them with his attorney, or agreed with his attorney's interpretation of how the buyout amount should be calculated; furthermore, contrary to the defendant's claims, the trial court's conclusion as to the proper interpretation of the term "interest" did not conflict with the plain language of the agreement, which was ambiguous, and the trial court properly considered both the entire language of the agreement and evidence beyond the language of the agreement when making its factual findings regarding the intent of the parties; additionally, the defendant inadequately briefed his claim that equity required that the mortgage encumbering one of the properties not be included in the calculation of the buyout amount for that property because the mortgage was taken out solely to fund security deposits on the property that had not previously been funded due to the alleged mismanagement of the plaintiff, and, even if the claim had been adequately briefed, the issue did not involve a determination of equity but, rather, the interpretation of the contract, and there was no evidence that the parties intended to treat the mortgage on that property differently than the mortgages on the other properties.

Argued April 12—officially released July 26, 2022

Procedural History

Action for, inter alia, a judgment declaring that the calculation of the purchase price required to be paid

for certain real properties under a settlement agreement take into account outstanding mortgage debt, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Schuman*, *J.*; judgment for the named plaintiff, from which the named defendant appealed to this court. *Affirmed.*

Gary J. Greene, for the appellant (named defendant).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellee (named plaintiff).

Opinion

BRIGHT, C. J. In this declaratory judgment action, the defendant Michael D. Reiner appeals from the judgment of the trial court rendered in favor of the plaintiff Jeffrey A. Reiner.[1] On appeal, the defendant claims that the court erred in concluding that the term "interest," as used in the buyout provisions of the parties' settlement agreement (agreement), meant "equitable interest" and, thus, that the buyout amount for the defendant's interests in certain parcels of real property is equal to his percentage interest in each property multiplied by the difference of the fair market value of the property minus any outstanding mortgage debt. We disagree and, accordingly, affirm the judgment of the trial court.

This dispute between brothers returns to us after our decision in *Reiner* v. *Reiner*, 190 Conn. App. 268, 210 A.3d 668 (2019). In *Reiner*, we affirmed, albeit on different grounds, the trial court's order denying the plaintiff's motion to enforce the parties' agreement pursuant

[1] Jeffrey A. Reiner, Trustee, and JAR Partners, LLC, also were named as plaintiffs in this action. For clarity, we refer to Jeffrey A. Reiner as the plaintiff. Additionally, the following defendants were named in this action: Michael D. Reiner, as trustee of the Sheila Reiner Trust; Sheila Reiner, individually; Sheila Reiner, as trustee of the Michael D. Reiner Trust; Sarah L. Reiner; Jacob A. Reiner; Rhino Real Estate Investors, LLC; and Connecticut LLC Irrevocable Trust. Again, for the sake of clarity, we refer to Michael D. Reiner as the defendant.

to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811–12, 626 A.2d 729 (1993) (*Audubon*),[2] after concluding that the buyout provisions in the agreement, which stated that the plaintiff would buy out the defendant's interests in certain properties after the death of the parties' mother, were not clear and unambiguous.[3] See *Reiner* v. *Reiner*, supra, 283–84. The plaintiff subsequently filed the underlying action in the Superior Court wherein he sought a declaratory judgment determining "the calculation of the purchase price for the [defendant's] 'interest[s]' in [the] properties . . . ." In its memorandum of decision dated October 30, 2020, the court determined that, "for the purposes of the buyout provisions of the agreement, 'interest' shall mean equitable interest, or [the defendant's] share of the fair market value of the property minus the outstanding mortgage debt." This appeal challenges the court's determination.

Our opinion in *Reiner* sets forth the following relevant facts and procedural history. "The [defendant] and the [plaintiff] are brothers who were two of the three primary beneficiaries of four irrevocable trusts (Reiner Trusts) that were established by their parents, Eleanore Reiner and Leo P. Reiner.[4] The [plaintiff] was the sole trustee of the Reiner Trusts. The Reiner Trusts owned

[2] "A hearing pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, supra, 225 Conn. 811–12, is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law." *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 499 n.5, 4 A.3d 288 (2010).

[3] Our conclusion in *Reiner* was different from the trial court's conclusion because the trial court denied the plaintiff's motion to enforce on the basis of the court's finding that the agreement was clear and unambiguous and that it was the defendant's interpretation, and not the plaintiff's, that controlled. *Reiner* v. *Reiner*, supra, 190 Conn. App. 275–76.

[4] "Nancy Brooks, the sister of the plaintiff and the defendant, was the third primary beneficiary of the trusts." *Reiner* v. *Reiner*, supra, 190 Conn. App. 271 n.6.

several parcels of real property (Reiner Trusts properties) that had a substantial value; however, a majority of the properties were encumbered by mortgages. Eleanore Reiner also was the sole member of 711 Farmington, LLC, and Canton Gateway, LLC. 711 Farmington, LLC, and Canton Gateway, LLC, each owned a single parcel of real property, both of which were encumbered by a mortgage. After a dispute arose regarding the Reiner Trusts properties, the [defendant], in 2011, commenced the [prior] action and several other parallel actions against the [plaintiff] alleging that he tortiously had mismanaged the Reiner Trusts properties. On July 5, 2012, the [defendant], the [plaintiff], and several other individuals and entities associated with the Reiner Trusts executed a settlement agreement to resolve the [prior] action, the parallel actions, and other disputes. . . . The agreement contained several provisions in which the [plaintiff] agreed to buy out the [defendant's] interests in certain properties after the death of Eleanore Reiner. The following buyout provisions are directly at issue . . . .

"Section 1 (a) of the agreement provides: '[The plaintiff] shall buyout [the defendant's] interests in the Reiner Trusts and the Reiner Trusts [p]roperties by paying cash to [the defendant] in proportion to his interests therein no later than 280 days following Eleanore Reiner's death. The buy-out amount payable to [the defendant] for his interests in the Reiner Trusts will be based on the fair market value of each of the Reiner Trusts [p]roperties at the time of Eleanore Reiner's death, multiplied by [the defendant's] interests in each [Reiner] Trust[s] [p]roperty with a deduction of ten (10%) percent to compensate for a minority discount and for the fact that there is no real estate brokerage commission.' Section 1 (b) of the agreement detailed the manner in which the fair market value for each of the Reiner Trusts properties was to be determined. The

parties also agreed that the parties' 'interests' in the Reiner Trusts properties accurately were set forth in the ' "Trust Property Schedule," ' which was attached to the agreement. . . .

"Section 2 of the agreement provides in relevant part: 'In connection with the execution and delivery of this [a]greement, Eleanore Reiner will immediately transfer, by [w]arranty [d]eeds (i) her interests (as sole member of 711 Farmington, LLC) in [711 Farmington Avenue, West Hartford (711 Farmington)] as follows: two thirds (2/3) to [the plaintiff] and one-third (1/3) to [the defendant] . . . and (ii) her interests (as sole member of Canton Gateway, LLC) in [50 Albany Turnpike, Canton (Canton Gateway)] as follows: three fourths (3/4) to [the plaintiff] and one-fourth (1/4) to [the defendant] . . . . Such transfers are being made upon the following conditions . . . .

" '[The plaintiff] shall buy out [the defendant's] interests in each [of] 711 Farmington and Canton Gateway by paying cash to [the defendant] no later than 280 days following Eleanore Reiner's death. The determination of the fair market value of 711 Farmington and Canton Gateway will be based on the same formula and terms used to determine the fair market value of the Reiner Trust[s] [p]roperties provided for in [§] 1 (a) of this [a]greement above except that the valuation shall be subject only to a four percent (4%) discount, not ten percent (10%). [The plaintiff] will have 280 days from the date of Eleanore Reiner's death, to obtain financing and consummate the buyout.' . . .

"On April 7, 2017,[5] the [plaintiff] filed the motion to enforce the agreement that [was] the subject of [the]

[5] In the four and one-half years between the execution of the agreement and the litigation underlying the prior appeal, the parties engaged in extensive litigation concerning property that Eleanore Reiner owned in Florida and other collateral issues stemming from the execution of the agreement. *Reiner* v. *Reiner*, supra, 190 Conn. App. 273. None of those issues was the subject of the previous appeal, and those issues are not implicated in the present case.

appeal [in *Reiner*]. Therein, he argued that certain buyout provisions of the agreement had been triggered as a result of the recent death of Eleanore Reiner, and that a dispute existed between himself and the [defendant] as to the interpretation of those provisions. In particular, Eleanore Reiner's death triggered the [plaintiff's] obligation, under § 2 of the agreement, to buy out the [defendant's] one-third interest in 711 Farmington and his one-quarter interest in Canton Gateway. Her death also triggered the [plaintiff's] obligation, under § 1 of the agreement, to buy out the [defendant's] interest in the Reiner Trusts properties, including 603 Farmington Avenue in Hartford [603 Farmington]. The [defendant] and the [plaintiff] were unable to reach an agreement on how to determine the price that the [plaintiff] was to pay the [defendant] for his interests in the properties. The [plaintiff] claimed that the buyout price of the [defendant's] interests is intended to be calculated as the [defendant's] proportionate interest in the equity in the properties, after deducting the debt secured by any mortgages, less the percentage discounts. The [plaintiff] requested that the court adjudicate the dispute by enforcing the agreement in accordance with his interpretation.

"On April 17, 2017, the [defendant] filed an objection to the [plaintiff's] motion to enforce the agreement. Therein, the [defendant] disagreed with the [plaintiff's] interpretation and advanced his own contrary interpretation of the agreement. The [defendant] maintained that the settlement agreement clearly and unambiguously provides that the buyout amount is to be ' "based on the fair market value" of each of the properties,' which amount did not include consideration of the existing mortgages on the properties.

"On August 10, 2017, the [plaintiff] filed a supplemental memorandum in support of his motion to enforce the agreement. In his supplemental memorandum, the

[plaintiff] argued that the agreement clearly and unambiguously provides that the amount of the buyout must take into consideration the mortgages on the properties. The [plaintiff] argued that a contrary interpretation would be in conflict with Connecticut mortgage jurisprudence, and would result in an absurd result in the form of a substantial unintended windfall for the [defendant].[6]

"On October 23, 2017, following an *Audubon* hearing, the court issued a memorandum of decision in which it denied the [plaintiff's] motion to enforce the agreement and concluded that the agreement was clear and unambiguous in conformance with the [defendant's] interpretation [that the buyout amount for the defendant's interests does not include consideration of the existing mortgages on the properties]." (Footnote added; footnotes in original; footnotes omitted.) *Reiner* v. *Reiner*, supra, 190 Conn. App. 270–76.

The plaintiff appealed to this court, claiming that "the clear and unambiguous language of the agreement specifies that the buyout amount is the [defendant's] equitable interest in the properties, namely, the fair market value of the properties less the amount of any mortgage encumbrances." Id., 270, 279. In response, the defendant argued "that the [trial] court properly determined that the agreement clearly and unambiguously provides that the buyout amount is the fair market value of the properties without regard to any debt associated with the properties." Id., 279. We disagreed with both parties and instead concluded that, because each party had set forth a reasonable interpretation of the

[6] "For instance, if the parties equally shared a property that had a fair market value of $1 million and that was encumbered by $900,000 of underlying debt, the buyout amount, pursuant to the [defendant's] construction, would be $500,000. As a result, the [plaintiff] would be obligated to pay the [defendant] five times the amount of the actual equity in the property." *Reiner* v. *Reiner*, supra, 190 Conn. App. 275 n.9.

buyout provisions, the agreement was "ambiguous with respect to the method of calculation of the buyout amounts . . . ." Id., 283. Accordingly, we held that the court had "properly denied the [plaintiff's] motion to enforce the agreement, [but] it incorrectly determined that the agreement [was] clear and unambiguous . . . ." Id., 284.

Thereafter, on June 28, 2019, the plaintiff filed with the trial court in this action a three count complaint alleging (1) breach of the agreement (count one), (2) breach of the implied covenant of good faith and fair dealing (count two), and (3) that "[a] dispute exists between the parties as to the calculation of the purchase price for the [defendant's] 'interest(s)' in said properties which requires judicial determination" (count three). On July 17, 2019, the defendant filed an answer and raised five special defenses: breach of the agreement, collateral estoppel, res judicata, waiver, and that the plaintiff sought damages that were not allowed under the agreement. With respect to the plaintiff's complaint, both the parties and the court construed the third count as seeking a declaratory judgment concerning the meaning of the agreement's buyout provisions. The parties further agreed that "the court's determination on the declaratory judgment count would be binding on the remaining counts of the complaint as well as the following related actions: *Rhino Real Estate Investors, LLC* v. *JAR Partners, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-18-6091460-S [*Rhino Real Estate I*]; *Rhino Real Estate Investors, LLC* v. *JAR Partners, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-18-6091459-S [*Rhino Real Estate II*];[7] and *Reiner* v. *Reiner*, Superior Court, judicial district of Hartford, Docket No. CV-11-6020238-S, which

[7] The proceedings in *Rhino Real Estate I* and *Rhino Real Estate II* are not at issue in the present appeal.

was the original action that generated the appeal [in *Reiner*]."[8] (Footnote added.)

A three day trial to the court was held on the plaintiff's declaratory judgment count on October 1, 2 and 6, 2020. At trial, the plaintiff argued that "interest," as used in the buyout provisions, meant "equitable interest" and that, accordingly, the buyout amount for the defendant's interests in 603 Farmington, 711 Farmington, and Canton Gateway required consideration of the existing mortgages on those properties. Conversely, the defendant argued that the parties had not intended to include the existing mortgages in the calculations for the buyout amount.

On October 30, 2020, the court issued a memorandum of decision wherein it adopted the plaintiff's proposed interpretation, stating: "The court finds that each party had a consistent and sincere belief that the agreement embodied his interpretation of the word 'interest.' Abby Reiner Delales, the daughter of [the plaintiff] who negotiated on his behalf, believed in good faith that 'interest' meant equitable interest, so that [the plaintiff's] buyout payment would equal the value of [the defendant's] equity in the properties. At the same time, [the defendant] earnestly believed that 'interest' meant percentage of ownership, so that the buyout payment would equal

[8] On June 28, 2019, while the plaintiff's complaint was pending, the defendant filed a motion seeking "an order directing [the plaintiff] to immediately pay the *undisputed* portion of the outstanding amount due and owing to [the defendant] under the parties' settlement agreement . . . plus attorney's fees and other money damages . . . ." (Emphasis in original.) On July 8, 2019, the plaintiff filed an objection to the defendant's motion, claiming that the motion was "baseless and violative of the Appellate Court's decision, which found ambiguity in the settlement [agreement] between the parties. Until such time as a court adjudicates the ambiguity and determines the amount to be paid to [the defendant], [the defendant's] 'interests' cannot be transferred to [the plaintiff], and [the plaintiff] is not obligated to pay until there is a determination." At the time of the present appeal, the court had not yet ruled on the defendant's motion for orders.

his percentage of the properties' fair market value. There is no parol evidence that undermines either party's position. The court places no reliance on the various claimed admissions against interest in the case, as the court views them as improvident or lacking in probative value.

"Under these circumstances, the most logical conclusion is that there was no meeting of the minds. . . . However, the parties have not pleaded that claim and in fact have admitted that a valid contract exists. . . . Accordingly, the court lacks authority to find that there was no meeting of the minds. . . .

"The court must look for the next best solution. The Appellate Court stated that, while it found that each side had a reasonable interpretation of the buyout provisions and, as a result, the language of the contract was ambiguous, it did not 'decide which party has the better interpretation.' . . . The court must therefore look for the better or more reasonable interpretation.

"The court finds some guidance in the Restatement (Second) of Contracts, which our appellate courts have cited in contract cases. . . . Section 201 (2) provides in part as follows: 'Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.' . . .

"In this case, the court finds no basis to say that [the plaintiff] or [Delales] had 'reason to know' that [the defendant] believed that 'interest' meant percentage of fair market value. On the other hand, [the defendant] did have reason to know that [the plaintiff] and [Delales] believed that 'interest' meant equitable interest. At the

time of the agreement, [the defendant] had been an attorney for over twenty-five years specializing in transactional real estate, business, and mortgage cases. Several exhibits and the testimony of [the defendant] establish that [the defendant] knew of the existence of mortgages on all three of the subject properties at the time of the agreement . . . . As a real estate attorney, [the defendant] had reason to know that Connecticut follows the title theory of mortgages and that, therefore, he did not have legal title to properties encumbered by mortgages. Thus, he could not convey a full legal interest in his share of the fair market value of the three properties. . . . Further, logically, [the plaintiff] would only want to pay the lesser of the two possible prices for the property. For all these reasons, [the defendant] had reason to know that [the plaintiff] believed that 'interest' referred to equitable interest and not to full legal interest.

"Accordingly, the court, following the Restatement, interprets the agreement in accordance with the meaning attached to it by [the plaintiff]. Therefore, for the purposes of the buyout provisions of the agreement, 'interest' shall mean equitable interest, or [the defendant's] share of the fair market value of the property minus the outstanding mortgage debt." (Citations omitted.) This appeal followed.[9]

On appeal, the defendant claims that the court erred in holding that the term "interest" meant "equitable interest" and, accordingly, that the buyout amount for

[9] While the present appeal was pending, the plaintiff moved to terminate the appellate stay that arose under Practice Book § 61-11 (a). The trial court denied the motion after finding that "there can be no real proceedings to enforce or carry out the judgment because the court rendered only a declaratory judgment . . . . The court did not order anyone to do, or prohibit anyone from doing, anything at all. Because there is no effective automatic stay, the court cannot terminate the automatic stay . . . ." The plaintiff did not seek further review from this court of the denial of his motion.

the defendant's interests in the properties must include consideration of the existing mortgages. The defendant primarily contends that this holding was error because, in reaching this result, the court relied on the wrong section of the Restatement (Second) of Contracts and ignored crucial evidence that supported the defendant's interpretation of the buyout provisions. We are not persuaded.[10]

As a preliminary matter, we first address the applicable standard of review. The defendant maintains that, because the agreement "contains definitive contract language . . . the determination [of] what the parties intended by their contractual commitments is a question of law subject to plenary review." Conversely, the

[10] When this appeal was filed on November 13, 2020, the court had rendered judgment only on the third count of the plaintiff's complaint, and counts one and two remained pending. Because counts one and two had yet to be adjudicated, there was a question of law as to whether the defendant had appealed from a final judgment. Accordingly, on March 24, 2021, we ordered the trial court to file an articulation "addressing whether it rendered judgment on the remaining two counts of the complaint and, if not, stating the status of counts one and two of the complaint." Also on March 24, 2021, the plaintiff withdrew the remaining two counts of his complaint. On March 30, 2021, the trial court filed its articulation of decision, wherein it stated: "At the time of the court's October 30, 2020 decision, the court [had] entered judgment only on count three and did not enter judgment on counts one and two. However, on March 24, 2021, the [plaintiff] filed a withdrawal of counts one and two. . . . Therefore, at the present time, the court has entered judgment on all existing counts of the complaint." (Citation omitted.) Thereafter, we ordered the parties to "be prepared to address whether the defendant . . . appealed from a final judgment given that the plaintiff . . . did not withdraw the first and second counts of the complaint until after the defendant filed this appeal." At oral argument before this court, both parties asserted that the defendant's appeal had properly been taken from a final judgment. We agree and conclude that, on the basis of the unique procedural posture of this case, the defendant has appealed from a final judgment. See *Zamstein* v. *Marvasti*, 240 Conn. 549, 556–57, 692 A.2d 781 (1997) (plaintiff properly appealed from final judgment, even though appeal was originally filed while two counts remained pending before trial court, because pending counts were later withdrawn after appeal was filed). On the basis of the particular circumstances of this case, to conclude otherwise "would unduly elevate form over substance . . . ." Id., 557.

plaintiff argues that, because this court determined in *Reiner* that the language at issue is ambiguous, we should apply the clearly erroneous standard of review because a determination as to what the parties intended their agreement to mean is a fact driven inquiry. We agree with the plaintiff.

Although the interpretation of definitive, unambiguous contract language is a question of law subject to plenary review, in *Reiner*, we concluded "that the agreement is ambiguous with respect to the method of calculation of the buyout amounts because the intent of the parties is not clear and certain from the language of the agreement." *Reiner* v. *Reiner*, supra, 190 Conn. App. 283. "When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *David M. Somers & Associates, P.C.* v. *Busch*, 283 Conn. 396, 403, 927 A.2d 832 (2007); see also *DeLeo* v. *Equale & Cirone, LLP*, 202 Conn. App. 650, 659, 246 A.3d 988 ("[t]o the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous" (internal quotation marks omitted)), cert. denied, 336 Conn. 927, 247 A.3d 577 (2021). Accordingly, the defendant's claim is properly reviewed under the clearly erroneous standard of review.[11]

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when

[11] To the extent that the defendant claims that plenary review should apply because the court made a legal error when it relied on the wrong section of the Restatement (Second) of Contracts, we note that the Restatement is not the law and is instead simply a tool for interpreting contracts. See *Frank* v. *Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 885 (Mo. 1985) ("restatements are not law") (Blackmar, J., concurring). Accordingly, the court's reliance on the Restatement does not require us to conclude that plenary review is the applicable standard of review.

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *David M. Somers & Associates, P.C.* v. *Busch*, supra, 283 Conn. 403.

We now address the merits of the defendant's appeal. The defendant first claims that the court erred in holding that the buyout provisions require consideration of the existing mortgages because the court incorrectly relied on § 201 of the Restatement (Second) of Contracts when it instead should have relied on § 220 of the Restatement (Second) of Contracts. We are not persuaded.

Section 201 (2) provides in relevant part: "Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party." 2 Restatement (Second), Contracts § 201, p. 83 (1981). Section 220, on the other hand, provides: "(1) An agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage. (2) When the meaning attached by one party accorded with a relevant usage and the other knew or had reason

to know of the usage, the other is treated as having known or had reason to know the meaning attached by the first party." Id., § 220, p. 147.

According to the defendant, the court should have applied § 220 when interpreting the parties' agreement because what is at issue with regard to the agreement is the parties' *usage* of the word "interest." The defendant further contends that had the court applied § 220 in interpreting the parties' agreement, the court would have concluded that the defendant's interpretation of the term "interest" (as meaning legal interest, and not equitable interest) controlled. We conclude that § 220 has no application in the present case.

The interpretative guidance provided by § 220 does not broadly apply to any usage of a term. Instead, "usage," as used in § 220, specifically pertains to "usages" that are a "habitual or customary practice." 2 Restatement (Second), supra, § 219, p. 146. Further, such a "usage" exists only when "few or many people use a word or phrase to convey a standard meaning or several standard meanings and develop a common understanding of the meaning or meanings." Id., comment (b), p. 146. The defendant cannot claim that his interpretation of the term "interest" was based on a habitual or customary usage of the term or that the term has a standard meaning that is understood by a group of people. The defendant did not present any evidence of such a usage to the court and, instead, his testimony concerning the meaning of "interest" was based solely on his personal understanding of that term as used in the agreement. We further conclude, as we explained in *Reiner*, that the word "interest," as used in real estate transactions such as the ones at issue in this case, has no habitual or customary meaning that is shared among a group of people. See *Reiner* v. *Reiner*,

supra, 190 Conn. App. 281–82. Thus, the court was correct in not relying on § 220 to resolve the underlying action.

We further conclude that the court correctly applied § 201 in resolving the underlying action. The interpretative guidance provided by § 201 applies in cases where the parties have attached different meanings to a term or provision of an agreement but one of the parties knew or had reason to know of the meaning attached to that term or provision by the other party. 2 Restatement (Second), supra, § 201, p. 83. In its memorandum of decision, the court found that the defendant had reason to know that the plaintiff believed that the term "interest" meant "equitable interest" and, thus, according to § 201, held that the plaintiff's interpretation of the buyout provisions should control. We conclude that the evidence in the record provides ample support for the court's determination that the defendant had reason to know of the plaintiff's interpretation of the term "interest."

First, the evidence establishes that the defendant was aware of the mortgages on each of the three properties. The defendant testified at trial that he knew that 603 Farmington, 711 Farmington, and Canton Gateway all were encumbered by mortgages when the parties executed the agreement. Closing documents and e-mails related to the mortgages for each of those properties further demonstrate that the defendant knew about the mortgages. Second, the evidence also supports the court's conclusion that the defendant, as an attorney specializing in "transactional real estate, business and mortgage cases" for more than twenty-five years, "had reason to know that Connecticut follows the title theory of mortgages and that, therefore, he did not have legal title to properties encumbered by mortgages." The

defendant testified that he was an accomplished transactional attorney who had decades of extensive experience and involvement with real estate and mortgage related transactions. Given this background, the trial court had a sufficient evidentiary basis to infer that the defendant knew that "Connecticut follows the title theory of mortgages, which provides that on the execution of a mortgage on real property, the mortgagee holds legal title and the mortgagor holds equitable title to the property." (Internal quotation marks omitted.) *Mortgage Electric Registration Systems, Inc.* v. *White*, 278 Conn. 219, 231, 896 A.2d 797 (2006). Accordingly, it was reasonable for the court to infer that the defendant likely knew that because he, as a mortgagor, had only equitable title to the property, "he could not convey a full legal interest in his share of the fair market value of the three properties." See id.; see also *Reiner* v. *Reiner*, supra, 190 Conn. App. 281. Furthermore, it was reasonable for the court to infer that the plaintiff would want to pay the lesser of the two possible prices for the properties and, hence, the defendant "had reason to know that [the plaintiff] believed that 'interest' referred to equitable interest and not to full legal interest."

The defendant argues that the court's findings as to each party's understanding of "interest" were clearly erroneous because the court ignored parol evidence that showed that both parties understood that the value of the defendant's interests in the properties was to be calculated based on the fair market value of the properties and not on the amount of equity in the properties after considering mortgages. In particular, the defendant relies on exhibits 605 and 606. Exhibit 605 is a series of e-mails, which included a July 6, 2012 e-mail exchange between the defendant and Attorney Samuel Chester, who was assisting the plaintiff with the drafting and execution of the agreement. In that

e-mail exchange, the defendant wrote that "[m]y biggest concern is mortgaging trust assets before my family is paid." Chester responded to this concern by writing: "The buyout of the trust properties is determined by **value**, not equity. If [the plaintiff] refinances a trust property, how would that negatively affect your interest?" (Emphasis in original.) The plaintiff and Delales were copied on Chester's response to the defendant.

Exhibit 606 contains additional e-mails sent later on July 6, 2012, among the defendant, his attorney, Doug Evans, and Chester. In an e-mail to Evans, on which Chester was copied, the defendant wrote: "This is a set up. . . . Now they want no notice which would allow [the plaintiff] to encumber everything and avoid payout." In response, Chester wrote to the defendant and Evans: "[The defendant's] buyout is not based upon equity, but upon fair market value of the properties. This is no 'set up.' " All of the e-mails in exhibits 605 and 606 on which the defendant relies were exchanged one day after the agreement was executed.

The defendant argues that these e-mail exchanges show that the parties, in particular the plaintiff, understood that the buyout amount would be calculated based on the fair market values of the properties and not on the amount of equity in those properties when the buyout occurred. He argues that the court's conclusion to the contrary was clearly erroneous. We are not persuaded. The record reflects that the court considered exhibits 605 and 606 but chose not to ascribe the weight to them that the defendant contends it should have.

The following additional facts and procedural history inform our analysis. While the present appeal was pending, on April 5, 2021, the defendant filed with this court a motion for permission to file a late motion for articulation with the trial court, which we granted. Thereafter,

on May 14, 2021, the defendant filed with the trial court his motion for articulation, wherein he asked the court to "articulate whether it considered the defendant's exhibits 605 and 606 in forming its decision . . . ." On June 1, 2021, the trial court granted the defendant's motion for articulation, stating: "The court did consider exhibits 605 and 606. However, the court did not attach any weight to the statements contained in these exhibits."

It is for the trial court to decide what weight to give the evidence presented to it. See *Vaiuso* v. *Vaiuso*, 2 Conn. App. 141, 146, 477 A.2d 678 ("[t]he weight given to the evidence before it . . . [is] within the sole province of the trial court"), cert. denied, 194 Conn. 807, 482 A.2d 712 (1984). Furthermore, the court's decision to give no weight to those two exhibits was reasonable given the other evidence it heard. Delales, who negotiated the agreement on behalf of the plaintiff, testified that the e-mails in exhibits 605 and 606 were sent after the agreement had been negotiated. Delales also testified that Chester had not been involved in any of the negotiations concerning the agreement or in any conversations about what "interest" meant. Further, according to Delales, Chester was not even aware that the properties were encumbered by mortgages when he sent the two e-mails in question. Finally, neither the plaintiff nor Chester was questioned about Chester's e-mail in exhibit 606 on which the plaintiff was copied. Consequently, there was no evidence that the plaintiff read the e-mail, discussed it with Chester, or agreed with Chester's statement regarding how the buyout amount would be calculated.[12] On the basis of the totality of the evidence, the court's conclusion that exhibits

[12] At oral argument before this court, the defendant argued that, because the plaintiff was copied on the e-mails in exhibits 605 and 606 but never corrected Chester's belief that the buyout amount for the properties was "determined by **value**, not equity," the plaintiff must have agreed with that interpretation of the term. (Emphasis in original.) We disagree because the trial court did not reach such a conclusion, and for us to so conclude,

605 and 606 did not credibly show that the plaintiff knew or had reason to know of the defendant's interpretation of the term "interest" was not clearly erroneous.

We also are unpersuaded by the defendant's claim that the court's conclusion as to the proper interpretation of "interest" is incorrect because it conflicts with the plain language of the agreement. More specifically, the defendant argues that the lack of any references to equity or mortgages in the agreement's buyout provisions should have been dispositive on the question of whether those provisions included consideration of the existing mortgages. This is essentially the same argument we rejected in *Reiner*. In *Reiner*, this court concluded that the parties' agreement was ambiguous as to whether the buyout amount for the defendant's interests included the mortgages on the properties. *Reiner* v. *Reiner*, supra, 190 Conn. App. 283–84. That conclusion was binding on the trial court in all subsequent proceedings. See *Marshall* v. *Marshall*, 200 Conn. App. 688, 707–708, 241 A.3d 189 (2020) ("[i]t is a well-recognized principle of law that the opinion of an appellate court, so far as it is applicable, establishes the law of the case upon a retrial, and is equally obligatory upon the parties to the action and upon the trial court" (internal quotation marks omitted)). Moreover, when a contract is ambiguous, the trial court is required to determine the intent of the parties and is permitted to rely on extrinsic evidence in doing so. See *Hudson City Savings Bank* v. *Hellman*, 196 Conn. App. 836, 858–59, 231 A.3d 182 (2020). Therefore, the court properly considered evidence beyond the language of the agreement when making its factual findings regarding the intent of the parties.

especially without having heard all of the evidence that the trial court did, would require us to speculate, which we cannot do. See *In re Selena O.*, 104 Conn. App. 635, 644–45, 934 A.2d 860 (2007) (conclusions that rest on speculation are erroneous).

For the same reasons, we reject the defendant's argument that the court erred because it failed to consider the entire language of the agreement. According to the defendant, had the court considered the entirety of the agreement, it would have found additional language that supported the defendant's interpretation of the buyout provisions. This is yet another species of the defendant's argument that the agreement, as a whole, is clear and unambiguous on its face. Again, we reached a contrary conclusion in *Reiner* and did so after considering the entire language of the agreement. See *Reiner* v. *Reiner*, supra, 190 Conn. App. 282 n.12. The trial court recognized that it was bound by that conclusion and properly turned to parol evidence to determine the parties' intent. This evidence included the testimony of the parties from which the court found that "each party had a consistent and sincere belief that the agreement embodied his interpretation of the word 'interest.' " Given the evidence before it, the court's finding was not clearly erroneous. Furthermore, because we had determined that the language of the agreement is ambiguous, and given the court's finding that the parties had very different yet sincere views as to what they agreed to, the court employed a reasonable and logical approach to resolve their dispute. We find no error in that approach or in the factual findings on which the court relied.

Finally, we reject the defendant's claim that equity requires that the mortgage encumbering 603 Farmington not be included in the calculation of the buyout amount for that property because that mortgage was taken out solely to fund security deposits on the property that had not previously been funded due to mismanagement by the plaintiff.

We first note that this claim is inadequately briefed. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented

to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022). The defendant's argument in support of this claim is both short and conclusory. Further, the defendant provides almost no meaningful analysis in support of the claim and does not provide a single citation to any applicable legal authority. Accordingly, the claim is inadequately briefed. See id., 630–31 (claims were inadequately briefed when party provided "no meaningful analysis," "almost no citation to applicable legal authorities," and briefing was conclusory).

Moreover, even assuming that the defendant had properly briefed this claim, we still would conclude that the court did not err in finding that the mortgage on 603 Farmington is included in calculating the buyout amount for that property. As the plaintiff points out, the present case did not involve a determination of equity or any equitable adjustments. Instead, the case solely involved the interpretation of a contract, and there is no evidence that the parties intended to treat the mortgage on 603 Farmington any differently from the mortgages on the other properties. Therefore, the court did not err in treating 603 Farmington the same way as the other properties for the purpose of calculating the buyout amount.

In sum, for all of the foregoing reasons, we conclude that the court properly determined that the buyout amount for the defendant's interests in the properties is calculated by multiplying his percentage interest in each property by the difference of the property's fair market value minus any outstanding mortgage debt.

The judgment is affirmed.

In this opinion the other judges concurred.

HOSSIEN KAZEMI ET AL. *v.* LAURENCE ALLEN ET AL.
(AC 44377)

Prescott, Suarez and Palmer, Js.

Syllabus

The plaintiffs sought to recover damages from the defendants, A and G Co., for, inter alia, vexatious litigation, in connection with a prior quiet title action regarding a disputed area of real property. A acquired a parcel of real property in 1996, and, in 2014, the plaintiffs acquired the adjoining property. Subsequently, the defendants notified the plaintiffs of their claim to a strip of land along the northern boundary of the plaintiffs' property. In October, 2015, the plaintiffs filed on the land records a notice of intent to dispute and prevent the defendants from acquiring the right to possess the disputed area. The plaintiffs then commenced the action to quiet title to their property and to obtain a declaration that the defendants did not have an interest in the area. In response, the defendants asserted a two count counterclaim sounding in adverse possession and trespass, alleging that they had been in possession of the disputed portion of the plaintiffs' property for more than fifteen years prior to the filing of notice on the land records. Following a trial, the trial court found for the plaintiffs. The plaintiffs then filed the underlying action in relation to the defendants' counterclaim, and, following trial, the court found that the plaintiffs successfully had demonstrated that the defendants lacked probable cause to bring the counterclaim and that the defendants had failed to prove their defense of advice of counsel. On the defendants' appeal to this court, *held*:

1. This court determined that the defendants properly appealed from a final judgment in light of the fact that the trial court, although it did not explicitly address the plaintiffs' trespass count in its decision, implicitly disposed of that count; according to the testimony at trial, the plaintiffs incurred expenses to remove structures that had been placed on the

property following judgment in the action to quiet title and the court awarded the plaintiffs costs to remove those structures, such that the court implicitly found in favor of the plaintiffs on their count alleging a trespass.

2. The trial court did not err when it determined that the defendants lacked probable cause to bring the adverse possession and trespass counts of their counterclaim, there having been a dearth of evidence to support their claims: the court properly determined, on the basis of the evidence presented at trial, that the defendants did not have a reasonable good faith belief in the existence of facts essential to bring the adverse possession claim with respect to certain encroachments, their use of hedges, a retaining wall and pillar, a mailbox, and a driveway, because, although A testified that the alleged encroachments on which their adverse possession claims were based existed when he purchased the property in 1996, certain surveys and photographs admitted into evidence showed either that no such encroachments existed on various dates following the purchase or that the encroachments were on the defendants' property and not the plaintiffs' property, and the trial court found A's testimony not credible and inconsistent; moreover, because the court did not err in finding that the defendants lacked probable cause to believe that they had acquired the property by adverse possession, the defendants also lacked probable cause to assert their trespass claim with respect to the disputed property over which they had no possessory right.

3. The trial court properly concluded that the defendants did not establish their advice of counsel defense, as evidence in the record supported the court's findings that the defendants withheld and misrepresented material facts to counsel, limited counsel's preparation, acted to prevent counsel from learning adverse material facts by preventing counsel from independently investigating to corroborate their version of events, and, thus, their reliance on counsel's advice necessarily could not have been made in good faith.

4. The trial court properly inferred that the defendants acted with malice, that court having properly determined that the defendants lacked probable cause to bring their claims.

Argued January 4—officially released July 26, 2022

Procedural History

Action, inter alia, to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the matter was tried to the court, *Hon. Edward T. Krumeich II*, judge trial referee; judgment for the plaintiffs, from which the defendants appealed to this court. *Affirmed.*

Thomas B. Noonan, with whom were *Douglas S. Skalka* and, on the brief, *Dennis M. Carnelli*, for the appellants (defendants).

Michael J. Leventhal, for the appellees (plaintiffs).

Opinion

SUAREZ, J. In this vexatious litigation action, the defendants, Lawrence Allen (Allen) and Green Tree Estate Association, Inc. (Green Tree), appeal from the judgment of the trial court in favor of the plaintiffs, Hossien Kazemi and Mahvash Mirzai. On appeal, the defendants claim that the trial court improperly (1) determined that the plaintiffs established that the defendants lacked probable cause to bring the claims for adverse possession and trespass in their counterclaim, (2) denied the defendants' motion for a directed judgement, (3) determined that the defendants failed to establish their advice of counsel defense, and (4) found that the defendants acted with malice. We affirm the judgment of the trial court.

The following facts, as found by the court or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. The defendants are the owners of real property known as 43 Maple Avenue (43 Maple) in Greenwich. The property was first acquired by Allen on October 16, 1996, and was later converted into a four unit condominium on December 5, 1998. Allen owns the condominium units, and Green Tree owns the common areas. On March 10, 2014, the plaintiffs acquired real property known as 33 Maple Avenue (33 Maple), the adjoining property situated to the south of 43 Maple. On September 14, 2015, John Tesei, Allen's attorney, sent a letter to the plaintiffs, on behalf of the owners of 43 Maple, in which he notified the plaintiffs of the defendants' claim to a strip of land along the northern boundary of 33 Maple. In the letter, Tesei indicated that the claim was based on the defendants'

adverse use of the disputed area for more than fifteen years by maintenance of shrubs, a curbed driveway, and a stone pillar. In response, on October 20, 2015, the plaintiffs served on the defendants, pursuant to General Statutes § 52-575,[1] a notice of intent to dispute and prevent the defendants from acquiring the right to possess the disputed area. The notice was recorded on the land records on October 22, 2015.

Immediately thereafter, the plaintiffs commenced an action to quiet title to 33 Maple pursuant to General Statutes § 47-31 and to obtain a declaration that the defendants did not have an interest in the disputed area (prior action). In response, the defendants asserted a statute of limitations special defense under § 52-575 (a) and a two count counterclaim sounding in adverse possession of the disputed area and trespass. The defendants alleged that they had been in possession of the disputed portion of 33 Maple for more than fifteen years prior to October 22, 2015, the date on which the notice

[1] General Statutes § 52-575 (a) provides in relevant part: "No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless within such fifteen-year period, any person or persons claiming ownership of such lands and tenements and the right of entry and possession thereof against any person or persons who are in actual possession of such lands or tenements, gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded . . . shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter, provided an action is commenced thereupon within one year next after the recording of such notice. The limitation herein prescribed shall not begin to run against the right of entry of any owner of a remainder or reversionary interest in real estate, which is in the adverse possession of another, until the expiration of the particular estate preceding such remainder or reversionary estate."

had been recorded. In their answer, the defendants alleged that several acts gave rise to adverse possession of the disputed property, including the defendants' maintenance of a driveway, a chain link fence, a stone pillar, certain shrubs, bushes and plants next to the stone pillar, and a mailbox. The defendants' trespass counterclaim alleged that the plaintiffs' workers had "destroyed the fence and mailbox . . . ." The defendants filed an amended counterclaim on May 2, 2017, which alleged the maintenance of a "brick pillar" along with the plants and mailbox. The amended counterclaim also alleged that the chain link fence was just a demarcation of the disputed area and it no longer alleged that the fence was maintained by the defendants. The amended trespass counterclaim alleged that the plaintiffs' agents entered the disputed area to replace the fence and that they "removed, dismantled, and/or otherwise displaced the mailbox . . . ."

The prior action was tried before the court, *Hon. David R. Tobin*, judge trial referee, on April 18 and 20, 2018. The court issued a memorandum of decision dated June 13, 2018, in which it quieted title to 33 Maple in favor of the plaintiffs and rejected the defendants' special defense and counterclaim of adverse possession. The court, after examining the evidence adduced at trial, concluded that the only evidence supporting the adverse possession counterclaim was Allen's uncorroborated testimony, which was insufficient to sustain the defendants' burden of proof. The court did not address the defendants' trespass counterclaim in its memorandum of decision because that claim was withdrawn by the defendants at trial in the prior action after they had rested their case.

Thereafter, on September 12, 2018, the plaintiffs filed the action underlying the present appeal. The complaint

alleged causes of action against the defendants sounding in slander of title,[2] vexatious litigation, vexatious litigation with malicious intent, and trespass. The vexatious litigation claims[3] against the defendants related to their counterclaim alleging adverse possession and trespass that they had raised in the prior action. In their defense against the vexatious litigation claims, the defendants attempted to demonstrate that they had brought their counterclaim in good faith and on the advice of counsel.

Following a trial to the court, *Hon. Edward T. Krumeich II*, judge trial referee, the court found that the plaintiffs successfully had demonstrated that the defendants lacked probable cause to bring the counterclaim alleging adverse possession and trespass and that the defendants had failed to prove their advice of counsel

[2] On December 27, 2019, the court granted the defendants' motion to dismiss the slander of title count after finding that the defendants were entitled to the absolute litigation privilege. There are no claims on appeal related to this issue.

[3] In the counts of the complaint alleging vexatious litigation, the plaintiffs do not specifically indicate whether the claims are statutory claims, brought under General Statutes § 52-568, or common-law claims. In the prayer for relief, however, the plaintiffs requested, for the second count, "[d]ouble damages pursuant to . . . § 52-568 (1)" and for the third count, "[t]reble damages pursuant to . . . § 52-568 (2) . . . ." Despite the plaintiffs' lack of precision in the counts of the complaint, the court, in its memorandum of decision, asserted that the "plaintiffs claim that in . . . prosecuting the counterclaims in the prior action [the] *defendants committed vexatious litigation under . . . § 52-568 and at common law.*" (Emphasis added.) After finding that the defendants lacked probable cause to bring the claims and that they acted with malice, the court ultimately awarded the plaintiffs' treble damages under § 52-568 (2). We note that, regardless of whether the plaintiffs' claims in the present case were brought under § 52-568 or the common law, our analysis in this opinion with respect to probable cause is the same. See *Ferri* v. *Powell-Ferri*, 200 Conn. App. 63, 68, 239 A.3d 1216 (noting that "[a] statutory action for vexatious litigation under . . . § 52-568 . . . differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages" (footnote omitted; internal quotation marks omitted)), cert. denied, 335 Conn. 970, 240 A.3d 285 (2020).

defense. In its memorandum of decision, the court found the following facts: "[The] defendants have demonstrated that they consulted with impartial counsel who advised them they had viable claims. . . . The credible evidence established there was not full and fair disclosure of material facts to counsel. Allen withheld and misrepresented material facts to counsel, limited counsel's preparation and acted to prevent counsel from learning adverse material facts by preventing counsel from independently investigating the defense and claims to corroborate his version of events. Allen did not rely on counsel's advice but, rather, manipulated counsel to accept his false version of events and acted in bad faith in prosecuting the limitations defense and [both counts of] the [counterclaim].

"The court finds Allen's testimony lacked credibility in many respects. Allen testified that the alleged encroachments existed when he purchased 43 Maple . . . in 1996. The 1998 survey belies that claim because it shows no encroachments and, indeed, shows neither the pillar and wall nor the mailbox shed. The 2006 survey also omits the mail shed but does show a new encroaching stone wall without a pillar where the 1998 survey showed a nonencroaching u-shaped structure. Allen was disingenuous when he testified in this case he was not familiar with surveys yet claimed the 1998 survey was inaccurate, as he did in the trial before Judge Tobin. The court rejects Allen's interpretation of the 1998 survey that the u-shaped structure shown is the encroaching wall depicted on the 2006 survey. The absence of a pillar is also striking because the 1998 survey calls out a pillar at another location. Allen's assertion that the surveys are not accurate rings hollow and is contradicted by other evidence that corroborates the wall and pillar and the mail shed were constructed after the 1998 survey.

"The amended counterclaim's change of allegations from a stone to a brick pillar was significant. Allen testified that the pillar was brick when he purchased the property in 1996 and was subsequently clad in fieldstone as part of the condominium renovations. No brick was shown in the video of the pillar's demolition and the demolition contractor testified the workers found no brick when the fieldstone pillar was demolished in 2019, along with the encroaching fieldstone, rubble, and mortar wall to which it was attached. The court finds that the encroaching wall and pillar were constructed sometime after 1996 and that Allen's testimony to the contrary in both trials was false. The court also finds that the stone pillar was added later and the testimony by Allen that there was originally a brick pillar in 1996 was fabricated to explain evidence that the pillar was formed of stone when the wall was extended and became an encroachment sometime after the 1998 survey.

"Hedges are shown on both the 1998 and 2006 surveys on 43 Maple . . . at the location Allen testified there were shrubs and other plantings in 1996 that encroached on 33 Maple . . . which were maintained by [the] defendants' landscapers. The only photograph of the hedges shows tall landscaped hedges that appear to be on [the] defendants' side of the property line with low ground cover beneath, possibly pachysandra or ivy also depicted nearby. No shrubs or other plantings are shown in the photograph. Although the court credits that [the] defendants' landscapers maintained the hedge and ground cover beneath, there is no proof of any encroachment by the hedge and ground cover on 33 Maple . . . that existed in 1996, as Allen testified.[4]

[4] "Because [the] defendants never engaged a surveyor to map out the claim to have adversely possessed a portion of 33 Maple . . . or to stake the line, there is a paucity of evidence as to the location of any alleged encroachments other than a portion of the wall where the pillar and wall were located on the 2006 survey."

"The mailbox shed was added sometime after the condominium conversion in December, 1998, presumably as part of the condominium construction project. The credible evidence is that the shed was originally placed on a concrete pad located on 43 Maple . . . and moved to a new location for the convenience of the postal service. The photograph of the mail shed and the concrete pad appear to show both to be on 43 Maple. [In the prior action] Judge Tobin could not find the shed encroached on 33 Maple for the requisite period.

"Allen went to great lengths to keep his counsel in the dark about material facts and surveys that contradicted his version of events and stymied their efforts to investigate his narrative. All three counsel involved relied on information supplied by Allen as to the alleged encroachments and their duration when advising him as to the merits of his defense and claims. The only source of information to counsel about the encroachments and their duration came from Allen, who kept [Attorney David W.] Rubin, and especially [Attorney Michael] Powers, on a tight leash ostensibly to keep them from overcharging him but also to prevent them from learning about Allen's deception. Allen would not allow Rubin to interview witnesses he wanted to interview and accused both his trial counsel of trying to run up their fees when they recommended doing more than the minimum Allen authorized to prepare and defend the case. Attorney Rubin twice moved to withdraw as counsel, in part, because he disagreed with Allen's efforts to prevent him from investigating the case to corroborate what Allen had told him and because Allen did not take counsel's advice as to how the case should be prepared, defended and prosecuted. Allen's interrogatory responses to the first set of interrogatories, prepared by Rubin's associate and certified as true by Allen, stated that the stone pillar was located on the property when he purchased [it] in 1996. In his responses to the

second set of interrogatories, after amendment of the answer, Allen swore there was a 'brick' pillar there when he purchased the property in 1996. Neither is supported by the objective evidence adduced at trial, notably the 1998 and 2006 surveys and the evidence related to demolition of the pillar in 2019. Allen did not supply counsel with the 1998 and 2006 surveys done by his surveyor, which turned out to be pivotal evidence at trial in the prior action. The 2006 survey was the only objective evidence that there was any encroachment at all and forced counsel to rely on Allen's anecdotal evidence that the encroachments existed for the requisite period.

"Rubin wanted to interview and/or depose Nakolinkova Bliznakova in San Francisco but Allen would not permit him to do so, citing the expense. At trial in the prior action her testimony as a rebuttal witness was devastating to [the] defendants. She testified she was the granddaughter of the owners of 33 Maple . . . and grantor on the deed to [the] plaintiffs. She testified the hedge was planted by her grandfather and was maintained by her family. She testified the chain link fence was erected by her grandfather to keep his dogs from leaving the property. Judge Tobin found the fence was never intended to demarcate the boundary between 43 Maple and 33 Maple and the hedge was located 'entirely, or in large measure,' north of both the fence and the property line.

"[Powers] replaced Rubin as defense counsel on July 27, 2017, and he tried the case in the prior action. When he was retained, he assured Allen he would not need to conduct an extensive investigation or interview and/or depose fact witnesses but would rely on the testimony of Allen, his wife Michelle Allen, and one of their landscapers. Little or no activity occurred in the case as reflected in the court's file until the trial date approached and then there was a flurry of activity that

[appears] calculated to delay trial and encourage settlement.

"On April 18, 2018, the first day of trial before Judge Tobin, [the] plaintiffs rested after brief testimony by Kazemi. Allen testified the remainder of the day to conclusion. An e-mail from Allen to . . . Powers on Monday, April 16, 2018, two days before trial, listed three witnesses, [Allen, Michelle Allen] and a landscaper. Those were the only witnesses [the] defendants intended to call at trial. Apparently, by the evening of the first trial day, Allen became concerned [the] defendants had not met their burden of proof to the satisfaction of Judge Tobin. That same day, on Wednesday, April 18, 2018, at 6:44 p.m., Allen sent Powers an e-mail stating that 'I have the general contractor and architect willing to sign attestation letters' as to construction of the mailbox and fieldstone cladding of the existing retaining wall. At 8:41 p.m. later that same day, Allen sent Powers an attestation letter he had drafted. At 9:30 a.m., the next day, April 19, 2018, the day before the second and final day of trial, Allen sent Powers proposed attestation letters he had drafted for signature by Michael Blanc . . . the architect, and Mark Mantione . . . the general contractor on the condominium conversion project and Joann P. Erb, a realtor involved in marketing Allen's properties. The attestation letters drafted by Allen and later signed by the contractor, architect, and realtor were addressed to Judge Tobin and attested to certain facts relating to the mailbox, wall, and pillar and landscaping at issue. These unsworn letters were never admitted into evidence and the signatories were never witnesses at trial of the prior action. Their significance to the claims in this action is as evidence that Allen knew the identity of the architect, contractor, and realtor and knew they had material information about the subject property that was kept from his counsel, who in the ordinary course at least would have interviewed

them and reviewed their files in preparation of the case. Allen had claimed at his deposition on May 9, 2017, he could not recall the name of the contractor who had worked on the pillar. If that was true initially, which is doubtful, it clearly was not true later as the case proceeded toward trial.

"Some of the information in the attestation letters is not helpful to [the] defendants in this case. For example, Mantione attested his crew poured the slab and built the mail shed in November, 1998, and then, '[i]n or about January, 1999, my crew moved the mailbox approximately 3 [to] 5 feet to the left of the cement slab inside the hedges, at the request of the Greenwich Post Office.' That is the position shown in the photograph of the mail shed and concrete pad, which appear to be on 43 Maple, not 33 Maple, north of the hedge the surveys place on [the] defendants' property. Mantione's letter also attests that in or about March, 1999, his crew 'extended the height at the beginning of the retaining wall to form a small pillar.' If true, the pillar did not exist in 1996, when Allen testified it existed. Mantione backtracked when he testified in this action that he clad an existing pillar with fieldstone, presumably to bolster Allen's testimony about an existing brick pillar, but that testimony is not credible and is contradicted by the surveys, the credible testimony of the demolition contractor and the pillar demolition video. The encroaching pillar was constructed of fieldstone when the section of the stone and rubble wall was extended and then encroached on 33 Maple . . . as shown on the 2006 survey.

"Blanc, the architect, signed an attestation letter dated April 17, 2018, the day before the trial started, which contradicted Mantione by stating the 'mailbox stand . . . was not constructed by one of the contractors or by the present owners of 43 Maple . . . .' Blanc

corroborated Mantione's letter, and contradicted Mantione's testimony at trial in this case and the prior case, by attesting that, in or about March, 1999, the renovation work '[e]xtended height at the beginning of the retaining wall to form a small pillar.' This contradicts Allen's testimony in both trials that the pillar existed in 1996. The 1998 survey does not show an existing retaining wall at that location, while the 2006 survey shows an encroaching wall there, which is proof the wall was not merely heightened, as Blanc and Mantione attested, but rather it was constructed sometime between December 4, 1998, and August 18, 2006, the respective survey dates. Allen's testimony that there had been no improvements since 1998 was false.

"Neither Rubin nor Powers had the benefit of interviewing Blanc or Mantione or reviewing their files. Neither counsel was provided with their names until Powers was presented with the attestation letters during trial. The attestation letters were not admissible; the realtor letter was offered but not admitted as hearsay by Judge Tobin. [The] defendants did not offer the architect and contractor attestation letters. Powers was not informed of the contractor, architect, and realtor as potential witnesses until shortly before the second day of trial. Rubin never knew their identity. Allen knew who they were, knew that the architect and contractor and their files would be a likely source of material information and yet he withheld their identity from his counsel.

"Also on April 19, 2018, at 10:29 p.m., Allen informed Powers that his wife found new evidence, including a 1997 survey that showed the wall and overhead photos of 43 Maple . . . in 1997, 2003 and 2006. By e-mail of same date at 10:51 p.m., Allen sent Powers the certified attestation letters and a 1997 survey by S.E. Minor and stated he would bring a 2005 survey by Ahneman to court the next day. The 2005 survey showed an

encroaching 'retaining wall' as of March, 2005, according to Judge Tobin's findings. Neither counsel had benefit of these late produced documents when they advised Allen of the viability of the defense and claims.

"The significance of the late provided evidence and the attestation letters was that information which should have been available to counsel was not provided to them by Allen so any advice counsel gave was not informed by what counsel would have learned from the missing evidence and lost opportunities to investigate. The court does not believe Allen's testimony that he wanted Mantione, Blanc and [Erb] to testify at [the] trial of the prior action but Powers decided not to call them because he had missed the deadline for listing them as witnesses or because they had not been deposed. Instead, the court credits Powers' testimony Allen did not want them to testify. Allen's apparent strategy for preparing the attestation letters was to avoid live testimony and use written statements to control the information to be given to Judge Tobin and to avoid cross-examination that would contradict his version of events.

"Allen's strategy was to defend the prior action based on the false narrative that there were encroachments on 33 Maple . . . that existed in 1996 when Allen purchased 43 Maple . . . . He compounded this by fabricating a trespass claim that was bereft of evidence and was withdrawn at trial of the prior action after [the] defendants had rested their case. Allen believed that Kazemi was a real estate developer who planned to build a new house and flip the property. The Tesei letter and later the special defense and [counterclaim] were designed to give him leverage for concessions as to the disputed strip and to keep any encroaching wall and pillar, hedge and plantings. His approach to the litigation was to forestall [the] plaintiffs' efforts to enforce

their title to 33 Maple . . . while keeping [the] defendants' expenses low with the expectation of settlement. When trial loomed, he had his attorney file frivolous motions with the hope of bringing [the] plaintiffs to the bargaining table and avoiding trial.[5] When he could not avoid trial, and indeed was in the midst of trial, Allen manufactured evidence that he sprung on his attorney at the last minute. He presented testimony by two of these witnesses, Mantione and [Erb], at trial in this case. Mantione's testimony was not credible as it related to the wall and pillar, which, he testified, was existing and in need of repair and his crew merely repaired and clad in fieldstone. It is clear from the surveys that the portion of the wall that encroached on 33 Maple . . . was constructed after December 4, 1998, but before August 18, 2006. Thus, the encroaching wall and pillar were either new when Mantione came onto the project, having been constructed by his predecessor contractor, or, more likely, Mantione constructed the wall or pillar, which is more consistent with his attestation letter that states his crew formed the pillar. Either way, these facts contradict Allen's testimony that the pillar and wall existed when he bought the property in 1996. The court credits [Erb's] testimony that [the] defendants maintained the hedge and ground cover shown in the photograph, but she started representing [the] defendants in

[5] "Two egregious examples of frivolous and dilatory motions filed by [the] defendants were the motion to dismiss filed on February 22, 2018, less than two months before trial was scheduled, and the application for ex parte temporary injunction filed the week before on February 16, 2018. In the motion to dismiss [the] defendants denied they were owners of 43 Maple . . . and referred to various conveyances to Allen's entities. The motion to dismiss was denied after a hearing. In fact, [the] defendants were the owners of 43 Maple . . . . In the application for ex parte temporary injunction [the] defendants falsely represented: '[The] plaintiffs are in the process of removing stone walls, shrubbery, and other physical structures that exist on the disputed portions of real property for which are the corpus of this case.' The court vacated the ex parte injunction that had been issued on February 23, 2018 . . . . There was no evidence that the events sworn to by Allen ever occurred and it appears Allen's affidavit was either based on

2002 and could not attest to the more than fifteen year duration of maintenance claimed by [the] defendants. In any event, neither Mantione nor [Erb] testified in the trial before Judge Tobin, nor did the architect Blanc, all of whom were known to and could have been called by Allen. Powers testified Allen did not want them to come to court and would not pay for subpoenas.

"Allen's false and deceptive misconduct in the prior action provides graphic evidence of his lack of probable cause, bad faith and malice. . . . Allen's false testimony in this case, and in the prior action, confirms his willingness to dissemble if he believes perjury and false pleading would advance what he perceives to be his interests. [The] defendants' defense and [counterclaim] in the prior action were grounded in the fiction that there were encroachments on 33 Maple . . . that existed when Allen purchased 43 Maple . . . in 1996. The trespass claim was based on an alleged event that did not happen and fictional possessory rights. Allen did not have probable cause to assert the defense and [both counts of the counterclaim] and did so maliciously to obtain leverage over [the] plaintiffs, who he believed planned to flip the property for sale and would be amenable to settlement on Allen's terms." (Citations omitted; footnotes in original; footnotes omitted.)

After finding that the plaintiffs had "proven their vexatious litigation claim by a fair preponderance of the evidence," the court awarded them compensatory damages, which included "demolition costs of $304.69," "surveying costs of $505," and "attorney's fees in the prior action of $58,680.50 . . . ." Because the court found both a lack of probable cause and that the defendants acted with malice, the court awarded the plaintiffs treble damages under General Statues § 52-568, for a

pure hearsay from his wife that turned out not to be true or was simply made up."

total damages award of $178,470.57. This appeal followed. Additional facts will be set forth as necessary.

I

As a preliminary matter, we address whether the defendants appealed from a final judgment in light of the fact that the court, in its decision, did not explicitly address the plaintiffs' trespass count. "[E]ven where the appellee fails to bring to our attention the lack of a final judgment, either by motion to dismiss or in its brief, or at oral argument, we must, nonetheless, act sua sponte." (Internal quotation marks omitted.) *Mase* v. *Riverview Realty Associates, LLC*, 208 Conn. App. 719, 726, 265 A.3d 944 (2021). As a result of our final judgment concerns, we notified the parties that "[a]t oral argument, counsel of record . . . [should] be prepared to address whether the defendants appealed from a final judgment given that the trial court's October 26, 2020 memorandum of decision does not expressly dispose of the fourth count of the plaintiffs' complaint alleging a cause of action for trespass."

The right of appeal is purely statutory, and General Statutes § 52-263[6] provides that parties may appeal to this court from the final judgment of the trial court. See *In re Teagan K.-O.*, 335 Conn. 745, 754, 242 A.3d 59 (2020) ("a final judgment . . . is a statutory prerequisite to appellate jurisdiction" (citations omitted)). "[L]ack of a final judgment is a jurisdictional defect that mandates dismissal." (Internal quotation marks omitted.) *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 686, 899 A.2d 586 (2006).

"When judgment has been rendered on an entire complaint . . . such judgment shall constitute a final judgment. . . . As a general rule, however, a judgment that

[6] General Statutes § 52-263 provides in relevant part: "[I]f either party is aggrieved by the decision of the court . . . upon any question or questions of law arising in the trial . . . *he may appeal to the court having jurisdiction from the final judgment of the court* . . . ." (Emphasis added.)

disposes of only a part of a complaint is not final, unless it disposes of all of the causes of action against the appellant." (Citation omitted; internal quotation marks omitted.) *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 717, 183 A.3d 1164 (2018). "In assessing whether a judgment disposes of all of the causes of action against a party, this court has recognized that the trial court's failure to expressly dispose of all of the counts in the judgment itself will not necessarily render the judgment not final. Rather, the reviewing court looks to the complaint and the memorandum of decision to determine whether the trial court explicitly or implicitly disposed of each count." (Emphasis omitted.) Id., 718.

In the present case, the court's October 26, 2020 memorandum of decision clearly disposed of the plaintiffs' vexatious litigation claims. The court explicitly found that the defendants lacked probable cause to bring both counts of their counterclaim for adverse possession and trespass and, as a result, the plaintiffs had proven their vexatious litigation claims. The court also found that the defendants had acted with malice. The court did not, however, expressly analyze or render judgment with respect to the plaintiffs' count alleging trespass, which raises the issue of whether the court rendered a final judgment. We conclude, nevertheless, that the court implicitly disposed of the plaintiffs' trespass count and, thus, it rendered a final judgment.

The plaintiffs' claims against the defendants included vexatious litigation, vexatious litigation with malicious intent, and trespass. In their complaint, the plaintiffs sought as relief, inter alia, "[d]amages in the amount required to restore and repair 33 Maple after the defendants' trespass." Generally, "[w]hen injury to property resulting from a trespass is remedial by restoration or repair . . . the measure o[f] damages is the cost of

restoration and repair." (Internal quotation marks omitted.) *Argentinis* v. *Fortuna*, 134 Conn. App. 538, 556, 39 A.3d 1207 (2012). In contrast, "[t]he purpose of [an] action [for vexatious litigation] is to compensate a wronged individual for damage to his reputation and to reimburse him for the expense of defending against the unwarranted action." (Internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 554, 944 A.2d 329 (2008).

According to the testimony at trial, the plaintiffs, after prevailing in the prior action, "incur[red] expenses to remove structures that had been placed on [the] property," including $505 to have "surveyors . . . come and stake out the property correctly" and $304.69 "for demolition of the wall . . . ." Although the court did not explicitly address the trespass cause of action in its memorandum of decision, the court awarded the plaintiffs "demolition costs of $304.69" and "surveying costs of $505 . . . ." Taking into consideration the complaint, the memorandum of decision, and the award of expenses incurred to restore and replace the property, we conclude that the court implicitly found in favor of the plaintiffs on their count alleging a trespass. Because we have determined that the court implicitly disposed of the plaintiffs' count alleging a trespass, it follows that the court disposed of all of the counts in the plaintiffs' complaint, and, therefore, we conclude that the court rendered a final judgment.

II

On appeal, the defendants first claim that the court erred in concluding that the plaintiffs established, for purposes of the vexatious litigation claims,[7] a lack of

[7] As we noted previously in this opinion, in their complaint, the plaintiffs alleged two separate counts of vexatious litigation against the defendants, both of which were based on the defendants' underlying claims of adverse possession *and* trespass. One of the counts was labeled "vexatious suit" and the other count was labeled "malicious vexatious suit."

probable cause related to the defendants' counterclaim in the prior action alleging claims for adverse possession and trespass. Specifically, the defendants argue that they "alleged facts and presented a viable claim for adverse possession in the [prior] action with respect to the [use of the] disputed property due to [the] defendants' having, for a period of not less than fifteen years, maintained the hedges and grounds up to the chain-link fence, erected the retaining wall and pillar, erected and placed the mailbox shed, and placed the Belgian block along the driveway." (Footnote omitted.) The defendants, therefore, argue that there was probable cause to bring the claim of adverse possession.[8] The defendants also argue that they had probable cause to bring the counterclaim of trespass because "[t]he evidence . . . demonstrates that [the] defendants had a possessory right to [the disputed area] based on adverse possession and that [the] plaintiffs entered this area and moved the mailbox without permission and constructed a fence in the disputed [area]."[9]

[8] "The essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner." (Internal quotation marks omitted.) *Anderson* v. *Poirier*, 121 Conn. App. 748, 752, 997 A.2d 604, cert. denied, 298 Conn. 904, 3 A.3d 68 (2010).

[9] In their brief, the defendants also argue, albeit in a conclusory manner, that the court conflated its analysis of probable cause with its analysis of the advice of counsel defense, specifically with respect to its findings that Allen had lied to his counsel. In the introductory section of the defendants' brief, the defendants assert that "the court purported to consider and determine an essential element of [the] plaintiffs' claim—lack of probable cause—through the lens of [the] defendants' advice of counsel defense, thereby commingling the parties' burdens to a point where factual evidence of probable cause clearly was not considered."

We observe that the defendants did not adequately brief this aspect of their claim with reference to any authority or an analysis of the court's written decision. As this court has explained previously, "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial

We begin by setting forth the legal principles relevant to our resolution of this claim. "In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor." (Citation omitted; internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 554. "For purposes of a vexatious suit action, [t]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. . . . Thus, in the context of a vexatious suit action, the defendant lacks probable

court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *Starboard Fairfield Development, LLC* v. *Gremp*, 195 Conn. App. 21, 31, 223 A.3d 75 (2019). When, during oral argument, a member of this panel asked counsel for the defendants about this aspect of their claim, counsel did not seem to remember having made this argument at all and did not pursue it.

Even if the argument is properly before us, we note that the court's memorandum of decision reflects that, in a single sentence, the court stated that "Allen's false and deceptive misconduct in the prior action provides graphic evidence of his lack of probable cause, bad faith, and malice." Despite this isolated reference linking its analysis of "probable cause" with its finding concerning Allen's "deceptive misconduct," our review of the decision as a whole reflects that the court did not conflate probable cause with its findings that Allen had lied to counsel. The court's analysis of probable cause was supported by reference to appropriate legal principles and it does not appear to have been intertwined with its analysis of the advice of counsel defense raised by the defendants. "It is well settled that [we] do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary." (Internal quotation marks omitted.) *Ellen S.* v. *Katlyn F.*, 175 Conn. App. 559, 565, 167 A.3d 1182 (2017).

cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Citations omitted; internal quotation marks omitted.) *DeLaurentis* v. *New Haven*, 220 Conn. 225, 256, 597 A.2d 807 (1991).

"We are mindful that [p]robable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in [vexatious litigation] must separately show lack of probable cause. . . . The lower threshold of probable cause allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . . Were we to conclude . . . that a claim is unreasonable wherever the law would clearly hold for the other side, we could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law. The vitality of our common law system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories." (Internal quotation marks omitted.) *Tatoian* v. *Tyler*, 194 Conn. App. 1, 59, 220 A.3d 802 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020).

"A statutory action for vexatious litigation under . . . § 52-568 . . . differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. In either type of action, however, [t]he existence of probable cause is an absolute protection against an action for malicious prosecution . . . ." (Footnote omitted; internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 200 Conn. App. 63, 68, 239 A.3d 1216, cert. denied, 335 Conn. 970, 240 A.3d 285 (2020).

We next set forth the standard of review for this claim. "[W]hat facts, and whether particular facts, constitute probable cause is always a question of law. . . .

Accordingly, our review is plenary." (Internal quotation marks omitted.) Id. When our review is plenary, "we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Barber* v. *Barber*, 193 Conn. App. 190, 196, 219 A.3d 378 (2019).

We first address the defendants' challenge to the factual findings on which the court relied when it determined that the defendants lacked probable cause to bring the adverse possession claim. When an appellant challenges the factual findings on which the court's finding of a lack of probable cause is based, we apply 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.) *Casiraghi* v. *Casiraghi*, 200 Conn. App. 771, 788, 241 A.3d 717 (2020). "Because factual findings and credibility determinations are squarely within the trial court's purview, we afford them great deference. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 755, 159 A.3d 666 (2017).

In the present case, the defendants argue that the court erred in finding that the hedges do not encroach onto 33 Maple. The defendants assert that the court's finding that the hedges did not encroach on 33 Maple "contradicts the testimony of the only witnesses who had personal knowledge of the hedges." They further

argue that the court's finding was based on the 1998 and 2006 surveys, "which the court purported to interpret in the absence of requisite expert testimony." They contend that the court's finding is clearly erroneous because "the court appears to have found that there was no evidence that the hedges encroached onto 33 Maple because it disbelieved Allen, not because there is evidence in the record permitting a reasonable inference that the hedges did not encroach onto 33 Maple." We are not persuaded.

At trial, Allen testified that there were shrubs and other plantings that encroached on 33 Maple, which were maintained by the defendants' landscapers. There was also testimony from Mantione that the hedges extended to the pillar and retaining wall that he built in 1998 and from Erb that the defendants maintained the hedges and ground cover shown in a photograph that was entered into evidence at trial. As we recited previously in this opinion, however, the court, in its memorandum of decision, found that "Allen's testimony lacked credibility in many respects." There was also evidence in addition to Allen's testimony, by way of the 1998 and 2006 surveys,[10] that depicted the hedges at the

[10] Both the 1998 and 2006 surveys were entered into evidence as full exhibits without objection at trial. The defendants never claimed at trial that an expert was necessary to interpret the surveys. To the extent that the defendants argue that the court was unable to rely on the surveys in the manner that it did, they appear to raise a claim related to the admissibility of the surveys. We decline to entertain an unpreserved evidentiary claim in the context of this claim. "Whenever evidence is admitted without objection, the trier of fact can rely on its contents for whatever they are worth on their face. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *Lambert* v. *Donahue*, 78 Conn. App. 493, 501, 827 A.2d 729 (2003). Because these surveys were admitted into evidence without limitation, the court properly drew whatever inferences from the surveys that it deemed to be reasonable.

location that Allen described. This evidence, however, shows that the hedges are located on 43 Maple, not 33 Maple. Additionally, contrary to Allen's testimony, the only photograph of the hedges that was entered into evidence shows tall landscaped hedges that appear to be on the defendants' side of the property line, and the photograph does not depict any shrubs or other plantings. Consequently, the court's finding that the hedges did not encroach onto 33 Maple was not clearly erroneous because there is evidence in the record, namely the surveys and photographs, to support this finding, and the court specifically found Allen's testimony not credible.

We now turn to whether, on the basis of the facts found by the court, the defendants had probable cause to bring the adverse possession and trespass claims. The defendants argue that the court erred in determining that the plaintiffs established a lack of probable cause for the adverse possession claim with respect to the defendants' use of the hedges, the retaining wall and pillar, the mailbox, and the driveway. Allen testified that the alleged encroachments onto 33 Maple on which the adverse possession claims are based existed when he purchased 43 Maple in 1996. The defendants argue, therefore, that they had probable cause to assert the adverse possession claim having met the requirements of adverse possession for the statutory period of fifteen years. The 1998 survey, however, shows no such encroachments. Moreover, as previously mentioned, the court did not credit Allen's testimony with respect to the encroachments and concluded that "Allen's strategy was to defend the prior action based on the false narrative that there were encroachments on 33 Maple . . . that existed in 1996 when Allen purchased 43 Maple . . . ." The court therefore determined that the defendants lacked probable cause to bring the adverse possession claim. We agree and affirm the judgment of the court.

We begin by examining the defendants' adverse possession claim as it pertained to the defendants' use of the property—specifically, with respect to the hedges. As previously mentioned, Allen testified that there were shrubs and other plantings that encroached onto 33 Maple and that they were maintained by the defendants' landscapers. Both the 1998 and 2006 surveys depict hedges at the location that Allen described; however, the surveys depict these hedges to be on 43 Maple, not 33 Maple. Additionally, the only photograph of the hedges entered into evidence depicts them to be on the defendants' side of the property line, which also indicates that the hedges did not encroach on 33 Maple.

Although Allen testified that shrubs and bushes encroached onto 33 Maple, there were no shrubs or other plantings depicted in the photograph, and the court did not find Allen's testimony credible. Further, when asked about the depiction of the hedges in the survey, Allen admitted that the survey showed the hedges to be located entirely on the property of 43 Maple. The court found, contrary to Allen's testimony, that there was no proof of any encroachment by the hedges or other plantings onto 33 Maple that existed in 1996. The court further noted that the defendants never engaged a surveyor to specifically map out the area that they claimed to adversely possess or to stake the property line, and, as a result, there was a lack of evidence as to the location of any encroachments. We conclude that the court properly determined, on the basis of the evidence presented at trial, that the defendants did not have a reasonable good faith belief in the existence of facts essential to bring the claim and thus lacked probable cause to bring the adverse possession claim as it pertained to the defendants' use of the property—specifically, with respect to the hedges.

Allen also testified that the retaining wall and pillar existed in 1996. The 1998 survey, however, does not

show an existing retaining wall or pillar. The 2006 survey does show a retaining wall, which indicates that the portion of the wall that encroached onto 33 Maple was constructed sometime between December 4, 1998, and August 18, 2006, the dates on which the respective surveys were completed. Because the 2006 survey also depicts the pillar, the surveys further indicate that the encroaching pillar was constructed when the section of the retaining wall was extended, which then caused it to encroach on 33 Maple. Both surveys contradict Allen's testimony that the pillar and wall existed when he bought the property in 1996.

Further, Allen's testimony at trial about the interrogatories that he answered in the prior action reveals that his answers to the first and second sets of interrogatories are internally inconsistent. Additionally, Mantione's attestation letter in the prior action, which was drafted by Allen, is also inconsistent with Allen's testimony at trial in the present case. On the basis of these inconsistencies, the court found that "Allen's apparent strategy for preparing the attestation letters was to avoid live testimony and use written statements to control the information to be given to Judge Tobin and to avoid cross-examination that would contradict his version of events." In Allen's first set of interrogatories in the prior action, Allen stated that there was a stone pillar located on the property when he purchased it in 1996. In the second set of interrogatories, however, he stated that there was a brick pillar on the property when he purchased it in 1996. Allen testified at trial that the pillar was brick when he purchased the property in 1996 and subsequently was clad in fieldstone as part of the condominium renovations. Contrary to Allen's testimony, there was no brick shown in the video of the pillar's demolition, and the demolition contractor testified that the workers found no brick when the pillar was demolished in 2019.

Additionally, Mantione's attestation letter, which was drafted by Allen, stated that Mantione and his crew extended the height at the beginning of the retaining wall to form a small pillar during their work on the property in 1999. If the statement in the letter is true, it would indicate that the pillar did not exist in 1996 as Allen testified. When Mantione testified in the present matter, however, he asserted that he did not form a new pillar in 1999; rather, he clad an existing pillar with fieldstone. Mantione's testimony is contradicted by the surveys and the testimony about the demolition of the pillar, and the court ultimately found it to be not credible. Instead, the court found this change in testimony to be an effort to bolster Allen's testimony about the existing brick pillar. On the basis of the surveys and the significant inconsistencies in the testimony of both Allen and Mantione, we agree with the court that the defendants did not have a reasonable, good faith belief in the existence of the facts essential to bring the adverse possession claim, and, therefore, they lacked probable cause to bring the claim as it pertained to the defendants' use of the property—specifically, with respect to the retaining wall and pillar.

Allen also claimed that the mailbox existed when he purchased the property in 1996 and that it encroached onto 33 Maple. In spite of this claim, Allen himself testified that the 1998 and 2006 surveys did not show an encroaching mailbox on 33 Maple. Moreover, a photograph introduced as an exhibit at trial also showed the mailbox to be on 43 Maple, rather than on 33 Maple. The evidence in the record does not support a reasonable, good faith belief in the existence of a claim for adverse possession as it pertained to the defendants' use of the property—specifically, with respect to the mailbox.

Finally, with respect to the driveway, Allen claimed that the driveway was in existence in 1996 when he

purchased the property and that it was located on the property of 33 Maple. When Allen testified, however, he admitted that neither the 1998 or 2006 surveys depicted any driveway encroaching onto 33 Maple. Further, during Rubin's testimony, Rubin indicated that, in an interrogatory answered by Allen in the prior action, Allen asserted that he did not have knowledge of when the portion of the curbed driveway that is located on the common property line came into existence. Allen also indicated in that interrogatory that he did not know whether that portion of the driveway was located on the common property line or on 33 Maple. On the basis of these inconsistencies in Allen's statements and the facts in the record, we determine that the court did not err in finding that the defendants did not have probable cause to bring the adverse possession claim as it pertained to the defendants' use of the property—specifically, with respect to the driveway.

The defendants further argue that the court erred in determining that the plaintiffs established a lack of probable cause to bring the trespass counterclaim. The defendants argue that they had probable cause for a trespass claim based on the plaintiffs' modifications to the disputed portion of 33 Maple because the defendants had acquired it by adverse possession. Because we determine that the court did not err in finding that the defendants lacked probable cause to believe that they had acquired the property by adverse possession, they also lacked probable cause to assert the trespass claim with respect to the disputed property over which they had no possessory right.

Specifically, with respect to this claim, the court found that Allen "fabricat[ed] a trespass claim that was bereft of evidence and was withdrawn at trial of the prior action after [the] defendants had rested their case." The court noted that Powers testified that the

defendants withdrew the trespass claim because there was insufficient evidence.

We agree with the court that the dearth of evidence to support the defendants' claims evidences the defendants' lack of probable cause to bring the adverse possession and trespass counts of the counterclaim. The court's conclusion that the defendants lacked probable cause to bring the adverse possession and trespass claims is legally and logically correct and has support from the facts that appear in the record. Accordingly, we conclude that the court did not err when it determined that the defendants lacked probable cause to bring both counts of the counterclaim.

III

The defendants next claim that the court improperly denied their motion for a directed verdict. The defendants argue that, "[e]ven if the trial court fully discredits Allen's testimony in finding lack of probable cause, the balance of the evidence unequivocally and completely supports [the] defendants' good faith, reasonable, and bona fide belief that they had a viable claim for adverse possession in the quiet title action." They claim that the court could not conclude the opposite simply because it disbelieved Allen. In support thereof, they cite *Essex Ins. Co.* v. *William Kramer & Associates, LLC*, 331 Conn. 493, 205 A.3d 534 (2019), without any analysis whatsoever.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be

abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Citation omitted; internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021). Because the defendants' brief did not provide any analysis of their claim that the court improperly denied their motion for a directed verdict, we conclude that the claim was inadequately briefed. We, therefore, decline to review it on appeal.

IV

The defendants further claim that the court improperly determined that they failed to establish their advice of counsel defense. We disagree.

We begin by setting forth the legal principles related to this claim. "[T]he defense [of advice of counsel] has five essential elements. First, the defendant must actually have consulted with legal counsel about his decision to institute a civil action . . . . Second, the consultation with legal counsel must be based on a full and fair disclosure by the defendant of all facts he knew or was charged with knowing concerning the basis for his contemplated . . . action . . . . Third, the lawyer to whom the defendant turns for advice must be one from whom the defendant can reasonably expect to receive an accurate, impartial opinion as to the viability of his claim . . . . The fourth element . . . is, of course, that the defendant, having sought such advice, actually did rely upon it . . . . Fifth and finally, if all other elements of the defense are satisfactorily established, the defendant must show that his reliance on counsel's advice was made in good faith." (Internal quotation marks omitted.) *Rieffel* v. *Johnston-Foote*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-13-6019381-S (February 19, 2015) (reprinted at

165 Conn. App. 391, 406–407, 139 A.3d 729), aff'd, 165 Conn. App. 391, 139 A.3d 729, cert. denied, 322 Conn. 904, 138 A.3d 289 (2016).

"Advice of counsel is a complete defense to an action of . . . [vexatious litigation] when it is shown that the [client] . . . instituted his [or her] civil action relying in good faith on such advice, given after a full and fair statement of all facts within his [or her] knowledge, or which he [or she] was charged with knowing. . . .

"In determining whether a [client] gave a full and fair statement of the facts within his or her knowledge to counsel, reliance on whether the omitted information would have had any impact on counsel's decision to bring the allegedly vexatious action . . . is irrelevant . . . because, as a matter of law, showing an impact on an attorney's ultimate course of action is not an element of the defense of reliance on counsel. . . . In other words, a client should not be permitted to rely upon the defense of advice of counsel if the client did not disclose all of the material facts related to a potential claim, because the lawyer cannot render full and accurate legal advice regarding whether there is a good faith basis to bring the claim in the absence of knowledge of all material facts. In such instances, a client's reliance on the advice of counsel is unreasonable regardless of whether the material facts would have altered counsel's assessment of the validity of the claim." (Internal quotation marks omitted.) *Rozbicki* v. *Sconyers*, 198 Conn. App. 767, 783–84, 234 A.3d 1061 (2020).

"Whether there was a full and fair disclosure of material facts as required by the advice of counsel defense is a question of fact . . . ." (Citation omitted; internal quotation marks omitted.) *Verspyck* v. *Franco*, 274 Conn. 105, 112–13, 874 A.2d 249 (2005). As previously noted, "[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. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached." (Citation omitted; internal quotation marks omitted.) Id., 113.

In its memorandum of decision, the court rejected the defendants' reliance on the advice of counsel defense. Specifically, the court determined that the defendants failed to establish both that they had made a full and fair disclosure to their attorneys of all facts they knew or were charged with knowing and that their reliance on counsel's advice was made in good faith.

With respect to the second element of the advice of counsel defense, the defendants argue that "[a]n objective review of the evidence presented at trial reveals that Allen provided both of his counsel with all of the material facts within his knowledge." We disagree and conclude that there is evidence in the record to support the court's finding, and, thus, the court's finding is not clearly erroneous.

As we stated previously in this opinion, the court ultimately found that "Allen withheld and misrepresented material facts to counsel, limited counsel's preparation, and acted to prevent counsel from learning adverse material facts by preventing counsel from independently investigating the defense and claims to corroborate his version of events." The court further found that all of the information related to encroachments on 33 Maple came from Allen, who kept his counsel, Rubin, and subsequently, Powers, "on a tight leash . . . to prevent them from learning about Allen's deception." Moreover, the court found that, at the trial in the prior action, Allen withheld from his counsel the 1998 and

2006 surveys done by his surveyor, which were pivotal evidence against his position.

Following the first day of trial in the prior action, on the evening of April 18, 2018, Allen notified Powers that the general contractor and architect on the condominium conversion project as well as a realtor involved in marketing Allen's properties were willing to sign attestation letters with respect to facts in issue including the construction of the mailbox, the pillar, and landscaping. The attestation letters, which were drafted by Allen and later signed by the contractor, architect, and realtor, were never admitted into evidence, however, and the signatories did not appear as witnesses at the trial. In the present action, the court noted that no evidence was presented to indicate that Rubin was aware of the facts recited in the attestation letters or the identity of the signatories prior to Allen's preparation of the letters after the first day of trial. Additionally, Rubin testified in the present action that, while he was representing Allen, he had asked Allen for the names of the contractors who worked on the property, but Allen had failed to identify them. On the basis of these facts, the court inferred that "Allen knew the identity of the architect, contractor, and realtor and knew they had material information about the subject property that was kept from his counsel, who in the ordinary course at least would have interviewed them and reviewed their files in preparation of the case."

Further, as the court found, Rubin advised Allen of the need to corroborate Allen's testimony about the encroachments, but Allen did not do so despite the fact that he obtained two separate surveys of the property that depicted the disputed area. Allen did not produce any documentation of the condominium project, including the 1998 and 2006 surveys, both of which were prepared at the defendants' request. Rubin saw the surveys for the first time on May 9, 2017, when they were

produced by the plaintiffs' counsel as deposition exhibits at Allen's deposition. The surveys were critical, material evidence at trial because they depicted the disputed area and the existence or nonexistence of each of the claimed encroachments at two different periods in time. On the basis of the foregoing facts, we conclude that there is evidence in the record to support the court's finding that the defendants had not made a full and fair disclosure to counsel of the material facts within their knowledge. On the basis of the evidence in the record, the court reasonably could have found that Allen omitted information that he was charged with knowing based on the events surrounding the attestation letters and his failure to provide his counsel with the 1998 and 2006 surveys. Accordingly, the court's finding that the defendants did not make a full and fair disclosure to counsel of the material facts within their knowledge is not clearly erroneous.

With respect to the fifth element of the defense, the defendants argue that "[t]he court's finding that [the] defendants did not rely on their counsel's advice in good faith is clearly erroneous based on the evidence corroborating [the] defendants' claims and the . . . court's improper focus on [the] defendants' right to supervise and direct the litigation, including discovery." We disagree. Because we conclude that the defendants knowingly did not make a full and fair disclosure to counsel, their reliance on counsel's advice necessarily could not have been made in good faith. We, therefore, uphold the court's conclusion that the defendants did not establish their advice of counsel defense.

V

Last, the defendants claim, summarily, that the court improperly found that they acted with malice. Specifically, the defendants argue that, because there was probable cause to bring the prior action, the court could

not "properly infer malice from a lack of probable cause." Additionally, the defendants seem to argue that the court's finding of their "improper motives" is not supported by the record but, rather, it is based on the court's disbelief of Allen, "which constitutes clear error."

"In a vexatious suit action, the defendant is said to have acted with malice if he acted primarily for an improper purpose; that is, for a purpose other than that of securing the proper adjudication of the claim on which [the proceedings] are based . . . ." (Citation omitted; internal quotation marks omitted.) *DeLaurentis* v. *New Haven*, supra, 220 Conn. 256 n.16. "Malice may be inferred from lack of probable cause." (Internal quotation marks omitted.) *Tatoian* v. *Tyler*, supra, 194 Conn. App. 57.

Because we have concluded in this opinion that the court properly determined that the defendants lacked probable cause to bring their claims, it was proper for the court to infer that the defendants acted with malice. See id.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT v. STEPHEN GUILD
(AC 43868)

Moll, Clark and DiPentima, Js.

Syllabus

The defendant acquittee, who previously had been found not guilty of certain crimes by reason of mental disease or defect, appealed to this court from the trial court's denial of his motion to dismiss the state's petition, filed pursuant to statute (§ 17a-593), to extend his commitment to the jurisdiction of the Psychiatric Security Review Board. On appeal, the acquittee claimed that this court had subject matter jurisdiction over his appeal because the trial court's order denying his motion satisfied

at least one prong of the finality test set forth in *State* v. *Curcio* (191 Conn. 27). *Held* that the trial court's order denying the acquittee's motion to dismiss the state's petition did not satisfy either prong of *Curcio* and was not a final judgment for purposes of appeal: the order did not terminate a separate and distinct proceeding for purposes of the first prong of *Curcio* as the order involved a constitutional challenge that was inextricably intertwined with the adjudication of the petition and, as a result, the proceedings concerning that order were not wholly severable from the merits of the state's petition; moreover, the order did not result in the irreparable loss of a claimed right if immediate appellate review was not afforded, required to satisfy the second prong of *Curcio*, as the petition remained pending before the trial court, the acquittee's claimed right to discharge from the board's jurisdiction on the basis of his right to equal protection pursuant to the United States constitution was still intact and further proceedings could still affect the acquittee's claimed right; accordingly, this court lacked subject matter jurisdiction over the appeal.

Argued December 7, 2021—officially released July 26, 2022

Procedural History

Petition for an order extending the defendant's commitment to the Psychiatric Security Review Board, brought to the Superior Court in the judicial district of Middlesex, where the court, *Keegan*, *J.*, denied the defendant's motion to dismiss the petition, and the defendant appealed to this court. *Appeal dismissed.*

Richard E. Condon, *Jr.*, senior assistant public defender, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Russell C. Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Stephen Guild (acquittee),[1] appeals from the judgment of the trial court denying

[1] Because the defendant was found not guilty by reason of mental disease or defect pursuant to General Statutes § 53a-13 in the underlying criminal proceedings, he is an "[a]cquittee," as that term is defined in General Statutes § 17a-580 (1).

his motion to dismiss the state's petition, filed pursuant to General Statutes § 17a-593 (c),[2] to continue his commitment to the jurisdiction of the Psychiatric Security Review Board (board) beyond his maximum term of commitment. On appeal, as a threshold matter, the acquittee claims that this court has subject matter jurisdiction over this appeal because the trial court's denial of his motion to dismiss satisfies at least one prong of the finality test set forth in *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). We conclude that the trial court's denial of the acquittee's motion to dismiss is not a final judgment for appeal purposes under either prong of *Curcio* and, accordingly, dismiss the acquittee's appeal for lack of subject matter jurisdiction.[3]

The following facts, as recited by the trial court, and procedural history are relevant to our resolution of this appeal. On October 9, 1997, the acquittee, who was

[2] General Statutes § 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee."

[3] The acquittee claims on the merits that, in denying his motion to dismiss, the court improperly rejected his claim that § 17a-593, as applied to him, violates his rights under the equal protection clause of the fourteenth amendment to the United States constitution. The acquittee's equal protection claim is twofold. First, he argues that the continued commitment procedures set forth in § 17a-593 (c), as interpreted in *State* v. *Metz*, 230 Conn. 400, 645 A.2d 965 (1994), and related statutes and regulations, do not afford him the substantive rights and due process protections otherwise provided by the civil commitment procedures contained in General Statutes § 17a-495 et seq. and General Statutes § 17a-508, consistent with the requirements of equal protection. In outlining this distinction, the acquittee contends that the state should have to prove that *Metz* acquittees are more dangerous than the similarly situated class of civilly committed inmates. Second, he argues that his continued commitment under the jurisdiction of the board beyond his maximum term of commitment subjects him to legal processes, criminal penalties, and other restrictions on his liberty interests inconsistent with the requirements of equal protection. In light of our conclusion that we lack subject matter jurisdiction to entertain this appeal, we do not address this claim.

angry because he believed that his father had sexually abused him, attacked his father with a folding knife and a sword, causing critical physical injuries. The acquittee was subsequently charged with attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a and assault in the first degree in violation of General Statutes § 53a-59 (a) (1).[4] He was acquitted of these charges as a result of mental disease or defect and, on March 5, 1999, was committed to the jurisdiction of the board for a period not to exceed twenty years, i.e., March 5, 2019. Notably, the acquittee was granted conditional release on June 17, 2016, and subsequently discharged from Connecticut Valley Hospital on conditional release on September 13, 2016.

On November 23, 2018, the state petitioned the court for an order of continued commitment pursuant to § 17a-593 (c) (petition) on the ground that the acquittee remains a person with psychiatric disabilities to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others.[5] On November 29, 2018, the court, *Keegan*, *J.*, ordered that the petition be forwarded to the board for a report to be filed with the court in accordance with § 17a-593 (d).[6] On or about February

[4] In its corrected revised memorandum of decision, the court explained that the acquittee was "acquitted due to mental disease or defect of the charges of attempted murder pursuant to General Statutes §§ 53a-48 and 53a-54a, and assault in the second degree, pursuant to General Statutes § 53a-60." It is not clear why the court referenced §§ 53a-48 and 53a-60. The trial court file, as well as the parties' briefs, reflect that the acquittee was charged with attempt to commit murder in violation of §§ 53a-49 and 53a-54a and assault in the first degree in violation of § 53a-59 (a) (1).

[5] While the petition was pending, the acquittee filed several motions to extend the acquittee's commitment to the board's jurisdiction, by agreement, pending the completion and eventual adjudication of his motion to dismiss, and the court granted those requests. Most recently, on September 28, 2021, by agreement of the parties, the court again extended the acquittee's commitment for a period of time not to exceed March 20, 2023.

[6] General Statutes § 17a-593 (d) provides: "The court shall forward any application for discharge received from the acquittee and any petition for continued commitment of the acquittee to the board. The board shall, within

14, 2019, the board submitted its report on the petition, recommending that the court grant the petition for a period not to exceed three years.

On March 5, 2019, the acquittee filed a motion to dismiss the petition and a memorandum of law in support of that motion on the basis that his continued commitment to the board pursuant to § 17a-593 (c), as applied to him, violates his rights under the equal protection clause of the fourteenth amendment to the United States constitution. See footnote 3 of this opinion. On June 20, 2019, the court heard oral argument on the acquittee's motion to dismiss. Thereafter, both parties filed posthearing briefs.

On December 2, 2019, the court issued a corrected revised memorandum of decision, dated November 26, 2019, denying the acquittee's motion to dismiss.[7] In its decision, the court concluded that § 17a-593, as applied to the acquittee, did not violate his right to equal protection under the fourteenth amendment to the United States constitution. This appeal followed.[8]

ninety days of its receipt of the application or petition, file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report."

[7] On October 18, 2019, the court issued its original memorandum of decision in which it denied the acquittee's motion to dismiss and also granted the petition, ordering the acquittee's continued commitment not to exceed three years. On October 31, 2019, the acquittee filed a motion to correct the original memorandum of decision, requesting that the court issue a memorandum of decision addressed solely to the merits of the motion to dismiss. Ultimately, on December 2, 2019, the court issued a corrected revised memorandum of decision denying the acquittee's motion to dismiss.

[8] On May 12, 2021, while this appeal was pending, the state filed a revised petition for an order of continued commitment pursuant to § 17a-593 (c) (revised petition), and the acquittee filed a motion to dismiss the revised petition. On September 28, 2021, the court granted a motion filed by the acquittee and joined by the state, requesting that the court "take no action" on the revised petition and the filings related to the revised petition, with both parties reserving "their right to pursue said [filings] if and when appropriate." Both the revised petition and the acquittee's motion to dismiss the revised petition remain pending.

On appeal, as a threshold matter, the acquittee claims that we have subject matter jurisdiction over this appeal because the court's denial of his motion to dismiss satisfies at least one prong of the finality test set forth in *State* v. *Curcio*, supra, 191 Conn. 31. The state argues that neither prong of *Curcio* is satisfied, and, therefore, we lack subject matter jurisdiction over this appeal. We agree with the state.

We begin by setting forth the relevant standard of review and principles of law. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [over which we exercise plenary review]." (Internal quotation marks omitted.) *Brown & Brown, Inc.* v. *Blumenthal*, 288 Conn. 646, 651–52, 954 A.2d 816 (2008).

"[T]here is no constitutional right to an appeal." *Palmer* v. *Friendly Ice Cream Corp.*, 285 Conn. 462, 466, 940 A.2d 742 (2008). "The legislature has enacted General Statutes § 52-263,[9] which limits the right of appeal to those appeals filed by aggrieved parties on issues of law from final judgments. Unless a specific right to appeal otherwise has been provided by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Footnote in original; internal quotation marks omitted.) Id., 466–67; see also *State* v. *Bemer*, 339 Conn. 528, 536–37, 262 A.3d 1 (2021)

[9] "General Statutes § 52-263 provides in relevant part: 'Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge . . . .' " *Palmer* v. *Friendly Ice Cream Corp.*, supra, 285 Conn. 466 n.5.

("[B]ecause our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim . . . . It is well established that [t]he principal statutory prerequisite to invoking our jurisdiction is that the ruling from which an appeal is sought must constitute a final judgment." (Internal quotation marks omitted.)).

As a general matter, "the denial of a motion to dismiss is an interlocutory ruling and, therefore, is not a final judgment for purposes of appeal." (Internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 645 n.5, 974 A.2d 669 (2009). In *State* v. *Curcio*, supra, 191 Conn. 27, our Supreme Court articulated the following rule: "In both criminal and civil cases . . . we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id., 31. "Unless the appeal is authorized under the *Curcio* criteria, absence of a final judgment is a jurisdictional defect that [necessarily] results in a dismissal of the appeal." (Internal quotation marks omitted.) *State* v. *Fielding*, 296 Conn. 26, 38, 994 A.2d 96 (2010). We address the applicability of each *Curcio* prong in turn.

I

The acquittee argues that the court's denial of his motion to dismiss is immediately appealable under *Curcio*'s first prong because, "[i]ndisputably, the proceedings on [his] motion to dismiss, predicated upon his equal protection as applied claim to § 17a-593 (c), [are]

separate and distinct, in form and substance, from a continued commitment proceeding on the merits." This argument fails.

"The first prong of the *Curcio* test . . . requires that the order being appealed from be severable from the central cause of action so that the main action can proceed independent of the ancillary proceeding. . . . If the interlocutory ruling is merely a step along the road to final judgment then it does not satisfy the first prong of *Curcio*. . . . Obviously a ruling affecting the merits of the controversy would not pass the first part of the *Curcio* test. The fact, however, that the interlocutory ruling does not implicate the merits of the principal issue at the trial . . . does not necessarily render that ruling appealable. It must appear that the interlocutory ruling will not impact directly on any aspect of the [action]." (Internal quotation marks omitted.) *Abreu* v. *Leone*, 291 Conn. 332, 339, 968 A.2d 385 (2009); see also *State* v. *Bemer*, supra, 339 Conn. 537. "The question to be asked is whether the main action could proceed independent of the ancillary proceeding." *State* v. *Parker*, 194 Conn. 650, 654, 485 A.2d 139 (1984).

Here, it is evident that the order at issue did not, under *Curcio*'s first prong, terminate a proceeding separate and distinct from the continued commitment proceedings in that such order involves a constitutional challenge that is inextricably intertwined with the adjudication of the state's petition. As a result, the proceedings concerning that order were not wholly severable from the proceedings relating to the merits of the state's petition, as evidenced by the fact that those proceedings could not advance and have not advanced during this appeal. See *State* v. *Bemer*, supra, 339 Conn. 537–38; *Abreu* v. *Leone*, supra, 291 Conn. 339; *State* v. *Parker*, supra, 194 Conn. 654. Because the order denying the acquittee's motion to dismiss was "merely a step along the road to final judgment"; (internal quotation marks

omitted) *Abreu* v. *Leone*, supra, 339; it does not constitute a final judgment for appeal purposes under the first *Curcio* prong and is not the proper subject of this appeal. See *State* v. *Parker*, supra, 653 ("[o]bviously a ruling affecting the merits of the controversy would not pass the first part of the *Curcio* test").

In sum, on the basis of the foregoing, we conclude that the court's order denying the acquittee's motion to dismiss the petition did not terminate a separate and distinct proceeding for purposes of the first prong of *Curcio*.

II

The acquittee also argues that the court's denial of his motion to dismiss is immediately appealable under *Curcio*'s second prong, i.e., the order results in the irreparable loss of a claimed right if immediate appellate review is not afforded. See *State* v. *Curcio*, supra, 191 Conn. 31. In support of this argument, the acquittee contends that he has "raised a colorable claim that continued commitment under § 17a-593 (c) is unconstitutional as applied to his circumstances. . . . As a matter of state law, [he] is entitled to immediate discharge at the expiration of his maximum term of commitment, absent continued commitment under § 17a-593 (c)." (Citation omitted.) We conclude that the second *Curcio* prong does not apply.

"The second prong of the *Curcio* test . . . permits an appeal if the decision so concludes the rights of the parties that further proceedings cannot affect them. . . . That prong focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal. . . . One must make at least a colorable claim

that some recognized statutory or constitutional right is at risk. . . . In other words, the [appellant] must do more than show that the trial court's decision threatens him with irreparable harm. The [appellant] must show that that decision threatens to abrogate a right that he or she then holds. . . . The right itself must exist independently of the order from which the appeal is taken. . . .

"The key to appellate jurisdiction under the second prong of *Curcio* is not so much that the right is already secured to the party; indeed, what is at issue in an appeal is the effect of the challenged order on the scope of the claimed right at issue. Rather, the second prong of *Curcio* boils down to whether, as a practical and policy matter, not allowing an immediate appeal will create irreparable harm insofar as allowing the litigation to proceed before the trial court will—in and of itself—function to deprive a party of that right." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Halladay* v. *Commissioner of Correction*, 340 Conn. 52, 62–63, 262 A.3d 823 (2021).

We are mindful that our Supreme Court "previously has determined that, under the second prong of [*Curcio*], a colorable claim to a right to be free from an action is protected from the immediate and irrevocable loss that would be occasioned by having to defend an action through the availability of an immediate interlocutory appeal from the denial of a motion to dismiss. . . . The rationale for immediate appellate review is that the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation. . . . The second prong of *Curcio* has been deemed satisfied under this rationale for actions that are claimed to violate: sovereign immunity . . . immunity for statements made in judicial and quasi–judicial proceedings . . . statutory immunity . . . the prohibition against double jeopardy . . . and

res judicata." (Citations omitted; internal quotation marks omitted.) *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 746–47, 150 A.3d 1109 (2016). None of those grounds is implicated in the present case.

Here, for purposes of *Curcio*'s second prong, the acquittee's claimed right is the right to discharge from the board's jurisdiction based on his equal protection claim described in footnote 3 of this opinion. We cannot conclude, notwithstanding the acquittee's arguments to the contrary, that such claimed right includes the right to avoid a continued commitment proceeding pursuant to § 17a-593 (c). Rather, the claim raises arguments as to why the petition should be denied on the merits. Unlike, for example, a sovereign's right to be immune from suit or a criminal defendant's right against double jeopardy, the claimed right at issue here will not be "irretrievably lost" if interlocutory appellate review of the court's order on the acquittee's motion to dismiss is denied. *State* v. *Coleman*, 202 Conn. 86, 92, 519 A.2d 1201 (1987). The petition remains pending before the court,[10] and, as the state correctly points out in its appellate brief, "the trial court may yet deny the state's pending petition for continued commitment. If the court denies the petition, the acquittee would be discharged from the [board's] jurisdiction." See also *State* v. *Coleman*, supra, 86, 91. The acquittee's claimed right is "still intact and may be enforced on trial or on appeal from a final judgment." Id., 91. Accordingly, further proceedings still can affect the acquittee's claimed right and, therefore, the second *Curcio* prong is not satisfied. See id., 91–92 (denial of motion to dismiss based on statute of limitations affirmative defense did not satisfy *Curcio*'s second prong); see also *State* v. *Ahern*, 42 Conn. App. 144, 146–47, 678 A.2d 975 (1996) (denial of motion to dismiss based on right to speedy trial and due process of law did not satisfy *Curcio*'s second prong).

[10] See footnote 7 of this opinion.

In sum, because the court's denial of the acquittee's motion to dismiss the petition does not satisfy either prong of *Curcio*, it is not a final judgment for purposes of appeal.

The appeal is dismissed.

In this opinion the other judges concurred.